

**THE RIGHT TO FAIR, JUST AND REASONABLE
TERMS AND CONDITIONS
UNDER THE CONSUMER PROTECTION ACT
AND THE GERMAN STANDARD BUSINESS TERMS
LEGISLATION IN COMPARATIVE PERSPECTIVE**

by

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ABSTRACT

This doctoral thesis deals with the right to fair, just and reasonable terms and conditions, set out in sections 48 to 52 of the Consumer Protection Act, and the theoretical and practical problems involved. These provisions are compared to the German standard business terms legislation with regard to the respective scope of application of both regimes, their incorporation requirements, the content control, the interpretational control as well as their redress mechanisms. The objective is to provide clarity of the South African terms and conditions legislation and to find possible solutions regarding uncertainties in connection with the Act. Where oversights, ambiguities or interpretational or practical problems exist, the suggested recommendations to the existing provisions shall provide for possible solutions and more certainty.

The most important findings of this thesis are that the content control performed according to the Act offers a similar level of protection to the German regime. Despite this comparable level of protection for individual consumers, the lack of an abstract challenges mechanism and the application of a particular-personalised approach are an obstacle for effective consumer protection and the eradication of unfair terms. The introduction of a supra-individual generalised approach and an abstract challenges mechanism would thus tremendously enhance consumer protection with regard to mass contracts.

What is more, an 'open' content control as performed in the German regime is preferable to an approach where the interpretational control takes place after the content control, or where both controls are merged.

A streamlining of the complicated South African enforcement mechanism and the amendment of some procedural provisions would be beneficial too. It is also demonstrated that the German approach is more proactive than the South African regime in this regard.

KEY TERMS

Consumer Protection Act; consumer protection; German law; BGB; terms and conditions; standard business terms; content control, interpretational control, incorporation control; redress; fair, just and reasonable.

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INTRODUCTION

I. Problem statement

With the Consumer Protection Act of 68 of 2008,¹ South Africa has aligned itself with international guidelines on consumer protection.

With regard to the country's challenges concerning poverty, illiteracy, discrimination and other forms of inequality that are still part of everyday life of many South Africans, the Department of Trade and Industry's intention was 'to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities.'²

The right to fair, just and reasonable terms and conditions, set out in sections 48 to 52 of the Act, is one of the most important innovations of this statute. The legislator recognised the 'need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases' and that South Africa would become the exception, with a deficient law of contracts in comparison to countries which recognise and require compliance with the principle of good faith in contracts.³ Consumer protection and terms and conditions legislation have developed rapidly since the Act came into force. This gives an idea of how important it is, not only for consumers but also for businesses, to keep abreast with these developments.

Although Part G of the Act already had existing legislation as a model, for instance, the law of the European Union,⁴ some of its provisions raise questions which cannot be resolved merely by taking into account the purpose of the Act (section 3) or the interpretational provisions (section 2).

This applies, for instance, to the South African incorporation requisites with regard to notices required only for certain terms and conditions (section 49). In contrast, the German regime applies a very formalistic approach by which standard terms of *any* type must be incorporated in the agreement. This has obviously consequences for consumer protection, which will be analysed in this thesis.

¹ Hereafter also referred to as 'the Act' or 'CPA'.

² Memorandum on the Objects of the Consumer Protection Bill 2008 at 80.

³ GN 1957 in GG No. 26774 of 9 September 2004, ch 3.4.3.

⁴ Council Directive 93/13/EEC of 5 April 1993 on Unfair terms in consumer contracts.

Furthermore, the structure and formulation of the South African 'blacklist' of section 51 and the general clause of section 48 differ from their German counterparts and other regimes. Clauses that fall under the greylist of regulation 44(3) are *presumed* to be unfair, unlike § 308 BGB which applies evaluative elements instead in order to assess the fairness of a clause. These differences will be discussed in detail.

The Act applies a particular-personalised approach where standard terms are assessed against the backdrop of an individual consumer's situation, whereas §§ 305 *et seq.* BGB apply an abstract-general approach by which the courts assess the given standard terms' fairness within a setting that is detached from individual consumers. The consequences of these different approaches will be presented.

An abstract-general approach makes institutional actions possible. This thesis deals with the question of whether the tools provided by the Act, such as class actions, can be a substitute for an abstract challenges mechanism.

Germany opted for an 'open' content control, which has consequences for the order of the various controls, among other things. This concept is alien to South African law. On the other hand, the purposive construction of the Act is not applied in Germany. The ramifications in both regimes will be analysed.

Lastly, the redress mechanism of the Act is very complex, with various judicial and administrative institutions involved. It will be discussed whether this mechanism is consumer-friendly and whether the South African legislator had other options than such a complicated enforcement system.

Under section 2(2)(a), the court, the Tribunal or the National Consumer Commission may take into account appropriate foreign and international law when interpreting the Act. This provision is hence the pivotal point for the relevance of this thesis and makes a comparison with the German regime interesting.

Germany has a long tradition of standard business terms legislation, which is codified today in §§ 305 to 310 of the Civil Code (BGB)⁵ and the Injunctions Act (UKlaG).⁶ Over the years, this field of law has generated a vast body of judicial decisions as well as extensive legal literature.

⁵ BGB = Bürgerliches Gesetzbuch.

⁶ UKlaG = Unterlassungsklagengesetz.

In this thesis, the relevant provisions of the Consumer Protection Act and the BGB shall be discussed and compared with each other. Thus, the research for this thesis involves principles, jurisprudence, literature and developments in the South African and German terms and conditions legislation. The objective is to provide clarity of the South African regime, to find possible solutions and to make recommendations with respect to oversights, uncertainties, practical problems, or even gaps, in connection with the Act.

The research involved is not only an academic exercise but of practical relevance for both consumers and industries. For consumers, it is crucial because the relevant provisions of the Act might not necessarily provide for adequate consumer protection with regard to the particularities of South Africa. What is more, it is in the businesses' interest to have certainty about the compliance with the Act as suppliers have to adjust their trading practices and revise their contracts and standard terms.

Moreover, this thesis could promote further research and directly and indirectly be a source for other practitioners and jurisprudence against the backdrop of section 2(2)(a) in order to develop the law.

II. Theoretical framework

Advantages of the comparative method and methodology

In order to understand the shortcomings of a piece of legislation, the comparative law offers a valuable tool. It enables to take both the perspective within the given national laws by presenting, in a first step, reports on the *status quo* of the given pieces of legislation (Parts I and II). These reports on the South African and the German regimes will present an overall picture of standard business terms legislation and legal solutions to practical problems by statutory rules or decisions in these two countries.

The second step consists of a comparison of both regimes by taking a perspective that is detached from the terminology of the national laws. Here, the underlying legal concepts are analysed in a more abstract way. The comparison of both regimes applies the principle of functionality, which means that the solutions that will be presented will be stripped of their national doctrinal background⁷ (Part III).

⁷ Zweigert and Kötz *Comparative Law* 44.

In instances where the compared acts, namely the Consumer Protection Act and its regulations, on the one hand, and the BGB and the UKlaG, on the other, do not offer a comparable solution to a given problem or concept, the solution will be searched in other 'sources of law' in a broader sense, such as other pieces of legislation, the case law, custom, trade usage or social practice.⁸

Although the author of this thesis is a German lawyer, he willingly avoids an approach where the comparative work starts from a particular question or legal institution in German law in order to compare it with another regime, and to draw conclusions and proposals for the German law. The reverse approach seems more fruitful and attractive as it gives new insights and forces the author to take another perspective from the outset.

As under section 2(2)(a) of the Consumer Protection Act, appropriate foreign and international law may be considered when interpreting the Act, a comparison with another regime is called for by the Act itself. The insights given by such a comparison shall therefore also be valuable from a practical point of view, e.g., for future cases and amendments to the existing law, where necessary.

This thesis contains both a macro- and a microcomparison⁹ of the South African and German legislation because not only specific technical/legal problems in the area of terms and conditions are analysed, but also the overall picture and the dispute resolution procedures. This macrocomparison is necessary because only by analysing the underlying mechanisms as well as the enforcement procedures, an understanding of the effectiveness of consumer rights is made possible. Without such a comparison, the picture would be incomplete.

What is more, a comparison without sociological considerations would be purely theoretical and not take into account the realities of both countries.¹⁰ Especially South African legislation cannot be fully understood without consideration of the country's historical burden of Apartheid.

Comparative law and history of law are 'wood from the same trunk' since the historical development of a piece of legislation is essential for its analysis and understanding.¹¹ Hence, the presentation of the South African and German parts will be preceded by an historical overview pertaining to the analysed pieces of legislation. Only when considering sociological

⁸ Zweigert and Kötz *Comparative Law* 35 and 36.

⁹ See Zweigert and Kötz *Comparative Law* 4.

¹⁰ Zweigert and Kötz *Comparative Law* 10 and 11.

¹¹ Zweigert and Kötz *Comparative Law* 8.

and historical elements in a comparative law thesis, the 'vulnerability' especially of South African consumers and the objectives of the German BGB provisions, for instance, can be fully understood.

Finally, in order to achieve a better understanding of certain topics and a more complete overview of how specific questions can be dealt with, not only the German legislation, but also the legislation of the United Kingdom,¹² Austria,¹³ Australia,¹⁴ to name but a few, as well as international guidelines¹⁵ will be discussed.

Reasons for the choice of the German regime as a comparative legislation

In its report, the Department of Trade and Industry (DTI)¹⁶ conducted research that implied an international legislative comparison, including the European Directive on Unfair Contract Terms¹⁷ and Germany.¹⁸

A comparison with the German legislation on standard business terms is valuable because Germany was the first country in Europe to identify the issue of standard terms and to address this field systematically. What is more, the German Standard Business Terms Act¹⁹ had an enormous impact on the drafting of the European Unfair Terms Directive, notably with regard to the control of the price-performance ratio and the lack of a distinction between pre-formulated and individually negotiated terms.²⁰

¹² For instance, the Office of Fair Trading *Unfair Contract Terms Guidance* (2008).

¹³ Konsumentenschutzgesetz (KSchG) of 1 October 1979.

¹⁴ Australian Consumer Law (Schedule 2 to the Competition and Consumer Act, 2010).

¹⁵ For instance, the UNIDROIT Principles of International Commercial Contracts, the United Nations Guidelines for Consumer Protection, 1999, or the United Nations Commission on International Trade (UNCITRAL) Model Laws.

¹⁶ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998).

¹⁷ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

¹⁸ German legislation is analysed throughout the document. See at 13, point 1.17 (judicial action of the courts), point 1.18 (consumer organisations and institutional actions), at 18 (private legislation opposed to administrative control), at 53 (good faith), at 91 (declaration of discontinuance of unfair practices), at 106, point 2.4.2.2 (powers of German courts), at 132 (fairness), at 140 (general clause and good faith), at 175 *et seq* (individually agreed terms), at 190, point 2.8.3.4 (changed circumstances after the conclusion of the contract), or at 202, point 2.9.2.17 *et seq* (interpretation of contracts).

¹⁹ AGB-Gesetz or AGBG = Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen.

²⁰ Brandner/Ulmer *BB* 1991, 701 *et seq*.

§§ 305 *et seq.* BGB – which contain the former AGBG provisions – are the culmination of a long judicial evolution, from the BGH's 1956 landmark decision with regard to good faith²¹ to a long chain of court decisions that were later seen as a 'highly commendable performance of German jurisprudence'.²² The significance of these highly developed provisions cannot sufficiently be accentuated because they offer *the* 'control instrument' in an economy geared towards mass consumption, rationalisation, anonymisation and profit maximisation.²³ The model character of the German provisions in this area makes a comparison with the South African regime valuable.

Hypotheses on the undertaken research

The underlying hypotheses of this thesis are the following:

The level of protection of the Consumer Protection Act lags behind the German regime and is unsuited for mass contracts and the eradication of unfair terms. This is because in many respects, the Act does not conform to internationally recognised standards with regard to:

- the particular-personalised approach of the Act that is diametrically opposed to the abstract-general approach of §§ 305 *et seq.* BGB;
- a missing abstract-challenges mechanism, unlike in the German regime that provides for institutional actions;
- the South African blacklist and the general clause which vary tremendously from internationally recognised standards as laid down in the German provisions;
- the complex redress mechanism of the Act with its various judicial and administrative institutions, unlike the much more streamlined German enforcement procedure.

In order to limit the scope of this thesis, certain topics, although interesting, cannot be covered in detail. This applies, for instance, for procedural aspects in terms of chapters 5 and 6 of the Act, or provisions in §§ 305 BGB *et seq.* that do not have an equivalent norm in South African legislation.

²¹ BGHZ 22, 90 *et seq.*

²² Zweigert and Kötz *Rechtsvergleichung* 329.

²³ Wendland in: *Staudinger/Eckpfeiler* E para 9.

III. Conceptual framework

Consumer

The term 'consumer' is broadly defined in section 1 of the Act as the counterpart of the supplier. Section 3 qualifies consumers as 'vulnerable', whereas section 22(2) refers to 'ordinary' consumers. The 'average consumer', a concept used in international practice, such as the EU Unfair Commercial Practices Directive (UCPD),²⁴ seems to be inexistent in the Act.

Hence, these abstract constructions of the image of a consumer vary in the different regimes. In European consumer policy, the 'active and critical information-seeker' has been influential because of the essential role of information and transparency in EU legislation.²⁵ On the other hand, the concept of the 'passive glancer', predominant in the Nordic countries, considers that consumers typically just glance at advertisement and do not base their decision to contract on thoroughly gathered or presented information.²⁶

On the other hand, the BGB does not refer to 'consumers' at all, with the exception of § 310(3) which was inserted due to European legislation. Instead, it refers to the 'other party'.

This begs the question whether these different concepts of the quality of consumers are congruent and interchangeable, or if they need to be distinguished from each other. As the purposes set out in section 3 have to be taken into consideration in the interpretation of the Act, the image that the Act has of a consumer is inherently linked to the question of the level of protection of the Act, and whether it conforms to international standards.

Standard business terms / terms and conditions

The Act does not contain a definition of 'terms and conditions', unlike § 305(1). From the German definition one can conclude that standard business terms are designed for mass contracts in order to facilitate transactions of the same kind with many clients.

Although the pieces of legislation discussed in this thesis aim to curtail 'private legislation'²⁷ in the form of standard terms and the unfettered shift of risks onto consumers,²⁸ legislation in this field is complex, overarching and characterised by many pitfalls. The legislator has to insure

²⁴ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005.

²⁵ See, e.g., *Pippig Augenoptik GmbH & Co KG v Hartlauer Handelsgesellschaft* Case 44/01 [2003] ECR I-3095 at 55, where the ECJ defines the consumer as someone 'who is reasonably well informed and reasonably observant and circumspect.'

²⁶ Eiselen and Naudé 'Introduction' in Naudé and Eiselen (eds) *CPA Commentary* para 26.

²⁷ Naudé 2006 *Stell LR* 369.

²⁸ WLP/Pfeiffer Introduction para 1.

not only a high level of protection for consumers, but also that the economy is not unnecessarily burdened with strangling restrictions that are an obstacle for mass transactions.

In any event, standard business terms legislation must tackle the inherent structural inequality between the parties that could be exploited by suppliers when drafting their terms and conditions.²⁹ An analysis of the South African provisions and their comparison with the German regime might reveal such weaknesses.

Unfairness

Unlike the Consumer Protection Act, many regimes do not use words such as 'unfair' in their general clauses or black- or greylists but rather require some imbalance between the parties' rights and obligations.³⁰

Although the Consumer Protection Act uses terms such as 'unfair, unreasonable or unjust', the Act not only does not contain any definition of these words, the South African legislator chose even more synonyms for 'unfair', such as 'inequitable' or 'unconscionable'. The use of different words makes their construction difficult. With regard to section 2(2), a comparison with German law, especially the general clause of § 307 with its concretisations could thus be very helpful in order to define the concept of 'unfairness'.

Good faith

The rationale of standard business terms legislation is to protect consumers from terms that do not sufficiently take into account the consumer's interests. The fact that the supplier must temper the furtherance of its own interest in order to consider the consumer's interests is also consistent with the *bona fides* principle, which is an important principle both in South African and German contract law.³¹

Both regimes apply the principles of public policy and good faith concurrently with their standard business terms legislation. Besides, in both countries, standard business terms legislations cannot be seen in isolation but in synergy with other provisions and the common law. The latter especially applies to South Africa. However, the evolution especially of the *bona fides* standard was different in both regimes.

²⁹ Naudé 'Introduction to ss 48-52 and reg 44' in Naudé and Eiselen (eds) *CPA Commentary* para 10.

³⁰ See, e.g., §§ 307(1) 1st sent. BGB or 879(3) ABGB (Austria).

³¹ Naudé 'Introduction to ss 48-52 and reg 44' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

As opposed to South African case law with its *exceptio doli* defence, German courts relied instead on codified principles, such as good faith (§ 242) and public policy (§ 138). The guiding function of the *ius dispositivum* for the specification of the principle of good faith was a milestone in German jurisprudence.³²

The difference in tackling unfairness in both countries is certainly based on the fact that the principles of good faith and public policy are codified in the BGB, whereas in South Africa, they have been developed by the courts. According to the SCA, the principle of good faith is not a principle capable of independent application, but an underlying value informing the rules and principles of the law of contract.³³ As such, the principle of good faith cannot directly nullify an otherwise valid contractual provision or its enforcement.³⁴ The evolution and the assessment especially of the principle of good faith will hence be a topic of this thesis.

Ubuntu

In South African contract law, not only concepts such as good faith and public policy play a role, but also constitutional values, such as *Ubuntu*, a philosophical concept found in Southern Africa focusing on people's allegiances and relations with each other.³⁵ *Vice versa*, public policy is informed by the concept of *Ubuntu*.³⁶ The rather flexible concept of *Ubuntu* could thus be an appropriate principle to inform the law of contract, as its foundation is a certain invariable focus on the greater good, the interest of the community and dignity.³⁷ Even in a legal context, it is often necessary to revert to philosophical and other concepts in constitutional law, such as dignity. It will therefore be examined in this thesis if *Ubuntu* is a valuable contribution to the concept of fairness with regard to terms and conditions.

IV. Chapter overview

In **Part I** of this thesis, the relevant provisions of the Consumer Protection Act shall be discussed. **Chapter 1** contains a short introduction and a historical overview in which the development of the South African consumer protection regime, from the unfettered application

³² BGHZ 41, 151 *et seq.*

³³ *Brisley v Drotosky* para [22] and [23], confirmed in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at 40H-41A.

³⁴ Pretorius 2003 *THRHR* 643.

³⁵ See Hutchison *et al Law of Contract* 185 note 93, with further references.

³⁶ Hutchison *et al Law of Contract* 185.

³⁷ Mokgoro 1998 *Buff. Hum. Rts. L. Rev.* 16, 18 *et seq.*

of the principle of freedom of contract to the enactment of the Consumer Protection Act, will be presented. In **chapter 2**, the scope of application of the Act and the incorporation requirements for terms and conditions will be analysed in the context of some South African idiosyncrasies in order to contrast them later with the German regime, especially concerning specific formal requisites. **Chapter 3** deals with the content control and the mechanism of the so-called black- and greylists and the general clause. This chapter is particularly important because of numerous peculiarities of the South African regime as opposed to the German legislation, e.g., as regards the structure and wording of sections 51 and 48 as well as regulation 44(3). This chapter is followed by a discussion of the interpretational control (**chapter 4**) in which it will be shown, for example, that despite many similarities with the German regime, the Act has a different approach in the form of purposive construction. In the final **chapter 5** of Part I, the complex redress mechanism of the Act and the institutions involved will be explained.

Part II deals with the German legislation. In the introduction and historical overview (**chapter 1**), the courts' contribution in the field of standard business terms, the subsequent legislation of the AGBG and the influence of EU law will be presented. This chapter is followed by a discussion of the national and international scope of application (**chapter 2**). The analysis of the incorporation control in **chapter 3** contains the formalistic approach in terms of the incorporation requirements in German law, together with the exclusion of surprising terms and the priority of individually agreed terms. In the discussion of the interpretational control (**chapter 4**), the importance of the order of the different controls as well as of an 'open' content control will be demonstrated. In the following **chapter 5** on content control, the rich body of German jurisprudence in this field will be presented within the triad of strictly prohibited clauses, prohibited clauses with an evaluative element and the general clause. Finally, in **chapter 6**, the enforcement mechanism, especially in the form of the institutional action, shall be discussed.

Both Parts I and II will already contain some comparative perspective and suggest possible amendments to the Act.

A comprehensive comparison of both regimes by analysing the findings of Parts I and II will be presented in **Part III**. The objective of this chapter is the highlighting of the differences between the two regimes and the assessment of possible solutions. The comparative study will also enter into the question of where the German standard business terms legislation provides

more consumer-friendly and effective solutions that could be applied to the South African regime too.

Finally, **Part IV** will contain the Conclusion (**I.**) and Recommendations (**II.**) for the Consumer Protection Act, followed by an Overall Conclusion (**III.**). Possible solutions for unresolved questions in terms of the South African regime will be presented in this Part.

PART I – THE RIGHT TO FAIR, JUST AND REASONABLE TERMS AND CONDITIONS UNDER THE CONSUMER PROTECTION ACT

INTRODUCTION

The South African law of contract has undergone a remarkable development in the last few decades. As the absolute application of the *pacta sunt servanda* principle, according to which agreements must be honoured, produced hugely unfair results, the courts mitigated this principle, *inter alia* by the application of the *exceptio doli* defence, in order to apply the abstract values of fairness and equity into substantive law. After the abolition of this defence by the much-criticised *Bank of Lisbon* decision, the courts applied other concepts, such as the principle of good faith, the concept of public policy and constitutional considerations in order to ensure fairness in the law of contract. The Consumer Protection Act finally created a legal framework to ensure equity and established the right to fair, just and reasonable terms and conditions in section 48 to 52. This framework applies only to consumer contracts, i.e., contracts between a consumer and a supplier,³⁸ but not to commercial contracts where both or all parties are contracting in the course of their respective businesses. The Act considers also small businesses whose asset value or annual turnover does not exceed a certain threshold as consumers,³⁹ so that under this statute, ‘consumers’ are not only natural persons.⁴⁰ As commercial contracts are thus treated only those which are contracted between companies whose asset value or annual turnover exceeds the abovementioned threshold.

In this chapter, the scope, the application and the problems inherent to the legal framework of sections 48 to 52 of the Consumer Protection Act as well as provisions that cause problems in terms of their comprehension, application and interpretation will be discussed. The South African Law Commission has recognised in its report⁴¹ the need for legislation against unfairness, unreasonableness and unconscionability in the field of contract law. The reasons

³⁸ Section 1 of the Consumer Protection Act defines ‘consumer agreement’ as an agreement between a supplier and a consumer other than a franchise agreement. **Provisions preceded by the word ‘section’ or ‘s’ are those of the Consumer Protection Act (also referred to as the ‘CPA’ or the ‘Act’), and provisions preceded by ‘§’ are those of the German BGB, save where otherwise indicated.**

³⁹ Section. 5(2)(b).

⁴⁰ Hutchison *et al* *Law of Contract* 437.

⁴¹ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xiv).

for the intervention of the legislature in terms of the Consumer Protection Act and the considerations contained in section 48 *et seq.* can only be fully understood against their historical background. Therefore, first, an overview of the development of aspects related to fairness and equity in South African contract law will be given. This shall contribute to the understanding of the modern South African contract law and consumer protection regime.

Then, the scope of application of the right to fair, just and reasonable terms and conditions, the formal requirements for written consumer agreements as well as the obligatory notice for certain terms and conditions will be discussed, before the so-called 'black-' and 'greylists' and the general unfairness standard of section 48 of the Act will be examined in detail. In another chapter, the interpretational control will be presented. Finally, the last part of this chapter will deal with the enforcement procedures which are at the consumer's disposition. In this part, also the institutions that are competent to deal with these questions will be discussed.

CHAPTER 1 – HISTORICAL OVERVIEW: FROM THE ABSOLUTE APPLICATION OF THE PRINCIPLES OF FREEDOM OF CONTRACT AND *PACTA SUNT SERVANDA* TO THE CONSUMER PROTECTION ACT

1. Freedom of contract

Freedom of contract has been an absolute principle in South African law in the nineteenth century.⁴² According to this principle, parties should be able to enter into agreements without any intervention by the State or courts⁴³ because any intervention was regarded as paternalistic and inconsistent with the parties' freedom of contract. Party autonomy, coupled with the sanctity of contracts (*pacta sunt servanda*), was therefore the 'sacred cow'⁴⁴ – or the 'hallowed basis', as Pretorius puts it more elegantly⁴⁵ – of South African contract law. The principle of freedom of contract goes back to the 16th, 17th and 18th centuries, when philosophers, lawyers, sociologists and economists postulated the philosophy of *laissez-faire*. According to this philosophy, individuals should be free to enter into contracts.⁴⁶

This however led often to unfair outcomes. Hahlo illustrates the problem with absolute freedom of contract as follows:

'Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place.'⁴⁷

The strict application of the *pacta sunt servanda* principle was certainly reasonable at a time when the parties were in an equal position when negotiating the terms of an agreement on an individual basis. This equality of bargaining power was hardly ever achieved, however.⁴⁸ When companies gradually imposed standardised and not individually negotiated contract terms, jurisprudence felt a need 'to protect the poor and the ignorant'⁴⁹ so that the principle of

⁴² This is applicable for both civil law and common law jurisdictions. See Hahlo 1981 *SALJ* 70.

⁴³ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 353.

⁴⁴ See *Barkhuizen v Napier* 2007 (5) SA 232 (CC) para [15] and the discussion of this case under para 4.1 of this chapter. **Except where otherwise indicated, references to chapters or paragraphs refer to those within the Part of this thesis in which they appear.**

⁴⁵ Pretorius 2004 *THRHR* 183.

⁴⁶ Aronstam 1979 *THRHR* 21-22.

⁴⁷ Hahlo 1981 *SALJ* 70.

⁴⁸ Aronstam 1979 *THRHR* 22.

⁴⁹ Hahlo 1981 *SALJ* 70.

freedom of contract had to be mitigated in order to protect consumers. Although in consumer contracts, some parts are negotiated between the supplier and the consumer as, for example, the definition of the main subject matter or the price, large parts are not as they are incorporated in the standard terms and conditions ('small print'). Therefore, the consumer is often confronted with a 'take-it-or-leave-it' situation towards the supplier. Even though consumers can shop around for the 'best', i.e., the most advantageous terms and conditions, they will most probably refrain from this possibility because the transaction costs would be too high.⁵⁰ It would cost much time to compare the terms of conditions of different suppliers, and for laypersons, they are often difficult to compare because of their different wording and structure.

Therefore, the strict application of this principle – which is still today a cornerstone of South African law of contract – has been curbed gradually by jurisprudence or lawmaking.⁵¹ This was achieved by introducing the concept of fairness. Examples include ticket contracts,⁵² restraints of trade⁵³ and cases of misrepresentation,⁵⁴ duress⁵⁵ and undue influence,⁵⁶ where consensus had been improperly obtained. In this regard, the *exceptio doli* defence played an important role in order to prevent inequitable outcomes.

2. The *exceptio doli generalis* in South African law of contract

2.1 The development of the *exceptio doli generalis*

South African courts gradually applied the *exceptio doli generalis* from the late nineteenth century in order to adopt some equitable doctrines from English law like estoppel, rectification and the right to rescind a contract induced by innocent misrepresentation.⁵⁷ It was regarded as

⁵⁰ Naudé 2009 SALJ 508.

⁵¹ Hahlo 1981 SALJ 71.

⁵² *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A).

⁵³ *Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

⁵⁴ *Bayer South Africa Ltd v Frost* 1991 (4) SA 559 (A).

⁵⁵ *Broodryk v Smuts* 1942 TPD 47.

⁵⁶ *Hofer v Kevitt* 1998 (1) SA 382 (SCA). See Stoop LLD thesis 2012 at 72. The appeal court did not recognise 'commercial bribery' as a ground for rescission in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA). See Van der Merwe *et al Contract General Principles* (2012) 110.

⁵⁷ *Hutchison et al Law of Contract* 27. See *United South African Association Ltd v Cohn* 1904 TS 733; *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717; *McDuff and Co Ltd v Johannesburg Consolidated Investment* 1924 AD 573; *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Estate Schickerling v Schickerling* 1936 CPD 269; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Allers v Rautenbach* 1949 (4) SA 226 (O); *Venter v Liebenberg* 1954 (3) SA 333 (K); *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T); *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T); *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (K); *Otto en 'n Ander v Heymans* 1971 (4) SA 148 (T); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A). Some of these cases will be discussed below.

an equitable defence which allowed a defendant to face a claim for performance when there was something unconscionable about the plaintiff's endeavour to enforce the contract or a contractual provision.⁵⁸ Nonetheless, courts were sceptical from the beginning about the utility of this defence and whether the *exceptio doli* actually was part of South African law or not because it was not clear if it had been adopted in Roman-Dutch law.⁵⁹ As the modern South African law of contract has its roots in Roman-Dutch law, which itself is based on Roman law, it is important to understand the historical background of the *exceptio doli*. Therefore, it is necessary to depict its coming into being and its development.

2.1.1 Roman law

The legal system in about 380 BC was known as the *ius civile*. It applied to Roman citizens, was underdeveloped and characterised by its strict formalism,⁶⁰ which led to a high degree of legal certainty. On the other hand, as this formalistic approach left no room for interpretation of an individual case, the outcomes were often inequitable,⁶¹ especially in cases where a party was a victim of fraud or compulsion.⁶² In 367 BC, the function of the *praetor* was created.⁶³ Over time, the *praetor* became the main source of law during litigation. By virtue of his political power (*imperium*), he could introduce a new legal remedy by way of an edict (*magistratum edicta*).⁶⁴ Although the *praetor* technically did not create new law, the edicts enjoyed legal protection (*actionem dare*) and were in effect often the source of new legal rules. While the edicts of his predecessor did not bind a *praetor's* successor, he did take rules from edicts of his predecessor that had proved to be useful. Thus, over time, parallel to the civil law and supplementing and correcting it, a new body of praetorian law emerged (*edictum translatitium*).⁶⁵

⁵⁸ Glover 2007 *SALJ* 449.

⁵⁹ Viljoen 1981 *De Rebus* 173 and 174. Viljoen is of the opinion that the *exceptio doli* seemed to be an established defence. However, its exact and precise limits had to be determined.

⁶⁰ See Britannica s.v. 'Roman law' at <https://www.britannica.com/topic/Roman-law#ref469058>. **All websites last accessed between 16 and 20 August 2020, except where otherwise indicated.**

⁶¹ Hawthorne/Thomas 1989 *De Jure* 143. The adherence to strict formalism was reasonable in the early stage of Roman law, when Rome was a small community. See Hahlo 1981 *SALJ* 71.

⁶² Lewis 1990 *SALJ* 30.

⁶³ Hawthorne/Thomas 1989 *De Jure* 145.

⁶⁴ Hawthorne/Thomas 1989 *De Jure* 145. The law introduced by the *praetors* is referred to as '*ius honorarium*'. See Oxford Classical Dictionary s.v. '*ius honorarium*' at <https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-8053>.

⁶⁵ See TheLaw.com Dictionary s.v. '*edictum translatitium*' at <https://dictionary.thelaw.com/translatitium-edictum>. In addition, the *praetors* considerably extended the concept of contract by giving an *actio in factum* (an action given by the *praetor* on the facts of the case alone where no standard civil law action was applicable (see 'Glossary of Roman law' at <http://thelatinlibrary.com/law/glossary.html>) or *praescriptis verbis* (an action given when the foundation of an action is a bilateral transaction for reciprocal performances which do not conform to the typical and recognised species of contracts - see Berger *Dictionary of Roman Law* 334) in certain circumstances falling

Although the *praetor* could introduce the principle of good faith during the negotiation phases of contracts, he did not have the discretion to insert the principle of good faith in any *stipulatio*, the most important contract-type in Roman law,⁶⁶ consisting of questions and answers.⁶⁷

In order to avoid inequities, the *exceptio doli* was established in 66 BC,⁶⁸ and the principle of good faith (*bona fides*) was introduced into the *stipulatio*. This defence was created 'so that a person should not by reason of the subtlety of the civil law, and contrary to the dictates of natural justice, derive advantage from his own bad faith.'⁶⁹ The *exceptio doli* was originally intended only for *bonae fidei* contracts but gradually extended to *stricti iuris* contracts.⁷⁰

In the case of *negotia stricti iuris*, the parties were bound to the strict wording of the contract, regardless of the possibility that the content of the agreement was against the *bona fides* principle. The parties could expressly stipulate in the formula that they had to act under this principle though.⁷¹ Hence, a judge could also in *actiones stricta iudicia* take into consideration any conduct that did not meet the requirements of the *bona fides* standard and therefore exercise a discretionary power.⁷² The defence was the *exceptio doli specialis* (or *praeteriti*), according to which the counterpart had not acted in good faith when concluding the agreement (*in contrahendo*), for instance on grounds of fraud or intimidation.⁷³

On the other hand, when the parties concluded a *negotia bonae fidei* agreement, they were required to do what was reasonable and expected of them.⁷⁴ The courts did in fact not take into

outside the ten classes of contract laid down in the *Institutes* (*mutuum, commodatum, depositum, pignus, stipulatio, litteris, emptio venditio, locatio conductio, societas, mandatum*). See Christie *Law of Contract* (2006) 5.

⁶⁶ Hawthorne/Thomas 1989 *De Jure* 145. According to Gaius (around 160 AD), contractual obligations arise from an act (*re*), from words (*verbis*), from writing (*litteris*) or from consent (*consensu*). Contrary to modern law, where a contractual obligation arises from an agreement between the parties, in Roman law, the adherence to strict formalism was, besides *consensus*, the requisite for any enforceable contractual obligation. Therefore, in *stipulatio*, for instance, a 'verbal' (*verbis*) contract, the parties had to conform to certain formulae in order to create an obligation. See Christie *Law of Contract* (2006) 5. If the parties did not comply with the form, there was no contract. If, on the other hand, there was compliance with the form but no agreement, there would be a contract nonetheless. See Lewis 1990 *SALJ* 30. Only with regard to sale (*emptio venditio*), hire (*locatio conductio*), partnership (*societas*) and mandate (*mandatum*) the informally declared *consensus* was sufficient in order to create an obligation, without any additional formalism or transfer of a thing. Only in 472, the formal requirements for the *stipulatio* were abolished, and *consensus* between the parties was sufficient to conclude such a contract. See Pretorius 2004 *THRHR* 181.

⁶⁷ Lewis 1990 *SALJ* 30.

⁶⁸ Hawthorne/Thomas 1989 *De Jure* 145.

⁶⁹ *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 535 – hereafter *Zuurbekom*.

⁷⁰ Christie *Law of Contract* (2006) 271, Aronstam *Consumer Protection* 170. Most contracts were introduced by the *praetor* and therefore were *negotia bonae fidei*. See Hawthorne/Thomas 1989 *De Jure* 145.

⁷¹ Aronstam *Consumer Protection* 171. This was done by inserting the words '*ex fide bona*'. See Hawthorne/Thomas 1989 *De Jure* 145.

⁷² Hawthorne/Thomas 1989 *De Jure* 145, Aronstam 1979 *THRHR* 30.

⁷³ Viljoen 1981 *De Rebus* 173, Lambiris 1988 *SALJ* 646.

⁷⁴ Aronstam 1979 *THRHR* 29.

account what the parties had promised but any conduct which was deemed to fall short of the required *bona fides* standard.⁷⁵ The defence for this type of agreement was the *exceptio doli generalis* (or *praesentis*) which the defendant could raise when the plaintiff acted contrary to good faith, either during the negotiations of the contract itself or during the action.⁷⁶

In practice, the Romans made no distinction between these two defences and simply used indiscriminately the term *exceptio doli*.⁷⁷ The most notable difference concerning the *exceptio doli* in the context of *iudicia stricti iuris* and *iudicia bonae fidei* was that it had to be expressly pleaded in the former, whereas in the latter, the court took equity aspects into account *ex officio*.⁷⁸

In classical Roman law, *dolus* was synonymous with *mala fides* (contrary to good faith). Therefore, good faith became a requirement for the stipulation under the *exceptio doli*.⁷⁹ Gaius,⁸⁰ who formulated⁸¹ the *exceptio doli*, although the *praetor* Aquilius Gallus had created this exception,⁸² stated that the advantages of the *exceptio doli* were twofold. On the one hand, it would be raised as an exception to *dolus*⁸³ which had already occurred, and, on the other, to *dolus* occurring during *litis contestatio*.⁸⁴ In other words, the *exceptio doli* had the effect that a claim could be defeated if the defendant had acted contrary to the requirements of good faith at the moment the contract was concluded, or at the moment of enforcing the action.⁸⁵

The *exceptio doli* operated as a general equitable defence or a general reserve clause which enabled the defendant, without specifying the defence, to set up any fact before the court in

⁷⁵ Aronstam *Consumer Protection* 171.

⁷⁶ Aronstam *Consumer Protection* 171, Hawthorne/Thomas 1989 *De Jure* 145.

⁷⁷ Viljoen 1981 *De Rebus* 173, referring to *Zuurbekom* 536; Aronstam 1979 *THRHR* 28.

⁷⁸ Lewis 1990 *SALJ* 32.

⁷⁹ Hawthorne/Thomas 1989 *De Jure* 145.

⁸⁰ Gaius' classification of contracts laid down in his *Institutes* became the most influential in Roman law and was the basis for teaching of Roman law until it was replaced by Justinian's *Institutes* in the 6th century AD. Justinian adopted the same classification, though. According to this classification, Roman private law distinguishes between the law of persons, the law of things and the law of actions (I 1.2.12). See Christie *Law of Contract* (2006) 3.

⁸¹ The form of the *exceptio doli* was: '*si in ea re nihil dolo malo factum sit neque fiat*'. See Aronstam *Consumer Protection* 169.

⁸² Viljoen 1981 *De Rebus* 173.

⁸³ There was *dolus* when the plaintiff knew, for instance, because of his fraud or intimidation, that his suit was inconsistent with good faith. See Aronstam *Consumer Protection* 169.

⁸⁴ Viljoen 1981 *De Rebus* 173, referring to *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T) at 438. In Justinian's system, the *litis contestatio* consisted in the statements made by the parties before the magistrate respecting the claim or demand, and the answer or defence to it. Afterwards, the cause was ready for hearing. In a more general sense, *litis contestatio* meant the contesting of the suit, or pleading the general issue. See definition of 'litis contestatio' in <http://legal-dictionary.thefreedictionary.com/litis+contestatio>.

⁸⁵ Hawthorne/Thomas 1989 *De Jure* 145.

order to secure a judgement in his favour.⁸⁶ It was an extensive defence which could be raised against any action which was '*contra aequitatem naturalem*'.⁸⁷ As the formulary procedure was an obstacle for the affluent Rome and perceived as a burden for commercial transactions, it was abolished. All contracts were from then on recognised to be of good faith, so this defence fell away⁸⁸ because the judge was obliged to decide if the contract in question was negotiated and performed *bona fides*.⁸⁹ The defendant was free to raise an *exceptio doli* on the grounds of fraud though.⁹⁰

2.1.2 Roman-Dutch law

Despite the existence of the *exceptio doli* in Roman law, its existence in Roman-Dutch law has never been entirely clarified.⁹¹ Some authors suggest that the *exceptio doli* was applied in Roman-Dutch law, but only impliedly, namely as a requirement of good faith, which itself was a requisite of any contract.⁹² Others assert that the *exceptio doli* has never been received in Roman-Dutch law because no reference can be found in Roman-Dutch literature.⁹³ Coetzee J stated in the *Aris Enterprises* case⁹⁴ that the *exceptio doli* had already served its purpose by the time of Justinian and was no longer needed after that.⁹⁵ The reason for the absence of references of the *exceptio doli* in Roman-Dutch literature could be that the parties had to perform their agreement in good faith.⁹⁶ There was thus no need for a defence like the *exceptio doli* as the courts themselves could investigate whether the parties had concluded or fulfilled their contract in good faith.⁹⁷ From the 12th century onwards, German nations tried to abolish all unnecessary

⁸⁶ Aronstam *Consumer Protection* 169, Viljoen 1981 *De Rebus* 173.

⁸⁷ Aronstam *Consumer Protection* 172.

⁸⁸ Glover 2007 *SALJ* 450.

⁸⁹ Hutchison *et al Law of Contract* 27.

⁹⁰ Van Zyl *Roman law* 385.

⁹¹ Roman-Dutch law became the law of the land when Jan van Riebeeck landed at the Cape in 1652. Therefore, the principles of freedom of contract and *pacta sunt servanda* became the foundation of the South African law of contract (Pretorius 2004 *THRHR* 185). Roman-Dutch law, contrary to Roman law, treated every serious and deliberate agreement as a contract because of the influence of the canon law and the *ius gentium* (the law which applied to foreigners, i.e., non-Romans. See Creifelds *Rechtswörterbuch* s.v. 'Römisches Recht') and the traditional Germanic respect for the sanctity of promises. See also Christie *Law of Contract* (2006) 6-7 and Pretorius 2004 *THRHR* 182 who stresses the role of the Church in terms of the religiously required obligation to honour agreements.

⁹² Aronstam *Consumer Protection* 173, Viljoen 1981 *De Rebus* 173. See also Hawthorne/Thomas 1989 *De Jure* 150.

⁹³ Aronstam *Consumer Protection* 173, Viljoen 1981 *De Rebus* 173, both referring to Simon van Leeuwen, Johannes van der Linden, D G van der Keessel and Cornelius van Bynkershoek; Glover 2007 *SALJ* 450.

⁹⁴ *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T) – hereafter *Aris Enterprises v Waterberg Koelkamers*. See para 2.2.6 of this chapter.

⁹⁵ *Aris Enterprises v Waterberg Koelkamers* 437H-438A. Lewis (1990 *SALJ* 32) states that the *exceptio doli* fell away in the 4th century AD as there was no need for it as a special defence after the formulary system of procedure was replaced.

⁹⁶ Hutchison *et al Law of Contract* 12, Aronstam *Consumer Protection* 172.

⁹⁷ Aronstam *Consumer Protection* 172.

formalities. Instead, the *consensus* of the parties was considered the essential element of an agreement.⁹⁸ Even though all contracts were regarded as *bonae fidei*, this principle was far from generally being accepted.⁹⁹

Despite the abovementioned differing viewpoints in terms of the question of whether the *exceptio doli* was part of Roman-Dutch law, it was applied by South African courts – within the principles of *pacta sunt servanda* and freedom of contract, which became the cornerstones of the South African law of contract¹⁰⁰ – since the late 19th century.¹⁰¹ Unfortunately, its limits, scope of application and requisites varied from case to case.¹⁰²

2.2 The application of the *exceptio doli generalis* in South African law

The Appellate Division assumed that the *exceptio doli* was available in modern law if otherwise the plaintiff's remedies 'would cause some great inequity and would amount to unconscionable conduct on his part'.¹⁰³

The following court rulings provide examples of how inconsistently the judiciary applied the *exceptio doli* defence.

2.2.1 *Weinerlein v Goch Buildings Ltd*

In the *Weinerlein* case,¹⁰⁴ the court had to consider the nature and scope of the *exceptio doli*. According to the court, the *exceptio doli* could apply in cases where the enforcement of a right would cause some great inequity and would be tantamount to unconscionable conduct.¹⁰⁵ Wessels JA relied on passages from the works of Donellus¹⁰⁶ and Vinnius.¹⁰⁷ He argued that Donellus submitted that as a general proposition, a claim might be supported by a strict interpretation of the law,¹⁰⁸ but as an exception, it cannot be supported in a case against a

⁹⁸ Aronstam *Consumer Protection* 172. In Roman law, the *consensus* became more and more important, but not for all types of contract. See Pretorius 2004 *THRHR* 182.

⁹⁹ Hawthorne/Thomas 1989 *De Jure* 148. It seems that in France, in the Netherlands and in Germany, scholars of authority adhered to the distinction between *contractus bonae fidei* and *stricti iuris* until codification solved this question.

¹⁰⁰ Pretorius 2004 *THRHR* 185.

¹⁰¹ Hutchison *et al Law of Contract* 27.

¹⁰² See list of decisions in note *supra* and the list provided in Hawthorne/Thomas 1989 *De Jure* 151.

¹⁰³ Hutchison *et al Law of Contract* 27, Aronstam *Consumer Protection* 181.

¹⁰⁴ *Weinerlein v Goch Buildings Ltd* 1925 AD 285 – hereafter *Weinerlein*. In this case, the question was whether a contract of sale of land, which was required by statute to be in writing, could be rectified to reflect correctly the prior oral agreement of sale between the parties.

¹⁰⁵ *Weinerlein* 292, Viljoen 1981 *De Rebus* 173.

¹⁰⁶ Donellus *De Jure Civ.* bk 22 c. 6, n. 3, vol. 5 at 1509-10

¹⁰⁷ I 1.4.13.

¹⁰⁸ Donellus *De Jure Civ.* bk.23, cc.n.3, vol 5 1509-10. See *Weinerlein* 292.

particular adversary, where to do so would be inequitable and unjust. Otherwise, the party could put, under the cloak of the law, a fraudulent claim.¹⁰⁹

2.2.2 Zuurbekom Ltd v Union Corporation Ltd

In the *Zuurbekom* case,¹¹⁰ Tindall JA held that 'it must be shown (as the very name *exceptio doli* indicates) that in the circumstances of the particular case the enforcement of the remedy in question [interdict] by the plaintiff would cause some great inequity and would amount to unconscionable conduct on his part.'¹¹¹ Tindall J admitted though that he 'cannot profess to be clear as to the exact limits of the defence known as the *exceptio doli*.'¹¹²

In the following years, the courts applied the *exceptio doli* by following especially the dicta of the *Weinerlein* and *Zuurbekom* cases.¹¹³ Nevertheless, the scope of the *exceptio doli* and the requisites of its application were still uncertain.

2.2.3 North Vaal Mineral Co Ltd v Lovasz

In *North Vaal v Lovasz*,¹¹⁴ Jansen J pointed out that the *exceptio doli* is not a substantive defence distinct from other legal principles but a result arrived at by the application of these other principles.¹¹⁵ He was of the opinion that the *exceptio doli* could usefully operate as a defence to a claim only when that claim had 'run the gauntlet' of the tests of error, fraud, duress or estoppel and had still survived. However, the *exceptio doli* could not be based upon what a particular court considered harsh, unfair, unjust or inequitable because this would have led to an equitable jurisdiction which the court does generally not possess.¹¹⁶

¹⁰⁹ *Weinerlein* 292.

¹¹⁰ *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) – hereafter *Zuurbekom*.

¹¹¹ *Zuurbekom* 537, *Aronstam Consumer Protection* 181.

¹¹² *Zuurbekom* 535.

¹¹³ *Aronstam Consumer Protection* 175.

¹¹⁴ *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) – hereafter *North Vaal v Lovasz*.

¹¹⁵ *North Vaal v Lovasz* 607F-G. Hawthorne/Thomas (1989 *De Jure* 151) are of the opinion that Jansen J did not doubt the existence of the *exceptio doli* in South African law, but rather criticised its scope of application.

¹¹⁶ *North Vaal v Lovasz* 607H. *Aronstam (Consumer Protection* 176) points out that Tindall JA contradicts himself when stating that the *exceptio doli* only exists when *inter alia* the enforcement of a right would cause great inequity and the plaintiff's conduct would amount to unconscionable conduct (608D).

2.2.4 Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd

In *Von Ziegler*,¹¹⁷ the court was of the opinion that the *exceptio doli* operates only within well-known and defined limits such as fraud, misrepresentation or mistake, justifying rescission or rectification.¹¹⁸

2.2.5 Paddock Motors v Igesund

In *Paddock Motors v Igesund*¹¹⁹ Jansen JA somewhat restricted the scope of application of the *exceptio doli*. He stated that in modern law, all contracts were regarded as being *bona fides* and that the *exceptio doli* could not be utilised in order to alter the terms of a valid agreement concluded between the parties.¹²⁰ He explained that uncertainty and scepticism existed in respect of seeing the *exceptio doli* as a separate substantive legal concept in modern law and that the precise limits of application of this defence have remained unclear.¹²¹ He suggests that the *exceptio doli* applies where a contract requires being in writing because it can be considered analogous to a *negotium stricti iuris*.¹²²

Aronstam criticised this restrictive interpretation. In his opinion, the *exceptio doli* was implied in the contract as an element of good faith. He argued that the field of operation of this institution had not been narrowed down, but it was unnecessary to expressly plead it because good faith was a requirement for the conclusion of a contract.¹²³ What is more, he criticised the analogy between *negotium stricti iuris* and the contract required by law to be in writing. Although in both agreements, compliance with formalities is a prerequisite for their validity, in Roman law, formalities by themselves created the contract. On the other hand, in South African law, *consensus* is required as well.¹²⁴

2.2.6 Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd

Only in 1977, in the *Aris Enterprise* case,¹²⁵ the question of whether the *exceptio doli* was part of South African law was raised for the first time. Coetzee J, as a single judge, argued that the *exceptio doli* was not part of the Roman-Dutch law, and that it had already served its purpose

¹¹⁷ *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) – hereafter *Von Ziegler*.

¹¹⁸ *Von Ziegler* 409D-E.

¹¹⁹ *Paddock Motors v Igesund* 1976 (3) SA 16 – hereafter *Paddock Motors v Igesund*.

¹²⁰ *Paddock Motors v Igesund* 28E.

¹²¹ *Paddock Motors v Igesund* 27G.

¹²² *Paddock Motors v Igesund* 28D.

¹²³ Aronstam *Consumer Protection* 179.

¹²⁴ Aronstam *Consumer Protection* 179.

¹²⁵ *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 – hereafter *Aris Enterprises v Waterberg Koelkamers*.

by the time of Justinian and was no longer needed.¹²⁶ After praising the benefits of the *exceptio doli* in Roman law, he states that 'in a fully developed system of law such an instrument has no meaningful *raison d'être* and is a superfluous anachronism.'¹²⁷ However, Coetzee J was bound by the decision of the Full Bench in *Otto en 'n Ander*,¹²⁸ where the existence of the *exceptio doli* in South African law was assumed.

2.2.7 Rand Bank Ltd v Rubenstein

Also in *Rand Bank v Rubenstein*,¹²⁹ the court declared itself to be bound to accept the existence of the *exceptio doli*. In this case, the court applied the defence to a set of facts where the agreement in question was not unfair, but rather the attempt to apply it to a situation, which arose subsequently, and which was regarded as unfair.¹³⁰ The facts of this case appeared to Botha J 'to be tailor-made for the application of the general defence of the *exceptio doli*.' Botha J stated that the application of broad considerations of fairness and justice was almost an everyday occurrence in a court of law. He held that if the bank had succeeded in converting the right acquired into a remedy in respect of a later unforeseen event, the outcome would undoubtedly be an injustice or inequity towards the defendant.¹³¹

As has been shown above, despite the fact that the *exceptio doli* had been applied in numerous cases, there was great uncertainty about the exact requirements and its exact field of application. Viljoen correctly maintains that assuming the *exceptio doli* as a distinct and substantive defence would necessitate the determining of its limits, requisites and field of operation.¹³² However, the courts were never seizing the opportunity to define the limits and requirements for the application of the *exceptio doli* defence precisely.

2.3 The abolition of the *exceptio doli generalis* by the *Bank of Lisbon* case

The answer to the questions of whether the *exceptio doli* had its place in South African law, and if so, of whether it had to be qualified as a distinct legal defence, of whether it was part of

¹²⁶ *Aris Enterprises v Waterberg Koelkamers* 437H-438A.

¹²⁷ *Aris Enterprises v Waterberg Koelkamers* 438A-B.

¹²⁸ *Otto en 'n Ander v Heymans* 1971 (4) SA 148 (T). In this case, Marais J stated that the *exceptio doli*, though not sharply defined, is a remedy which will be granted to a party if the court believes that an impermissible injustice would otherwise result and that actual fraud is not a requisite or element of the *exceptio doli* (at 155).

¹²⁹ *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) – hereafter *Rand Bank v Rubenstein*. In this case, Rand Bank attempted to use the suretyship for a purpose for which it was never intended by relying on the wide wording of the deed of suretyship.

¹³⁰ Van der Merwe/Lubbe/Van Huyssteen 1989 SALJ 236.

¹³¹ *Rand Bank v Rubenstein* 215D-H.

¹³² Viljoen 1981 *De Rebus* 174.

the element of *bona fides*, and of whether it was an equitable remedy giving the judge discretion, was given in the much-criticised *Bank of Lisbon* decision.

2.3.1 The majority decision

In the *Bank of Lisbon* case¹³³ the Appellate Division of the Supreme Court held – by rejecting dicta of the three Appellate Division decisions on which reliance had often been placed in the past, favouring the recognition of the *exceptio doli* as binding¹³⁴ – that the parties have to adhere to the terms of a (written) contract, and that they could not claim the *exceptio doli generalis*¹³⁵ because it was not part of South African law and therefore could not be used as a defence.¹³⁶ Joubert JA, after an extensive historical depiction of Roman law, argued that the *exceptio doli* was 'a superfluous, defunct anachronism' which had to be 'bur[ied]'.¹³⁷ According to the judges, equity or the application of good faith could not override a clear rule of law, such as the *pacta sunt servanda* principle.

2.3.2 The minority judgment by Jansen JA

In the minority judgment, Jansen JA held that the principles of freedom of contract and *pacta sunt servanda* were not absolute and that the *exceptio doli* formed a substantive defence against contractual unfairness.¹³⁸ In addition, the common law maintained the principle that it will not readily dissolve an agreement unless there are factors of public policy, such as fraud, duress or undue influence.¹³⁹

¹³³ *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) – hereafter *Bank of Lisbon*. In this case, the respondents handed signed suretyships to the lender bank and passed mortgage bonds on their properties in order to secure overdraft facilities. After payment of the full amount of the loan, the respondents claimed the redelivery of all securities from the bank. Despite full payment of the loan, the bank refused the redelivery because it intended instituting a claim for damages against the respondents for breach of another contract between the parties. The Bank asserted that it was entitled in terms of the loan contract to retain the abovementioned securities. However, the respondents retorted that the conduct of the bank was contrary to the view of the society of what is right or wrong in the requirements of good faith. Therefore, the common-law remedy of the *exceptio doli generalis* would apply.

¹³⁴ *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) and *Paddock Motors (Pty) v Igesund* 1976 (3) SA 16 (A).

¹³⁵ In fact, the respondents (the applicants) raised the *replicatio doli generalis*, but as Jansen JA states at the beginning of his minority decision (611G), the underlying principles of this defence are the same as for the *exceptio doli generalis*. The difference between the two defences is that the *exceptio doli* is raised by the plaintiff rather than the defendant. See Lewis 1990 *SALJ* 27.

¹³⁶ *Bank of Lisbon* 617A-B.

¹³⁷ In order to emphasise the image of a 'burial' of the *exceptio doli generalis*, Joubert JA used the phrase '*Requiescat in pace*' (let it rest in peace) (607A-B).

¹³⁸ *Bank of Lisbon* 617F-G.

¹³⁹ Van Eeden *Guide to the CPA* 168.

Jansen JA was of the view that the principles of the *exceptio doli* were part of the Roman law and were received in Roman-Dutch law.¹⁴⁰ He feared that the abolition of the *exceptio doli* would leave a vacuum which the principle of good faith would not be able to fill entirely because it had not yet absorbed the principles of the *exceptio doli*, and the concept of *contra bonos mores* had not yet specifically been applied in this field.¹⁴¹

2.3.3 Criticism

The majority ruling was severely criticised by the legal fraternity 'for its positivist and overly scholarly method of historical reasoning'¹⁴² and regarded as an 'unfortunate judgment'¹⁴³ as it lacked an in-depth discussion of general policy considerations or the responsibility of a court to ensure justice.¹⁴⁴ Van der Merwe, Lubbe and Van Huyssteen legitimately pointed out that the majority decision, while accepting that contracts are *bonae fidei*, rejected the *exceptio doli* and at the same time denied that *bona fides* has developed to fulfil the function of the *exceptio*. They asked what then was the meaning and function of *bona fides*.¹⁴⁵ Kerr opined that the statements in the *Bank of Lisbon* case about the absence of the *exceptio doli* in Roman law and Roman-Dutch law were incorrect and that those concerning modern law should be re-examined because the *exceptio doli* defence was available in South African law.¹⁴⁶ What is more, the facts of the *Bank of Lisbon* had striking similarities with those of the *Rand Bank*¹⁴⁷ case where the court in question decided that the facts of the case were 'tailor-made' for the general application of the *exceptio doli*.

Despite the criticisms, in the following years, there was much uncertainty about the application of the *exceptio doli*, and litigants sought other ways on how to resist the enforcement of unconscionable contracts, e.g., by the use of principles such as good faith, public policy, *boni mores* and constitutional values.¹⁴⁸

¹⁴⁰ *Bank of Lisbon* 617E.

¹⁴¹ *Bank of Lisbon* 616C.

¹⁴² Christie *Law of Contract* (2006) 12.

¹⁴³ Domanski 1995 *SALJ* 165.

¹⁴⁴ Christie *Law of Contract* (2006) 12, Lewis 1990 *SALJ* 29.

¹⁴⁵ Van der Merwe/Lubbe/Van Huyssteen 1989 *SALJ* 241-242.

¹⁴⁶ Kerr 1991 *SALJ* 585, 586.

¹⁴⁷ *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W).

¹⁴⁸ Domanski 1995 *SALJ* 166, Forsyth/Pretorius 1993 *SA Merc LJ* 184, Glover 2007 *SALJ* 450. It seems that only Kerr defends the minority opinion of Jansen JA in terms of the *exceptio doli*'s right to exist (Kerr 2008 *SALJ* 241; 1991 *SALJ* 583). The Constitutional Court was faced with an attempt to revive the *exceptio doli* for the first time in *The Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC), but without success for the applicant. Lewis (1990 *SALJ* 29), referring to the *Bank of Lisbon* case, states that the *exceptio doli* had its merits as a device for the achievement of an equitable result in particular circumstances, i.e., the use of a contract for an end that was not intended when it was concluded. She underlines though the importance of 'look[ing]

3. The principles of public policy and good faith

Although the legal fraternity mourned somehow the abolition of the *exceptio doli* years after the *Bank of Lisbon* decision, all efforts to resuscitate it in subsequent rulings failed.¹⁴⁹ It became clear that the existing principles to ensure a certain degree of fairness and reasonableness, like the principle that agreements must be obtained properly, the concept of legality, or the rules of interpretation, were not sufficient in order to ensure justice.¹⁵⁰ One can argue with good reason though that the abolition of the *exceptio doli* was not to be lamented as 'the half-life of the *exceptio doli* from 1925 to 1988 showed it to be so entangled in its history that it was not a satisfactory instrument for modern courts to use'.¹⁵¹

The Supreme Court of Appeal consistently held that the *bona fides* principle does not constitute an independent substantive ground that will allow a court to intervene in a contractual relationship. It therefore preferred a contextual, rather than a normative standard of *bona fides*. In other words, good faith operates only as an informing principle which shapes the nature and content of specific doctrines (such as public policy).¹⁵² In the years after the Lisbon case, public policy therefore assumed its role as a remedy in the law of contract.¹⁵³ Public policy is the general sense of justice of the community, the *boni mores*, as manifested in public opinion at a particular time.¹⁵⁴ This principle supersedes the *pacta sunt servanda* maxim if a contract is perceived as incompatible with general social norms and customs.

The presentation of the following cases depicts the differing views and arguments in favour and against the different possibilities of how to fill the gap left by the *exceptio doli*.

3.1 Magna Alloys and Research (SA) Pty Ltd v Ellis

In *Magna Alloys and Research (SA) Pty Ltd v Ellis*¹⁵⁵ the court had to deal with restraints of trade and established the principle that a restriction of trade is enforceable unless the court is convinced that it is unreasonable and contrary to public policy.¹⁵⁶ Public policy is the general sense of justice of the community, the *boni mores*, as manifested in public opinion at a

forward rather than back' and seeking for other solutions, such as a different approach to interpretation of contracts.

¹⁴⁹ Barnard 2006 *Stell LR* 394.

¹⁵⁰ Van der Merwe *et al Contract General Principles* (2012) 274-275.

¹⁵¹ Christie *Law of Contract* (2006) 13.

¹⁵² Glover 2007 *SALJ* 451, Pretorius 2003 *THRHR* 643.

¹⁵³ Domanski 1995 *SALJ* 166.

¹⁵⁴ Hutchison *et al Law of Contract* 177, Christie *Law of Contract* (2006) 17.

¹⁵⁵ *Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) – hereafter *Magna Alloys*.

¹⁵⁶ A restraint of trade is an agreement by which someone is restricted in its freedom to carry on its trade, profession, business or other economic activity. See Van der Merwe *et al Contract General Principles* (2012) 183.

particular time.¹⁵⁷ The court held that restraints of trade are to be treated like other contract terms. They are therefore enforceable, except where they are contrary to public interest. However, freedom of contract is, according to this decision, the principle.¹⁵⁸ In order to determine if a restraint of trade is contrary to public interest, one has to enquire about the reasonableness of the restraint. This is done first, according to the court, by assessing if it is reasonable or not for the parties (*inter partes*). If so, this is an indication that it could also be reasonable or not in terms of public interest. Factors to be considered for the determination of reasonableness are, among others, the nature and the period of the restricted activity, and the particular interests.¹⁵⁹

3.2 Sasfin (Pty) Ltd v Beukes

In the *Sasfin (Pty) Ltd v Beukes*¹⁶⁰ case, the court held that it had the power to refuse the enforcement of contracts that were against public policy or contrary to good morals (*'bonos mores'*). In order to define the term 'public policy', the courts took several considerations into account. Smalberger JA pointed out that agreements which are clearly adverse to the interests of the community because they are contrary to law or morality or to social or economic expedience will not be enforced on the grounds of public policy.¹⁶¹ He argued that public policy should adequately consider the doing of simple justice between man and man.¹⁶² Nonetheless, he held that the power of the court to declare agreements contrary to public policy should be exercised sparingly and only if there is no doubt. In his opinion, a contract is not necessarily contrary to public policy because it offends one's personal sense of propriety and fairness.¹⁶³

Although the decision was silent about good faith, one can interpret the court's ruling as allowing this principle to reassert its influence indirectly through the requirement of legality.¹⁶⁴ Smalberger JA's approach to weighing the *pacta sunt servanda* principle against 'simple justice between man and man' was criticised as being too imprecise and only one of several

¹⁵⁷ Hutchison *et al* *Law of Contract* 177, Christie *Law of Contract* (2006) 17.

¹⁵⁸ Van der Merwe *et al* *Contract General Principles* (2012) 185. In English case law however preference is given to freedom of trade.

¹⁵⁹ Van der Merwe *et al* *Contract General Principles* (2012) 186. See *Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) (at 897-898).

¹⁶⁰ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) – hereafter *Sasfin v Beukes*. In this case, the respondent, Mr. Beukes, a specialist anaesthetist, entered with Sasfin into a discounting agreement in terms of which Beukes was obliged to offer for sale to Sasfin any book debts he wished to sell. Sasfin, the appellant, wanted to enforce the deed of cession although Beukes had earlier contended that certain clauses were contrary to public policy and therefore invalid and unenforceable.

¹⁶¹ *Sasfin v Beukes* para [8].

¹⁶² *Sasfin v Beukes* para [14].

¹⁶³ *Sasfin v Beukes* para [12].

¹⁶⁴ Hutchison *et al* *Law of Contract* 28.

considerations in order to determine public interest, like inequality of bargaining power and the nature and ambit of the obligations involved.¹⁶⁵

3.3 Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman

The first case which revived the concept of good faith was *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*.¹⁶⁶

Olivier JA based his decision on the principle of good faith and opined that the contract was concluded in a manner which was against the *bona fides* principle.¹⁶⁷ He submitted that *bona fides* should be applied to all agreements because public policy would require so. Although he underlined the close link between *bona fides* and public policy, he saw this principle more as an independent basis for repealing an agreement.¹⁶⁸ He stated that it was the function of *bona fides* to give expression to the community's sense of what is fair, just and reasonable.¹⁶⁹

The *Saayman* case is remarkable because it underlines the role of the principle of good faith in South African contract law. Olivier JA made use of this principle not in order to declare invalid an unfair contractual term, but because he found that the bank had not acted in good faith during the conclusion of the contract, a suretyship. What is more, it was the first time that the principle of good faith was mentioned to entitle a party to rescind a contract in circumstances where actions based on misrepresentation, duress and undue influence could not be used.¹⁷⁰

Van der Merwe believes that the principle of good faith would seem to be particularly appropriate to ensure substantive justice.¹⁷¹

3.4 Brisley v Drotsky

In *Brisley v Drotsky*¹⁷² though, the Supreme Court of Appeal did not follow the arguments brought forward by Olivier JA in the *Saayman* case. According to the SCA, the principle of

¹⁶⁵ Van der Merwe *et al Contract General Principles* (2012) 189.

¹⁶⁶ *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman* NO 1997 4 SA 302 (SCA) – hereafter *Saayman*. In this case, a frail, 85 year old woman had signed a suretyship in favour of a company owned by her son. In his minority judgment, Olivier JA declined to enforce the deed of suretyship as he was of the opinion that the bank should have advised her to get independent legal advice before signing the deed and committing herself, or should itself explained the ramifications of her doing.

¹⁶⁷ Glover 1998 *THRHR* 329-330.

¹⁶⁸ Pretorius 2003 *THRHR* 643.

¹⁶⁹ Glover 2007 *SALJ* 450.

¹⁷⁰ Glover 1998 *THRHR* 333-334. The courts hesitated to introduce other grounds to rescind a contract. In *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA), the appeal court held that a contract is voidable in case of 'commercial bribery', but did not recognise it as a distinctive ground for rescission. See Van der Merwe *et al Contract General Principles* (2012) 110.

¹⁷¹ Van der Merwe *et al Contract General Principles* (2012) 276.

¹⁷² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) – hereafter *Brisley v Drotsky*.

good faith is not a principle capable of independent application ('free-floating'), but an underlying value informing the rules and principles of the law of contract.¹⁷³ For this reason, the principle of good faith cannot directly nullify an otherwise valid contractual provision or its enforcement.¹⁷⁴ In other words, good faith operates only as an informing principle which shapes the nature and content of specific doctrines, such as public policy.¹⁷⁵ Therefore, the test is if the clause in question is contrary to public interest, and not if its enforcement would be contrary to good faith. Unfairness is thus a component for determining if a clause is against public policy. Public policy is entrenched in the Constitution of South Africa, 1996¹⁷⁶ and the values that it enshrines,¹⁷⁷ like human dignity, the achievement of equality and the advancement of human rights and freedoms.¹⁷⁸ The court accepted good faith as a fundamental principle of the law of contract which is expressed in the specific rules and principles.¹⁷⁹

The court's rationale was heavily based on Hutchison's discussion¹⁸⁰ on the Shifren principle¹⁸¹ according to which a non-variation clause is of force and effect unless the parties agreed in writing to depart from specific clauses of their contract.¹⁸² In his article, Hutchison also suggests that the principle of good faith is not 'free-floating', and that its direct application of this maxim would amount to a resurrection of the *exceptio doli*.¹⁸³ In his view, good faith is rather a concept with a creative, controlling and legitimating function which operates indirectly through other rules and doctrines.¹⁸⁴

3.5 Safcol v York Timbers

In 2004, the Supreme Court of Appeal gave judgment in the matter between *South African Forestry Co Ltd ('Safcol') and York Timbers Ltd*.¹⁸⁵

¹⁷³ *Brisley v Drotzky* para [22] and [23]. This was confirmed later in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at 40H-41A.

¹⁷⁴ Pretorius 2003 *THRHR* 643.

¹⁷⁵ Glover 2007 *SALJ* 451, Pretorius 2003 *THRHR* 643.

¹⁷⁶ Hereafter referred to as the Constitution.

¹⁷⁷ *Brisley v Drotzky* para [22].

¹⁷⁸ See Art 1 of the Constitution.

¹⁷⁹ Van der Merwe *et al Contract General Principles* (2012) 279.

¹⁸⁰ Hutchinson 2001 *SALJ* 720.

¹⁸¹ See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

¹⁸² Hutchinson 2001 *SALJ* 720.

¹⁸³ Hutchison 2001 *SALJ* 743.

¹⁸⁴ Hutchison 2001 *SALJ* 744.

¹⁸⁵ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) - hereafter *Safcol v York Timbers*. In terms of two contracts which were concluded more than 30 years ago, Safcol was obliged to supply York with saw logs at stipulated prices. According to the contracts, the parties could seek a revision of the stipulated prices in the future. If the parties were unable to reach agreement on the new prices, the party seeking revision could approach the Minister of Forestry. If the Minister was of the view that an agreement was not possible, the matter could be referred to arbitration. Over many years, York had however frustrated Safcol's attempts to approach the

In this case, it had to be decided whether York Timbers had breached the contract concluded with Safcol by its various attempts to avoid any price increase by frustrating Safcol's attempts to approach the Minister, and consequently to refer the dispute to arbitration.

Safcol argued that the implied terms imposed an obligation on York Timbers to act in accordance with the dictates of reasonableness, fairness and good faith when Safcol exercised its rights with regard to the price revision clauses of the contract.¹⁸⁶ York Timbers upheld that these contentions were in conflict with *Brisley v Drotsky*¹⁸⁷ and *Afrox Healthcare Bpk v Strydom*.¹⁸⁸ In these cases, the SCA held that these values do not constitute independent substantive rules that courts can employ to intervene in contractual relationships.¹⁸⁹ Hence, the court rejected Safcol's argument as being contrary to its previous rulings.¹⁹⁰

However, the court held that

'[w]hile a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.'¹⁹¹

This means that the court will seek an equitable interpretation in order to find out the parties' intention where the wording of an agreement is ambiguous.¹⁹²

4. Constitutional aspects

4.1 Barkhuizen v Napier

In *Barkhuizen v Napier*,¹⁹³ a decision awaited with suspense because of the constant theoretical tension about the influence of the Constitution on contract law,¹⁹⁴ the Constitutional Court had to decide if a time-limitation clause in a short-term insurance policy was constitutional in terms of section 34 of the Constitution which grants the right to access to the courts. The clause

Minister and, consequently, to refer the matter to arbitration in a number of ways. In the result, the last price increase agreed upon was in 1994. While other sawmills, which were also supplied by Safcol, paid a price increase every year between 1994 and 1998, York was still paying 1994 prices.

¹⁸⁶ *Safcol v York Timbers* at [26].

¹⁸⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹⁸⁸ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

¹⁸⁹ *Safcol v York Timbers* at [27]. See also discussion on *Brisley v Drotsky*, para 3.4 above.

¹⁹⁰ *Safcol v York Timbers* at [31].

¹⁹¹ *Safcol v York Timbers* at [32].

¹⁹² *Hutchison et al Law of Contract* 268.

¹⁹³ *Barkhuizen v Napier* 2007(5) SA 323 (CC) – hereafter *Barkhuizen v Napier*.

¹⁹⁴ *Glover* 2007 SALJ 453.

prevented an insured claimant from legal action if summons was not served on the insurance company within the time limits set out in the provision.

The court based its decision on the considerations of reasonableness and fairness. To determine 'fairness' the court held that first, one has to ask whether the clause itself is unreasonable. If it is reasonable, one has to ask in a second step whether one should enforce it in the light of the circumstances of the particular case which prevented compliance with the clause.¹⁹⁵ According to the court, the reasonableness of a clause has to be determined by weighing-up public policy on the one hand, which requires that parties are generally bound to the *pacta sunt servanda* principle, and the specific fundamental right involved in a case, on the other. In the present case, this was the right to seek judicial redress.¹⁹⁶ The court held that the *pacta sunt servanda* maxim could be mitigated if the implementation of certain clauses would result in unfairness or would be unreasonable for being contrary to public policy.¹⁹⁷ According to Ngcobo J, unequal bargaining power is a factor, which alongside other factors, plays a role in the consideration of public policy. This especially applies in a society as unequal as the South African.¹⁹⁸ The court held that the application of the *pacta sunt servanda* principle is subject to constitutional control.¹⁹⁹ Thus, the courts have to 'employ [the Constitution's] values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives.'²⁰⁰

In the following, academia commented on *Barkhuizen v Napier*. The question was how this case would have to be interpreted for subsequent cases. Glover, Kerr and Sutherland even discussed a resurrection of the *exceptio doli*.

Although the Constitutional Court did not mention the *exceptio doli*, Glover²⁰¹ considered the *exceptio doli* being back for different reasons. First, he saw a congruence between the Constitutional Court's formulation of the defence and the formulation of the *exceptio doli* in

¹⁹⁵ *Barkhuizen v Napier* para [56].

¹⁹⁶ *Barkhuizen v Napier* para [57].

¹⁹⁷ *Barkhuizen v Napier* para [69]-[70].

¹⁹⁸ *Barkhuizen v Napier* para [59].

¹⁹⁹ *Barkhuizen v Napier* para [15].

²⁰⁰ *Barkhuizen v Napier* para [70]. See also *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) where it was held that the longstanding *in duplum* rule, according to which the debtor's interests cannot exceed the double amount of the capital, should be applicable during the litigation process. The debtors' right of access to courts and other valid policy considerations have to be considered, and a proper balancing of these rights has to be undertaken.

²⁰¹ Glover 2007 *SALJ* 449.

other cases, like *Weinerlein*²⁰² and *Zuurbekom*.²⁰³ Second, in his opinion, the role the majority in *Barkhuizen v Napier* conferred to the good faith principle would be in favour of the *exceptio doli*. Lastly, the advantage of the possibility to use the jurisprudence of the cases which dealt with the *exceptio doli* would provide greater clarity about the criteria for this defence in the future.²⁰⁴ Glover himself admits the weakness of these arguments though, and that the Constitutional Court chose rather public policy than the *exceptio doli* in order to determine the reasonableness of a specific clause, and that good faith will be a principle embedded in the principle of public policy.²⁰⁵

Kerr²⁰⁶ found it remarkable that despite the discussions of public policy, fairness, reasonableness and simple justice in the *Barkhuizen v Napier* case no reference was made to the *exceptio doli*.²⁰⁷ He stated that the majority of the *Barkhuizen v Napier* case did not refer to the known common-law principles or develop any existing principles. Instead, the majority merely concentrated on underlying constitutional values and the facilitation of a broader field of operation of these values.²⁰⁸ On grounds of the Constitutional Court's reference to 'fairness' and 'unfairness' he suggested instead a 'defence on unfair conduct (at the time action is brought)' – which is, it is suggested, nothing else but a periphrasis for the *exceptio doli* – instead of the application of public policy in the light of constitutional considerations.²⁰⁹ This would have the advantage that the courts had not to identify public policy and that the contract may continue in a reasonably modified form instead of being terminated.²¹⁰

This interpretation as to a resurrection of the *exceptio doli* defence seemed to be confirmed by *Bredenkamp and Others v Standard Bank of South Africa*²¹¹ where the High Court granted an interim interdict. In this case, the plaintiffs and later appellants sought relief against the bank's

²⁰² See above, para 2.2.1.

²⁰³ See above, para 2.2.2.

²⁰⁴ Glover 2007 SALJ 455, 456.

²⁰⁵ Glover 2007 SALJ 456, 457.

²⁰⁶ Kerr 2008 SALJ 241.

²⁰⁷ Kerr 2008 SALJ 245.

²⁰⁸ Kerr 2008 SALJ 246.

²⁰⁹ Kerr 2008 SALJ 244, 247.

²¹⁰ Kerr 2008 SALJ 247.

²¹¹ *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) – hereafter *Bredenkamp v Standard Bank*. The bank had closed Mr Bredenkamp's account because The United States Department of Treasury's Office of Foreign Assets Control had listed him as a 'specifically designated national' because he was said to be a 'crony' of President Mugabe of Zimbabwe (para [14]).

enforcement of its right to cancel their accounts because such cancellation was unfair and invalid for being unconstitutional.²¹²

On appeal, the Supreme Court of Appeal held that *Barkhuizen v Napier*²¹³ was authority for the proposition that a party could not impose a term on another party, where the provision would operate unfairly, and that a clause could not be enforced in an unfair manner.²¹⁴ It rejected however the idea of an overarching requirement of fairness in the law of contract and stated that fairness was not a free-standing requirement for the exertion of a contractual right.²¹⁵

Sutherland²¹⁶ emphasises the importance of *Barkhuizen v Napier* because of the central role the Constitution plays when interpreting concepts such as public policy. In his opinion, the Constitution can serve as an essential promotor for reform of contract law, and it is central to ensure the harmony of legislative projects.²¹⁷

In subsequent cases, the Supreme Court of Appeal upheld this jurisdiction. In *Maphango v Aengus Lifestyle Properties*, it held that

'(...) a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.'²¹⁸

In this case, the court nonetheless assessed whether the cancellation of the agreements was unreasonable and unfair.²¹⁹

In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC*,²²⁰ the same court held that

'(...) our Constitution and its value system does not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith.'²²¹

²¹² *Bredenkamp v Standard Bank* para [22].

²¹³ *Barkhuizen v Napier* (2007) (5) SA 323 (CC). See para 4.1 above.

²¹⁴ *Bredenkamp v Standard Bank* para [27].

²¹⁵ *Bredenkamp v Standard Bank* para [53].

²¹⁶ Sutherland 2008 *Stell LR* 390 and 2009 *Stell LR* 50.

²¹⁷ Sutherland 2009 *Stell LR* 72.

²¹⁸ *Maphango v Aengus Lifestyle Properties* para [25].

²¹⁹ *Maphango v Aengus Lifestyle Properties* para [27].

²²⁰ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* (234/10) ZASCA 45 (30 March 2011) – hereafter *African Dawn Property Finance v Dreams Travel and Tours*.

²²¹ *African Dawn Property Finance v Dreams Travel and Tours* para [28].

The question is how this jurisprudence is compatible with *Barkhuizen v Napier*, according to which public policy precludes the enforcement of unfair contractual provisions. Hutchison believes that one must read this case in context. Only where constitutional values and principles are at stake – here the constitutional right of access to the courts – the question of fairness or reasonableness becomes relevant.²²²

It is not entirely clear whether the Constitutional Court will agree with such a limited role of considerations of contractual fairness because in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,²²³ the court put forward the central role of good faith in South African contract law and the desirability of taking constitutional values, such as *Ubuntu* – which includes the ideas of humanness, social justice and fairness – into account within the law of contract.²²⁴

4.2 Views on the development of the case law

Nowadays, it would be idle to discuss whether the *Bank of Lisbon* decision was right or not because the legislator has intervened in the meantime. Instead of ‘abolishing’ the *exceptio doli* entirely (those who opine that this defence never was part of South African law would say that there was nothing to abolish), the courts could have used their liberty to extend its availability in South African law.²²⁵ However, they never did that. Based on the overview of case law above, it becomes clear that the courts applied the principles of public policy and good faith inconsistently, without developing a homogeneous jurisprudence.²²⁶ Christie suggests that the concept of public policy is a sufficiently flexible and tested concept to achieve the outcomes which could be achieved by the *bonos mores* concept, but in a more predictable way.²²⁷ Unfortunately, the courts never developed this concept sufficiently either.²²⁸ Domanski calls public policy ‘a somewhat nebulous and arbitrary defence, whose boundaries are not clearly

²²² Hutchison *et al* *Law of Contract* 32.

²²³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) – hereafter *Everfresh v Shoprite*.

²²⁴ *Everfresh v Shoprite* para [71].

²²⁵ Lambiris 1988 SALJ 647.

²²⁶ Aronstam (*Consumer Protection* 182) makes an interesting suggestion in that the principles of duress, undue influence, error, fraud and estoppel are all based on a common principle, i.e., ‘inequality of bargaining power’. Therefore, the courts could have developed applied considerations of equity to deal with harsh and unconscionable contracts and regulate contracts on the basis of these principles.

²²⁷ Christie *Law of Contract* (2006) 17.

²²⁸ A further development of the concept of public policy would have had the advantage that no comparative law considerations would have been necessary, as it is internationally recognized that the notion of public policy is defined by each country. See Art V 2 (b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and Art 36 UNCITRAL Model Law on International Commercial Arbitration 1985.

defined.²²⁹ After all, it is generally accepted that a judge is more than a *bouche de la loi*, as Hawthorne and Thomas point out, and that finding the law forms an essential part of the judiciary's task.²³⁰ The same applies to the concept of good faith which is, according to Van der Merwe, an appropriate principle which has to be developed in order to ensure substantive justice.²³¹ Forsyth and Pretorius submit (in the context of a surety) that the requirement of *boni mores* has been applied to provide a perhaps unsuitable defence and that its limits are at least as uncertain and unpredictable as the *exceptio doli*.²³² Unfortunately, jurisprudence did not develop – as Lewis and other authors had hoped – any doctrine of unconscionability in order to strike down contracts that operate harshly against a party on the ground that they are *contra bonos mores*. To some extent, this would have ameliorated the problem resulting from the *Bank of Lisbon* ruling that South African courts had no equitable jurisdiction.²³³

Legal intervention would probably have been superfluous if the courts had constructively developed the abovementioned principles. As this did not happen, legislation was inevitable and necessary.

5. The Consumer Protection Act

Having the abovementioned development without any doubt in mind, the Law Commission recognised in its report the 'need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases',²³⁴ i.e., the coming into existence of a contract, its execution and its enforcement. The Law Commission was of the opinion that the issue of unfair contracts or terms had to be addressed 'in a more fundamental and less fragmentary way than *ad hoc* reform to specific Acts',²³⁵ and that although voluntary codes of conduct should be encouraged, they could not replace proper legislation.²³⁶ In its report, the Department of Trade and Industry (DTI) conducted research that also implied an international legislative comparison and benchmarking study including various countries.

²²⁹ Domanski 1995 *SALJ* 167.

²³⁰ Hawthorne/Thomas 1989 *De Jure* 145.

²³¹ Van der Merwe *et al Contract General Principles* (2012) 276.

²³² Forsyth/Pretorius 1993 *SA Merc LJ* 189.

²³³ Lewis 1989 *Annual Survey of South African Law* 37.

²³⁴ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998).

²³⁵ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xiv).

²³⁶ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xv).

The guidelines published in this report were harshly criticised. Some writers feared that the proposed legislation would open the doors for a paternalistic approach, even though the common law provided the courts with the principles needed to encounter unfairness.²³⁷ This criticism concerned the making of a contract, unfair agreements and contract terms and the enforcement of them. With respect to the making of a contract, the critics brought forward that the common law already curbed unfairness in the case of misrepresentation and fraud, duress, undue influence, mistake, illegality and unenforceability. Even inequality of bargaining power could be tackled by the common law by developing it further because rules relating to duress were not cast in stone and could be extended further by the judiciary.²³⁸ As to unfair contracts and contract terms, the critics argued that under common law, and even during the application of the *exceptio doli generalis*, the basis of the law of contract was to enforce terms or agreements upon which the parties had agreed. Any intervention by the courts would be paternalistic, jeopardise the parties' freedom of contract and be inconsistent with the historical development of South African contract law. According to this argumentation, the *pacta sunt servanda* principle already had been mitigated by common law in the case of unreasonable restraints of trade, or unreasonable terms in a contract that was signed without being read.²³⁹ Otherwise, every agreement could be challenged in a later stage. This would harm the conduct of business, personal trust and the persons' respect for the law.²⁴⁰ In respect of unfair enforcement of contracts, the classical sphere of the 'late' *exceptio doli*, the critics admitted that the common law did not have this situation under control. Nonetheless, some authors suggested other solutions than legislative intervention, like relaxing the rules for the construction of contracts by allowing evidence of surrounding circumstances in order to investigate the parties' real intentions,²⁴¹ or relying on the courts' discretionary power to refuse an order of specific performance.²⁴²

With respect to the allegations above, it is submitted that the contrary is true: Not a well-defined legal framework has a negative impact on business and personal trust, but legal uncertainty and missing mechanisms to assure general fairness. What is more, the solution suggested in terms

²³⁷ Christie *Law of Contract* (2006) 14-15, Glover 1998 *THRHR* 334, Hefer 2000 *TSAR* 149, Grové 1998 *THRHR* 697.

²³⁸ Christie *Law of Contract* (2006) 14.

²³⁹ Christie *Law of Contract* (2006) 14.

²⁴⁰ Christie *Law of Contract* (2006) 15.

²⁴¹ Lewis 1990 *SALJ* 35 *et seq.*

²⁴² Lambiris 1988 *SALJ* 650. Lambiris however recognises that the field of application of such a refusal would be narrower than a general defence allowing a defendant to allege and prove that the enforcement of a valid legal obligation would be unfair (at 651).

of the unfair enforcement of contracts, such as more flexible rules for the interpretation of contracts, is certainly a reasonable approach, but hardly sufficient.

In its Draft Green paper of 2004,²⁴³ the DTI finally proposed that general provisions against unfair contracts be inserted into consumer law rather than enacting separate unfair contracts legislation. The objective of such a law should be to establish the rights and responsibilities of the parties, to promote the use of plain language in consumer agreements and to give examples of unfair contract provisions through guidelines that build on international precedents.²⁴⁴ The Law Commission recognised that South Africa would become the exception, with a deficient law of contracts in comparison to countries which recognise and require compliance with the principle of good faith in contracts.²⁴⁵ The Draft Green Paper indicated that many countries, also in Africa, had adopted a rights-based approach to consumer protection and recommended the implementation of a comprehensive consumer protection regime as well as the creation of an infrastructure for the regulation of the consumer goods and services market.²⁴⁶

Existing consumer protection provisions were fragmented, outdated and often incorporated in legislation that was merely incidental with the protection of consumers. In addition, as South Africa had become a democratic state, the values reflected in the existing legislation were no longer applicable, especially at the expense of consumers and small businesses. General rules of law regulating the most basic consumer rights of information, disclosure, fairness and transparency, for instance, did not exist. Discriminatory conduct and unfair market practices were hence a daily – and unsanctioned – occurrence.²⁴⁷

In 2006, the draft Consumer Protection Bill was published for public comment. It was extensively revised after the consideration of many submissions.²⁴⁸

This Bill was published together with a Memorandum on the Objects of the Consumer Protection Bill in 2008.²⁴⁹ According to this Memorandum, '[c]urrently contracts are regulated in terms of the common law. The Bill aims to codify and improve on the common law by

²⁴³ GenN 1957 in GG No. 26774.

²⁴⁴ GenN 1957 in GG No. 26774 ch 3.4.3 *in fine*.

²⁴⁵ GenN 1957 in GG No. 26774 ch 3.4.3. See also SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xiv).

²⁴⁶ Memorandum on the Objects of the Consumer Protection Bill, 2008, point 1 at 81.

²⁴⁷ Memorandum on the Objects of the Consumer Protection Bill, 2008, point 1 at 80.

²⁴⁸ Memorandum on the Objects of the Consumer Protection Bill, 2008, point 1 at 81.

²⁴⁹ GenN 556 in GG No. 31027 of 5 May 2008.

addressing unfair contract terms and provide consumers with remedies in the case of breach of contract.²⁵⁰

As consumer protection is part of the functional areas of concurrent national and provincial legislative competence,²⁵¹ the procedure prescribed in section 76(1), (2) of the Constitution had to be observed. In order to ensure a broad agreement on the Bill and to deal with potential constitutional concerns, initial consultation was conducted with provinces before the parliamentary procedure.²⁵²

The Consumer Protection Act 69 of 2008 was signed into law on 24 April 2009. Most of its provisions, such as the regulations containing a list of terms that are presumed to be unfair,²⁵³ took effect on 1 April 2011.²⁵⁴

Under section 121, the Act repeals parts of the Merchandise Marks Act of 1941,²⁵⁵ the Business Names Act of 1960,²⁵⁶ the Price Control Act 1964,²⁵⁷ the Sale and Service Matters Act of 1964²⁵⁸ and the Consumer Affairs (Unfair Business Practices Act) of 1988.²⁵⁹ On the other hand, other important statutes have not been repealed,²⁶⁰ like the National Credit Act of 2005,²⁶¹ the Long-Term Insurance Act of 1998,²⁶² the Short-Term Insurance Act of 1998²⁶³ and the Financial Advisory and Intermediary Services Act of 2002.²⁶⁴

²⁵⁰ Memorandum on the Objects of the Consumer Protection Bill, 2008, point 4.7, para 2 at 86.

²⁵¹ Schedule 4 Part A, point 6 of the Constitution: 'consumer protection'.

²⁵² Memorandum on the Objects of the Consumer Protection Bill, 2008, point 14 at 90.

²⁵³ Regulation 44.

²⁵⁴ Mupangavanhu 2012 *PELJ* 320 note 1. See also item 2 subitems (1), (2) and (3)(a) of Schedule 2 of the CPA.

²⁵⁵ 17 of 1941.

²⁵⁶ 27 of 1960.

²⁵⁷ 25 of 1964.

²⁵⁸ 25 of 1964.

²⁵⁹ 71 of 1988.

²⁶⁰ Melville (*Consumer Protection Act* at 3) is of the opinion that this is a result of a resolute lobbying on the part of the financial sector. It is interesting to note that the Law Commission in its Project 47 of 1998 (at 2) brings forward the argument that it 'is persuasive that the tendency to over-regulate (...) is uncalled for, and that the purpose should not be to codify the entire field of law of contract in this respect, but rather to retain specialised *ad hoc* legislation already in existence, and to make provision only for those matters which are still left uncatered for'. The Law Commission suggests in the following that the proposed legislation should not apply to certain contracts, which differ completely from those who were finally retained by the CPA.

²⁶¹ 34 of 2005.

²⁶² 52 of 1998.

²⁶³ 53 of 1998.

²⁶⁴ 37 of 2002.

The Consumer Protection Act regulates unfairness in contracts and constitutes the legislature's first general intervention by introducing a comprehensive legal framework dealing with unfairness for judicial evaluation of consumer to business contracts.²⁶⁵

Chapter 2 of Part G of the Act deals with the right to fair, just and reasonable terms and conditions. Its title is somewhat misleading though, since Chapter 2 Part G has a much broader scope of application than terms and conditions. Under the Act, the courts have now the ability to consider any factors that might be helpful while determining whether standard provisions are fair.²⁶⁶ A court has now the discretion to make any order that it considers just and reasonable in the circumstances.²⁶⁷

The Act implicitly prohibits unfair conduct during the negotiation phase. Especially in the South African context, where a large part of the population is illiterate or almost illiterate and inexperienced in business matters, legislative intervention in this field was of utmost importance. After all, terms and conditions are the basis of nearly every transaction. It is suggested that there is a psychological effect both on consumers and on businesses: Consumers are more aware of their rights and will ultimately conduct more self-confidently, and businesses are constrained to change their policies and review their standard terms. Having also in mind that South Africa has eleven official languages, and that there will always be a different understanding in a particular language and within various contexts, the courts will probably consult international law too.²⁶⁸ In numerous civil law countries, such as Germany,²⁶⁹ the codification of consumer protection rules is the norm. Despite the codification of this regime, the courts have the needed flexibility to interpret standard terms from case to case. Furthermore, the object of the court is the application and, where necessary, the development of the law in order to achieve justice. Therefore, a generalising approach is necessary, where values or principles such as 'fairness' and 'reasonableness' are a given concrete content when applied in a particular case. One therefore must distinguish between the application of certain common-law mechanisms on the one hand, and the application of 'open' terms, on the other. When common-law mechanisms are applied in order to avoid unjust outcomes, like the

²⁶⁵ Van Eeden *Guide to the CPA* 169.

²⁶⁶ Section 52.

²⁶⁷ Section 52(3).

²⁶⁸ See s 2(2)(a).

²⁶⁹ In German law, those 'vague' terms are referred to as 'indefinite legal concepts' or 'indeterminate legal terms' (*unbestimmte Rechtsbegriffe*). Those are terms the content of which is not given by a precise definition, but from case to case by jurisprudence. This is done by an assessment and an appreciation of the given circumstances. Examples are 'darkness', 'public interest' or 'good morals'. See Creifelds *Rechtswörterbuch* s.v. 'unbestimmte Rechtsbegriffe'.

exceptio doli and the principles of good faith and public policy, there is the problem that these concepts are somehow imprecise as the judiciary did not define their nature, foundation and exact scope of application, especially with regard to the *exceptio doli generalis*. On the other hand, ‘open’ terms like ‘fairness’, ‘conscionableness’ and ‘reasonableness’ have to be given a concrete meaning on a case-to-case basis within a well-defined legal framework. In this context, some of the abovementioned cases, where the principles of public policy and good faith have been applied (albeit not homogeneously) might be helpful in that respect. It remains to be seen how the courts give a meaning to these terms.

6. Conclusion

Without any doubt, the application of the principle of freedom of contract to standard term contracts is theoretical because in reality, the parties do not have equal bargaining power and autonomy. Consumers are often confronted with a ‘take-it-or-leave-it’ situation, and the transaction costs for comparing different standard provisions are too high.

The strict application of the principles of freedom of contract and *pacta sunt servanda* resulted in often unfair outcomes, especially for the consumer. In order to mitigate unfair results, the *exceptio doli* defence was applied in South African law from the late 19th century. This defence had been created in Roman law and served as an equitable defence for the plaintiff when he or she argued that the enforcement of the contract in question was unconscionable. Despite its application in South Africa, many authors contested the reception, and consequently, the existence of the *exceptio doli* in Roman-Dutch law.

As we have seen, over the years, the courts applied this defence without precisely defining its very nature, scope and application. The courts never came further than applying it in circumstances where the enforcement of a right would cause great inequity and would be tantamount to unconscionable conduct. It was also applied as a ‘default’ defence, when error, fraud, duress or estoppel did not apply, or within defined limits such as fraud, misrepresentation or mistake. In another case, the *exceptio doli* was only applied in the context of written contracts and considered analogous to a *negotium stricti iuris*. In the famous *Rand Bank v Rubenstein* decision, the court applied the *exceptio doli* directly to the agreement, but to a situation which came into being after the conclusion of the contract that was considered unfair.

The incoherent application of the *exceptio doli* defence came suddenly to an end in 1988 with the very criticised *Bank of Lisbon* decision where it was held that this defence, despite its former application, was not part of South African law and had to be 'bur[ried]'.

Regrettably, the mechanisms developed by case law after the abolition of the *exceptio doli*, such as the principles of public policy and good faith, as well as the consideration of constitutional aspects, did not lead to a homogeneous case law. Although the courts had numerous opportunities to create and define an overarching concept of 'fairness' or 'equity' in contract law, they let pass them. Almost no attention was paid to fairness during the negotiation of a contract, and only three instances were formally recognised in which contracts may be rescinded for procedural unfairness: misrepresentation (or fraud), duress and undue influence. These were not sufficient to ensure fairness in other circumstances, however.

According to the Supreme Court of Appeal, the *bona fides* principle is not an independent substantive ground that will allow a court to intervene in a contractual relationship. It therefore preferred a contextual, rather than a normative *bona fides* standard. Good faith would thus only operate as an informing principle with regard to specific doctrines, such as public policy. In the years after the *Lisbon* case, public policy therefore assumed its role as a remedy in contract law that supersedes the *pacta sunt servanda* maxim.

When enquiring whether a contractual term or the enforcement of a contract was against public policy, the courts applied a reasonableness test. Factors taken into account for this test were, e.g., the nature and the period of the restricted activity (in the case of restraints of trade), the particular interest and those of the community, the compliance with legal requirements, or social or economic expedience. The notion of simple justice between man and man played a crucial role in this context.

While the close link between public policy and good faith was admitted, in the *Saayman* decision, the SCA saw the principle of good faith more as an independent basis for repealing a contract. In *Brisley v Drotsky*, however, the court held that the principle of good faith was not 'free-floating', but only informing other principles of the law of contract. In *Safcol v York Timbers*, it was stated that in a case where a contractual term is ambiguous, the principle that contracts are governed by good faith can be applied, and the intention of the parties can be determined on the basis that they have negotiated in good faith.

Finally, in *Barkhuizen v Napier*, the Constitutional Court gave an answer to the Constitution's influence on contract law and linked public policy considerations with specific fundamental rights. Constitutional values, such as *Ubuntu*, also play an essential role. Besides, the court held that the *pacta sunt servanda* maxim is subject to constitutional control. The Constitution is seen as a promotor for reform of contract law and as central to ensure harmony of legislation.

A consequence of this inconsistent case law was that the legislator intervened more fundamentally by enacting the Consumer Protection Act which aims the consumer's protection in all contractual phases. In the forefront, some authors criticised legislative intervention for fear of a 'paternalistic' approach which would jeopardise the principle of freedom of contract, or that case law (*sic*) could be a better solution. Others suggested more flexible rules for the construction of contracts. The case law would not have been a solution because in decades, no equity jurisprudence had been developed, and the other suggested solutions were insufficient.

Despite this criticism, the Law Commission recognised that South African consumer protection was far behind international standards and developments.

The Consumer Protection Act introduces a comprehensive legal framework dealing with unfairness. Sections 48 to 52 deal with unfair terms and conditions. The courts can now consider any factors while determining whether standard terms are unfair, and have the discretion to make any order that it considers just and reasonable in the circumstances.

The Consumer Protection Act is a game-changer considering the South African context with many different cultures and millions of inexperienced and formerly discriminated consumers. Open concepts such as 'fairness' and 'reasonableness' give the courts the flexibility needed in order to find a just outcome for each case.

CHAPTER 2 – APPLICATION OF THE CONSUMER PROTECTION ACT AND INCORPORATION OF CONTRACT TERMS

INTRODUCTION

In order that the Consumer Protection Act applies, the contract terms must be incorporated, that is included in such a way that the courts recognise them as valid. This is done by threshold requirements that must be met in order to consider them as part of the contract.²⁷⁰ Inversely, provisions that have not been incorporated in the contract are considered not written.

Unfortunately, the Act in general, and sections 48 to 52 in particular, are not structured logically.²⁷¹ Usually, the enquiry of standard terms may typically²⁷² be divided into three main categories. These are incorporation control, content control (or ‘substantive control’) and interpretation control.²⁷³

In order to enjoy the protection of sections 48 to 52, one has therefore to examine first whether the terms in question fall under the ambit of the Act. This so-called ‘incorporation test’ consists of the question of whether the standard provisions fall under the scope of application of the Act, and whether other conditions required by the Act have been met in order to incorporate them into the contract.

As mentioned above, Part G of Chapter 2 is not structured logically, and provisions pertaining to the incorporation of contract terms and those concerning content control are presented in an unstructured way. Section 48 contains the general prohibition against unfair terms and conditions and thus refers to content control. Section 49 concerns formal requirements for the incorporation of specific terms, such as plain language and signing or initialling. Section 50 requires that written contracts be written in plain language and contain an itemised breakdown of the consumer’s financial obligations, which are formal requirements as well. On the other hand, section 51 provides a list of prohibited terms and therefore refers to the content control.

For the sake of a better understanding, these provisions will be presented and examined in a more structured way.

²⁷⁰ Naudé 2009 *SALJ* 506.

²⁷¹ Hutchison *et al Law of Contract* 433, Naudé 2009 *SALJ* 507.

²⁷² Reference to this typical distinction is made here because of the CPA’s objective to be in line with international consumer protection standards – see SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xiv) and Preamble of the Act under (c).

²⁷³ See Naudé 2009 *SALJ* 506.

First, the scope of application of the Act will be examined in order to determine in which instances this statute actually applies. Then, other requirements, such as notices required for certain terms and conditions and written consumer agreements will be discussed in detail. The requirements set out in these provisions must be met in order to include the terms and conditions into the contract.

1. The application of the Consumer Protection Act and interaction with other norms

As discussed above,²⁷⁴ the Act does not repeal all statutes related to consumer protection.²⁷⁵ What is more, under section 2(8), other legislation applies in conjunction with the Act.²⁷⁶ If there is any inconsistency between a provision of the Consumer Protection Act and a provision of such a statute, the provision of both acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.²⁷⁷ Although the Act is relatively comprehensive in terms of consumer protection, it is not an overarching consumer protection statute.

That is because according to section 2(10), consumers still have the right to rely on rights they may have under the common law. Because of the common-law principle of freedom of contract, the parties can exclude most of the residual rules of the common law of contract by agreement.²⁷⁸ This applies, for instance, to so-called exemption clauses which exclude or limit the liability of a party, e.g., for misrepresentation or breach of contract, or to *voetstoots* clauses excluding the seller's liability for latent defects in the thing sold.²⁷⁹ On the other hand, and contrary to common law, the Act mostly affords rights that cannot be derogated, alienated or waived by the consumer. Hence, the Act grants a higher level of protection to consumers. Although the courts have developed some principles to strike down unfair exemption clauses,²⁸⁰ in most cases, the consumer will therefore rather refer to the Act's protection than to common-law rules.

²⁷⁴ Chapter 1 para 5.

²⁷⁵ E.g., credit agreements under the NCA. The goods and services which form the subject of the credit agreement are subject to the CPA though. Other pieces of legislation which have not been repealed are the Long-Term Insurance Act of 1998, the Short-Term Insurance Act of 1998 and the Financial Advisory and Intermediary Services Act of 2002.

²⁷⁶ This applies to the Public Finance Management Act, 1999 (Act 1 of 1999), the Public Service Act, 1994 (Proclamation No. 103 of 1994), the Public Finance Management Act, 1999 and the Public Service Act, 1994.

²⁷⁷ Section 2(9).

²⁷⁸ *Hutchison et al Law of Contract* 432.

²⁷⁹ *Van der Merwe et al Contract General Principles* (2012) 258.

²⁸⁰ For example, for lacking consensus between the parties as to the exemption clause (*Van Wyk v Otten* 1963 (1) SA 415 (O); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Micor Shipping (Pty) Ltd v Tregger Golf & Sports (Pty) Ltd* 1977 (2) SA 709 (W); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A)), abuse of the other party's circumstances to such an extent that consensus can be said to have been obtained improperly;

Section 69(d) provides that a consumer may seek to enforce any rights in terms of the Act, by approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. The argument can be made that a consumer who has rights in terms of the common law and the Act must first exhaust the dispute-resolution process regulated in the Act before addressing common-law courts. This argument is contrary to section 2(1) though, according to which the Act must not be interpreted in a way that would preclude the consumer from exercising a common-law right. Hence, the consumer should have the freedom of choice as regards the applicable dispute-resolution mechanism.

In the following, the mechanisms according to which the Act applies will be further examined.

2. Scope of application of the Consumer Protection Act

As Part G of Chapter 2 of the Consumer Protection Act contains no special provisions concerning its scope of application, sections 5 and 6 apply.

2.1 Territorial scope of application

In terms of section 5(1), the Act applies to transactions for the promotion, the supply of goods or services and the goods and services themselves, occurring within South Africa unless one of the exceptions of subsection (2) apply, or the application is exempted under subsections (3) and (4).

The scope of 'occurring within the Republic' is unclear as other statutes, like the National Credit Act, use the formulation 'having effect within South Africa', which is not used in the Consumer Protection Act at all. The DTI's Draft Green Paper on the Consumer Policy Framework²⁸¹ does not explicitly mention the territorial scope of application of the Act and does therefore not use any of the earlier mentioned formulations. Instead, it refers generally to 'South Africa'. According to the Memorandum on the Objects of the Consumer Protection Bill²⁸² '[t]he Bill will apply to most transactions in the ordinary course of business between parties within the Republic'. The National Credit Act uses the phrase 'having effect within (the Republic)' only once, and in the same sentence with 'within the Republic' (section 4(a)).

exemption clause is formulated so widely that it amounts to an undertaking to perform if the party so chooses, or the undertaking will lack the necessary certainty (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 34; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at para [23]).

²⁸¹ 09/04 no. 26774.

²⁸² Point 3.2 at 82.

Otherwise, the formulation 'within the Republic' is used throughout the entire National Credit Act.²⁸³

The formulation 'within the Republic' is also used in section 1 for the definition of 'producer' as well as in sections 5(1)(a), (b) and 5(5). In addition, it is used in Schedule 1 ('Amendment of laws') with regard to section 126A(5)(b) of the National Credit Act. This has clearly practical reasons as this provision deals with 'a computer programme originating within the Republic'. The formulation 'having effect within' would have made no sense here. The same applies to sections 4(4)(a) ('principal office within'), 11(4)(d) ('area within') and 50(1) NCA ('activity at any place within'). Section 16(1)(c) NCA ('consumer credit activity within') is no exception as it would be difficult for the National Credit Regulator to monitor socio-economic patterns outside the Republic.

At first glance, the fundamental difference between 'within (South Africa)' and 'having effect in (South Africa)' seems to be that in the first case the parties have both to be physically present in South Africa for the conclusion of the transaction, whereas in the second case they may conclude their transaction while one or all parties to the contract might be outside South Africa, even though the transaction produces legal effects in South Africa.

This could mean that the scope of application of the Act is narrower than the one of the National Credit Act as it applies only in instances where all parties are physically present in South Africa when entering into an agreement. Such a construction would have significant consequences for businesses having their place of business or headquarters outside of South Africa.

Under section 5(8)(a), the Act applies irrespective of whether the supplier resides or has its principal office within or outside South Africa, however. In such cases, questions of international private law concerning the choice of law and the enforcement arise.

Furthermore, this begs the question when a transaction within the Republic 'occurs' as 'transaction' includes the agreement itself as well as the delivery of goods and the performance of services.²⁸⁴ In other words, the transaction can 'occur' several times. If, for instance, a sales contract has been concluded outside South Africa but the delivery of the goods takes place within the country, the transaction still occurs within the Republic.

²⁸³ See ss 4(4)(a), 11(4)(d), 16(1)(c) and 50(1) NCA.

²⁸⁴ Section 1, definition of 'transaction'.

It is submitted that for the application of the Act, a simultaneous physical presence of both the consumer and the supplier during the conclusion of the agreement is not necessary for the Application of the Act, and that it is sufficient that the supply of the goods or the performance of the services takes place in South Africa.

Another problem is the determination of the moment of conclusion of the agreement in the case of electronic transactions. According to the information theory, a contract is concluded when the offeror is informed of the acceptance of the offer.²⁸⁵ Section 22(2) of the Electronic Communications and Transactions Act (ECTA)²⁸⁶ provides that '[a]n agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror'. Moreover, under section 23(b) ECTA, a data message is received when the complete message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by him. This refers to the receipt theory, however. As it is difficult to determine the place of contract for electronic transactions, section 23(c) ECTA provides that a data message must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

Since today many websites are merely platforms of advertisements,²⁸⁷ and the content therein cannot be regarded as an offer made by the given supplier but as an *invitatio ad offerendum*, the buyer will thus be the offeror under sections 22(2) and 23(c) ECTA.²⁸⁸

It is common in international transactions that standard terms contain a clause providing that the law of a particular country will apply. Such a provision cannot supplant the mandatory application of the Act to transactions occurring within South Africa but only have effect on the consumer's rights that are not regulated in the Act. In addition, such clauses will be presumed to be unfair if the consumer was a resident of South Africa at the time of the conclusion of the agreement, and he or she was entering into the agreement for purposes wholly or mainly unrelated to his or her business or profession.²⁸⁹

²⁸⁵ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 57.

²⁸⁶ 25 of 2002.

²⁸⁷ Such as Ebay, Amazon, Gumtree, Airbnb, Hotels.com, Ebookers, Cars.co.za.

²⁸⁸ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 57.

²⁸⁹ Regulation 44(3)(bb).

2.2 Material scope of application

Section 48 contains an enumeration of prohibited actions ('must not') and refers to content control rather than the material scope of application of section 48 *et seq.*

For this reason, section 5(1) applies for the determination of the material scope of application of the Act.

In order to have a better understanding of the ambit of the Act, it is important to discuss some definitions of section 1 in detail beforehand to which section 5 refers to, and their application with respect to section 5.

a) Definitions and their application in section 5

aa) Transaction

'Transaction' is defined in section 1 as an agreement between the parties, in respect of a person acting in the ordinary course of business, for the supply of goods or services in exchange for consideration,²⁹⁰ the actual supply of those goods,²⁹¹ or the performance of the services agreed upon.²⁹² This means that once-off transactions are not considered transactions under the Act.²⁹³

The expression 'ordinary course of business' might sometimes be challenging to interpret with regard to the supplier. The definition of 'transaction' in section 1 of the Act mentions 'ordinary course of business' but does not define it. A translator whose 'ordinary business' is the translation of texts and their delivery within a certain deadline might happen to sell one of the assets he uses to perform his services, e.g., a computer, for various reasons, such as the purchase of a new device. One could put forward that the sale of the computer this person uses professionally is performed in the 'ordinary course of business'. It is submitted that this point of view would go too far because this kind of sale is not part of the translator's business or 'ordinary' in the sense of 'usual'. This view is supported by the fact that 'business' is defined as the continual marketing of any goods or services, which means that there has to be a certain degree of regularity. 'Continual' is defined in dictionaries as 'of regular or frequent recurrence, often repeated, very frequent',²⁹⁴ or 'forming a sequence in which the same action or event is

²⁹⁰ Section 1, definition of 'transaction' (a)(i).

²⁹¹ Section 1, definition of 'transaction' (a)(ii).

²⁹² Section 1, definition of 'transaction' (a)(iii).

²⁹³ Jacob/ Stoop/Van Niekerk 2010 *PELJ* 312.

²⁹⁴ See <http://dictionary.reference.com/browse/continual>.

repeated frequently'.²⁹⁵ This excludes exceptional sales, for instance. These would therefore not fall into the ambit of the 'ordinary course of business'.

In *AA Mutual Insurance Association Ltd v Biddulph and Another*,²⁹⁶ the court held that 'even a single, isolated activity, enterprise or pursuit' suffices for a more purposive interpretation of 'in the course of the business'. It adopted this purposive interpretation²⁹⁷ in order to protect the insured. In the context of the Act, courts might also tend to apply such a wide interpretation for the sake of consumer protection. However, one cannot ignore that the legislator chose the wording '*ordinary* course of business' which narrows the margin for a broad construction.²⁹⁸

A purposive interpretation may be justified on a case-to-case basis though because consumers may not always know whether the supplier acts in its ordinary course of business.²⁹⁹ It is therefore submitted that consumers must inform themselves to a reasonable degree. This means that they must at least gather some *prima facie* information about the 'ordinary' business of the supplier. On the other hand, consumers cannot be expected to research the ambit of a supplier's license or the business purpose, for instance. Consumers who purchase goods from a big company are likely to know the purpose of the given enterprise. This might be not the case for smaller entities though.

In the context of this assessment, it is recommended that the courts also consider the surrounding circumstances. In many cases, a business which sells goods that are not covered by its purpose – e.g., old office equipment or furniture which was used in the company – might not be much interested in making a profit out of this sale, but simply wants to get rid of those items. This is particularly the case where the goods have already been written off and do not appear in the books anymore. In such a case, it would be disproportionate to afford the protection of the Act to consumers and to treat the company as if it had dealt in the ordinary course of business.

In summary, a wider, purposive construction of 'ordinary course of business' is likely to be the exception because of the word 'ordinary' which requires a certain extent of regularity, as well as a lack of need for consumer protection in most cases. This especially applies where used and already written-off goods are sold. On the other hand, the lack of the protection of the Act is

²⁹⁵ See 'continual' in Oxford Dictionaries Online at <https://www.lexico.com/definition/continual>.

²⁹⁶ *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976 (1) SA 725 (A) 739B-C.

²⁹⁷ Purposive interpretation will be discussed in ch 4.

²⁹⁸ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 41.

²⁹⁹ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 43.

balanced by the fact that the consumer will purchase those goods at a lower price that reflects the condition of the items.

Section 5(6)(a) widens the definition of 'transaction' considerably 'for greater certainty' concerning the supply of goods or services in the ordinary course of business by a club, trade union, association, society or other collectivity to its members, irrespective of whether the member has to pay a consideration for the supply, or an economic contribution to become or remain a member. Therefore, the free supply of T-shirts with the logo of a trade union to its members is regarded as a 'transaction' in terms of the Act. At first sight, this seems to be an over-protection of the consumer, because it raises the question of why a consumer who did not have to pay a consideration should be protected in terms of the Act. The reason is that each consumer should be granted protection under sections 53 to 61, for instance, against faulty products which cause damage to the consumer.

Furthermore, section 5(6)(b) to (e) extends the definition of 'transaction' to franchise agreements. The reason for the protection of the franchisee is that franchise agreements are often concluded between a large franchisor and a smaller juristic person who can easily be overreached. Contrary to other consumers, who are excluded from the protection of the Act if they reach a specific asset value or annual turnover,³⁰⁰ this limitation does not apply to franchises.

The transaction must be made in exchange of consideration. 'Consideration' is defined in section 1 as anything of value given and accepted in exchange for goods or services, such as money, property, a ticket, labour, barter or other goods or services, any other thing, undertaking, promise, agreement or assurance. De Stadler correctly points out that the agreement by one party to accept a donation cannot be construed as consideration.³⁰¹ Not only would such a broad interpretation render every reference to consideration in the Act meaningless, but this would eventually also mean that a mere declaration of intent, which is the basis of bi- and multilateral contracts, would serve as consideration.

It is suggested that goods which are allegedly given 'for free' according to advertisements promising that one will receive 'x amount for free' if one buys a particular product, must be regarded as given in the exchange of consideration.³⁰² The part which is given 'for free' is part

³⁰⁰ Section 5(2)(b).

³⁰¹ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 47.

³⁰² Examples: A box of orange juice with the label '20 % more for free', or 'Buy 3 and pay 2'.

of a product which is given in the exchange of consideration. In reality, this part is not free of charge because only the margin of the supplier is concerned. In any event, such labelling of a product falls under section 5(1)(b) as it fulfils the conditions of 'promotion' of a good.³⁰³

Section 5(6)(a) provides that it is irrelevant whether the goods are supplied for fair value consideration or otherwise by a club, trade union, association, society or other collectivity. Since according to the definition of 'consideration', the apparent or intrinsic value of the consideration is never relevant, it is somehow inconsistent that the legislator refers to the 'fair value' consideration in section 5(6)(a). This could mean that the consideration requirement has not completely been relaxed and that where a club hands out goods free of charge to its members, this must be considered a transaction.³⁰⁴ It is suggested that this argument goes in circles with the first sentence in section 5(6) because this provision already provides 'for greater certainty' which arrangements must be regarded as transactions. The phrase 'whether for fair value consideration or otherwise' in section 5(6)(a) must thus be read as 'in any circumstances, and irrespective of whether there is consideration' because it simply means that arrangements by clubs and associations to their members which are covered by this provisions are transactions, and that their members are protected by the Act.

As section 5(8)(b) provides that it is irrelevant if a supplier operates for profit or not, the Act will also apply to non-profit or charitable organisations. These organisations should therefore not accept any form of 'consideration' from the public, as otherwise the Act applies.³⁰⁵

The supply of goods or services has to be performed to certain 'persons' (members of a club or an association and so forth) so that section 5(6) does not only concern the material³⁰⁶ but also the personal scope of application.

bb) Goods and services

The promotion and the supply of goods or services³⁰⁷ and goods or services that are supplied or performed in terms of a transaction to which the Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services,

³⁰³ See definition of 'promote' in s 1.

³⁰⁴ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 312.

³⁰⁵ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 49.

³⁰⁶ See s 5(6)(b) to (e).

³⁰⁷ Section 5(1)(b).

or separate from any other goods or services,³⁰⁸ also fall into the material scope of application of the Act.

It is crucial to determine whether a particular product has to be defined as a good or as a service because the client's remedies differ in both cases. If products are defective as regards the supply of a service, sections 55, 56 and 61 apply, whereas in case of a sub-standard service, section 54 applies. What is more, section 61 according to which the consumer may claim for harm caused by defective goods, does not give the same rights in case of harm caused by sub-standard service delivery.³⁰⁹

The definition of 'goods' in section 1 covers a wide range of tangible and intangible products, such as consumables, furniture, clothing, literature, data, information encoded on a medium, as well as legal interest in immovable property, and even utilities. The latter are provided by the State or parastatals (Egoli Gas, Eskom...), so that these particular suppliers may be held liable.³¹⁰ The list is not exhaustive and hence open to other items.³¹¹

The definition of 'service' in section 1 is also extensive. Like the definition of 'goods', it is not limited³¹² and includes:

(a) any work or undertaking performed by one person for the direct or indirect benefit of another. This is a far-reaching catch-all provision which aims to include all kinds of different services. Paragraphs (b) to (g) can thus be regarded as examples of services which fall under paragraph (a);³¹³

(b) the provision of any education, information, advice or consultation (with exceptions concerning the Financial Advisory and Intermediary Services Act);³¹⁴

(c) any banking services, financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another (with exceptions concerning the

³⁰⁸ Section 5(1)(c).

³⁰⁹ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

³¹⁰ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 14.

³¹¹ The word 'include' in the definition of 'goods' in s 1 indicates that it is not a *numerus clausus*.

³¹² This is indicated by the word 'includes' and the phrase 'but not limited to'. See definition in s 1.

³¹³ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

³¹⁴ Act 37 of 2002, shortly referred to as FAIS.

Financial Advisory and Intermediary Services Act,³¹⁵ the Long-term Insurance Act³¹⁶ and the Short-term Insurance Act);³¹⁷

Intermediary banking or related financial service, undertaking, underwriting or assumption of risk as well as advice are not included in the definition of ‘services’ to the extent that the service is regulated by the Financial Advisory and Intermediary Services Act³¹⁸ or the Long-Term Insurance Act³¹⁹ or Short-Term Insurance Act.³²⁰ Therefore, these services are excluded from the application of the Act.³²¹

The Financial Services Laws General Amendment Act³²² came into effect on 28 February 2014. This statute exempts the banking industry, the long- and short-term insurance industry, the pension fund industry, collective investment schemes and securities from the application of the Act. It intends to introduce a more stringent consumer protection framework for the financial services sector referred to as ‘Treating Consumers Fairly’. This list does not mention the National Credit Act, which means that the Consumer Protection Act even applies if goods or services are sold or provided in terms of a credit agreement;³²³

(d) the transportation of an individual or any goods. This concerns the transportation of persons or goods (freight) by bus, taxi, train, or aeroplane;

(e) the provision of (i) any accommodation or sustenance, (ii) any entertainment or access to it, (iii) access to any electronic communication infrastructure, (iv) access, or the right of access, to an event or to any premises, activity or facility, or (v) access to or use of any premises or other property in terms of a rental.

According to this definition, the provision of food and drinks in a restaurant are regarded as a service. The food or drinks themselves are goods though. The provision of accommodation includes hotels, B&Bs, hostels and so forth. It is submitted that the accommodation in a sleeping car of a train also falls under this definition. Besides, it is subject to paragraph (d) as it concerns the transportation of individuals.

³¹⁵ Act 37 of 2002.

³¹⁶ Act 52 of 1998.

³¹⁷ Act 53 of 1998.

³¹⁸ 37 of 2002.

³¹⁹ 52 of 1998.

³²⁰ 53 of 1998.

³²¹ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 311.

³²² 45 of 2013. GenN 195 in GG 35132 of 9 March 2012.

³²³ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 20.

Regarding the provision of entertainment or similar intangible products, one must distinguish between the person performing (e.g., musician), and the person giving access to the entertainment (e.g., event manager). Under the Act, both will be considered service providers.³²⁴ ‘Access to any electronic communication infrastructure’ refers to telecommunications and television networks, wireless application networks and similar service providers. Access, or the right of access, to any event or to any premises, activity or facility refers to owners of casinos, bars, theme parks, swimming pools, shopping malls etc.;

(f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental. The letting of immovable property is a service, whereas granting access to moveable property could either be a service or fall under the definition of ‘goods’.³²⁵ De Stadler argues that the exclusion of rental is inconsistent as it is included in paragraph (e) of the definition of ‘service’.³²⁶ This differentiation between ‘rental’ on the one side, and ‘right of occupancy’ and ‘power or privilege over or in connection’ with land or other immovable property, on the other, could mean, it is suggested, that not only substantive rights, such as a rental, which are based on a contractual agreement under the law of obligations but also rights *in rem*, such as servitudes (the right of abode, for instance), have to be understood as services in terms of the Act. The enumeration under (f) therefore expands the definition of ‘service’ beyond rentals and does not restrict it, as De Stadler suggests. This would mean that also the beneficiary of a servitude is protected by the Act *vis-à-vis* the other party, i.e., the creator of the servitude, and that the Act not only covers transactions based on the law of obligations, but also certain transactions *in rem*. It is nonetheless somehow disconcerting that a ‘right’ (of occupancy) should be a service. In terms of legal methodology, this is a dubious qualification which can only be explained by the legislature’s wish to expand the definition of ‘service’ to certain *in rem* rights;

(g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service. The inclusion of ‘rights of a franchisee in terms of a franchise agreement’ into the definition of ‘service’ is also disconcerting and could mean that a franchisor has to comply with the

³²⁴ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 25.

³²⁵ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 28.

³²⁶ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 29.

provisions of the Act set out in section 5(6)(b) to (e) when entering in such an activity. If this were the case, point (g) would be superfluous.

The phrase 'irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service' means that a person who does not participate directly in the provision of a service is still liable as a service provider. This applies to intermediaries, such as travel agencies, which do not themselves provide hotel rooms or excursions. The consumer thus does not have to engage in a complicated and expensive process in order to determine who is accountable because all parties of the supply chain can be held liable.³²⁷ Despite the strange formulation of point (g), the inclusion of intermediaries to be held liable for service delivery is probably the reason for the existence of point (g).

cc) Promote

Section 1 defines the verb 'promote' with a wide array of other verbs, such as (a) advertise, display or offer to supply any goods or services, to all or part of the public for consideration; (b) make any representation that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction. The abovementioned actions have to take place in the ordinary course of business.

Briefly, these actions describe any activity that supports or encourages the publicising of a product or venture to increase sales or public awareness.³²⁸

'Public' in paragraph (a) also comprises an individual because also other sections in Chapter 2 Part E refer to individual consumers. Furthermore, other provisions referring to direct marketing comprise individual consumers as regards promotions.³²⁹

Paragraph (b) of the definition of 'promote' ensures that promoters cannot circumvent the application of the Act if another supplier undertakes the actual supply. This means that the promotor does not necessarily have to undertake the actual transaction with the consumer in order that the Act applies.³³⁰

³²⁷ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 16.

³²⁸ Stevenson and Waite *Oxford Dictionary*, s.v. 'promotion'.

³²⁹ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 64.

³³⁰ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 65

The phrase ‘any other conduct’ in paragraph (c) is an all-catch clause which ascertains that a supplier by any conduct, such as displaying or making a product available without making any statement about it, cannot escape the application of the Act.³³¹

The promotion ‘within the Republic’ under section 5(1)(b) seems to be problematic, considering cross-border advertising and new media, such as the internet. As the actual promotion in these cases does not necessarily take place ‘within the Republic’, it is therefore sufficient that the ultimate transaction itself does in order to apply the Act. One could also argue that section 5(1)(b) only applies to promotions which take place within South Africa, with no regard to the place where the ultimate transaction takes place.

The second argument is more convincing when reading section 5(1)(b) entirely. Otherwise, section 5(1)(a) referring to transactions within the Republic would have less meaning. What is more, section 5(1)(b)(i) clearly operates in cases where a supplier expected the Act not being applicable, e.g., because he or she was reasonably of the opinion that the consumer would be a juristic person with an asset value or annual turnover above the threshold of section 5(2)(b). Such a case is imaginable where the consumer became a juristic person only after the transaction. Then, the Act would still not apply in terms of section 5(1)(b)(i), however.

dd) Goods or services which are supplied or performed

The supply of goods and the performance of services in terms of section 5(1)(c) is another step of the ‘supply chain’ to which the Act applies, besides the promotion of goods or services and the transaction. It emanates from the definition of ‘consumer’ that not only the party of a consumer agreement is protected by the Act but also the end-user, recipient or beneficiary. In order that the Act applies to the goods or services mentioned in section 5(1)(c), it must be applicable to the transaction. This is not the case, for instance, with donations because these do not involve any consideration.³³² In cases where a consumer purchases a good from a supplier and then gives this good as a gift to another person, this person must however be regarded as a beneficiary in terms of the definition (c) of ‘consumer’, although there was no consideration between the consumer and the beneficiary.

It is not entirely clear what ‘irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services’ means. This phrase could mean that suppliers cannot circumvent the application of

³³¹ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 66.

³³² De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 72.

the Act by separating certain goods or services – to which the Act applies – from other goods or services supplied. It could also mean that the supplier will not be able to argue that the goods and services supplied under a single transaction are subject to the provisions on either goods or services. In any event, such an argument cannot be maintained in terms of section 54(1)(c) and 61(2) according to which the supplier of a service in conjunction with certain goods is also considered the supplier of these goods.³³³

ee) Goods supplied in terms of an exempt transaction

Section 5(1)(d) merely confirms that transactions which are exempted from the application of the Act still enjoy the protection of sections 60 and 61. These provisions govern safety monitoring and recall as well as liability for harm caused by unsafe goods.

The fact that the words ‘exemption’ and ‘exempt’ are used not only in the context of section 5(2)(c) but also for other kinds of exemptions, which technically speaking are exceptions,³³⁴ could be interpreted in favour of a more comprehensive construction of ‘exemption’ / ‘exempt’.³³⁵

Despite the vast scope of application of the Act, there are situations where it is not applicable. In these cases, there is no exemption in terms of section 5(1)(d) or 5(5) and the Act is not applicable as a whole. This is the case, for instance, for transactions with consumers who are juristic persons with an annual turnover exceeding the threshold of section 5(2)(b).

ff) Terms and conditions

It is remarkable that neither section 1 nor section 48 *et seq.* contain a definition of ‘terms and conditions’. One would expect that a statute dedicating an entire part to unfair contract terms and containing a section with definitions would define this term.

In dictionaries, ‘terms’ are defined as ‘stipulated or agreed requirements, conditions with regard to payment or agreed conditions under which a dispute is settled’,³³⁶ and terms and conditions

³³³ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 73.

³³⁴ See para 2.2 b) cc) below.

³³⁵ De Stadler argues in that way as the words ‘exemption’ and ‘exempt’ would not appear in section 5(2), but in subsection (3) and (4). However, these words do appear in section 5(2)(c) in relation to exemptions granted by the Minister. This does not weaken her argumentation, however. See De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 73.

³³⁶ Stevenson and Waite *Oxford Dictionary* s.v. ‘terms’.

are '[g]eneral and special arrangements, provisions, requirements, rules, specifications, and standards that form an integral part of an agreement or contract.'³³⁷

In other words, terms and conditions are provisions between the parties of an agreement that form an integral part of the latter.

In section 1, a definition of 'terms and conditions' with the following (or similar) wording should therefore be included:

'Terms and conditions' means any general and special arrangements, provisions, requirements, rules, specifications and standards contained in an agreement between a consumer and a supplier, irrespective of their denomination, content and presentation.'

This definition would cover all kinds of standard terms and ascertain a uniform application of the Act and fairness control. It would also remove all ambiguities of whether certain terms and conditions are part of an agreement. Subsidiary agreements, side letters and other arrangements would be included. Suppliers would thus not be able to circumvent the application of the Act by 'swapping out' certain terms and applying other 'creative' contract design measures.

b) Exceptions

Section 5(2) contains several exceptions in which the Act does not apply.

aa) Goods and services promoted or supplied to the State

The Act does not apply to transactions in terms of which goods or services are promoted or supplied to the State, i.e., where the State is a consumer.³³⁸

Section 1 defines only the term 'organ of state' in referral to section 239 of the Constitution.³³⁹

In the final draft of the Act, the words 'organ of state' have been removed without any further explanation in the parliamentary records.³⁴⁰ 'State' and 'organ of state' are not synonymous, a view which is supported by the fact that both terms are used in section 81(2)(b)(ii), and 'organ of state' appears in section 5(8)(c). According to *Holeni v Land and Agricultural Development*

³³⁷ The Business Dictionary online: <http://www.businessdictionary.com/definition/terms-and-conditions.html> s.v. 'terms and conditions'.

³³⁸ Section 5(2)(a).

³³⁹ Pursuant to s 239 of the Constitution 'organ of state' means: (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

³⁴⁰ Both 'State' and 'organ of state' can still be found in the original draft of the Consumer Protection Bill, s 5(2)(a). See GenN 418 in GG 28629 of 15 March 2006.

Bank of SA,³⁴¹ the Constitution distinguishes between the two concepts, even if it does not define the term ‘State’ (nor did the court in its ruling). In *Mateis v Ngwathe Plaaslike Munisipaliteit en Ander*,³⁴² the court held that ‘State’ was an amorphous juristic-political concept without a fixed meaning that has to be interpreted according to the piece of legislation in which it appears.

De Stadler believes that based on the abovementioned cases and the definition of ‘organ of state’ in the Constitution, the concept of ‘State’ has a more limited meaning.³⁴³ She contends that ‘State’ only includes departments of state at the national, provincial and local level, but not other institutions exercising public functions. Therefore, parastatals would have to be considered consumers, even though they are most likely excluded from the application of the Act because of their annual turnovers or asset values. She admits though that this interpretation would not explain why both terms are listed in section 81(2)(b)(ii).³⁴⁴

The legislature should therefore clarify this question, either by inserting a definition of ‘State’ in the Act, or by deleting the term in section 81(2)(b)(ii). One should nonetheless keep in mind that this problem is of minor importance. In most cases, the distinction between these two concepts should have no practical impact for the reasons mentioned above.

As the term ‘State’ is not defined, it is unclear if companies or other entities, of which the State is a shareholder or member, are included in this exception.³⁴⁵

One could argue that only companies or other entities in which the State holds more than 50 per cent of the shares or votes are excluded from the ambit of the Act. An argument for this opinion is that under this threshold, the State has not that much influence on the company or entity in question.

On the other hand, this is not true where the State as a shareholder has less than 50 per cent of the shares or votes but is the biggest shareholder in comparison to minor shareholders. In this case, it has more influence than small shareholders who might ultimately have different interests.

³⁴¹ *Holeni v Land and Agricultural Development Bank of SA* 2009 (4) SA 437 (C) at 442B-C.

³⁴² *Mateis v Ngwathe Plaaslike Munisipaliteit en Ander* 2003 (4) SA 361 (SCA) at 367F.

³⁴³ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 79.

³⁴⁴ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 79.

³⁴⁵ See Jacobs/Stoop/Van Niekerk 2010 *PELJ* 3 note 52.

Besides, in entities where the State is a shareholder, it can exercise its influence by other means, e.g., by passing specific laws or granting exemptions. It is therefore submitted that in any case where the State has any direct influence by the holding of shares, irrespective of their number or percentage, the company or entity in question should not afford the protection of the Act.

bb) Turnover and asset value threshold

The Act does neither apply when a consumer is a juristic person³⁴⁶ whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister under section 6.³⁴⁷ The Minister of Trade and Industry has by notice determined the monetary threshold at R 2 million.³⁴⁸ It is not necessary that the juristic person equals or exceeds its annual turnover *and* asset value. The word 'or' in this section indicates that only one of both is sufficient for excluding the application of the Act.

The reason for the exemption of transactions involving the State and large businesses is that they do not require the protection offered by the Act as they benefit from the flexibility of operation in an unregulated market.³⁴⁹

The Act is essentially consumer protection law, with an extended understanding of what constitutes a consumer. It therefore aims at protecting small businesses that are similarly vulnerable as natural persons. The Act hence assumes that entities that are not juristic persons deserve the same protection as other consumers. This approach considers the socio-economic realities in South Africa. The application of turnover and asset thresholds to juristic persons excludes companies that do not need protection and assures that the majority of companies who need protection are actually protected. This has the consequence that a sole proprietorship-

³⁴⁶ The definition of 'juristic person' in s 1 goes further than the common law definition, where partnerships and trusts are not considered juristic persons.

³⁴⁷ Section 5(2)(b) CPA. In terms of section 2(5), despite the periods of time set out in section 6, each successive threshold determined by the Minister in terms of that section continues in effect until a subsequent threshold in terms of that section takes effect. Unfortunately, this provision is completely out of place as it is located within the interpretational provisions. It would have been better and more logical to insert it into section 6 instead.

³⁴⁸ GG No. 34181 of 1 April 2011. This threshold has not been changed since. In its comment letter of the threshold determination of 29 October 2010, the South African Institute of Chartered Accountants (SAICA) criticises that the threshold of R 2m does not correspond to domestic and international practice as normally there tends to be a ratio of 1:2 between assets and turnover due to the practical relationship between the two in terms of size in average businesses. Moreover, SAICA believes that a single level threshold is far too simple at it would unintentionally jeopardise many small businesses, such as used car dealers or small new car dealerships which need protection from large business and vehicle manufacturers with which they interact. Therefore, a matrix threshold structure, such as used in the National Small Business Act 102 of 1996 which takes into account the nature of the business would be necessary. See 'Consumer Protection Act, No. 68 of 2008' at <https://www.saica.co.za/Technical/LegalandGovernance/Legislation/ConsumerProtectionAct/tabid/1911/language/en-ZA/Default.aspx> under 'Legislation/Submissions and comments' (no longer available).

³⁴⁹ See Memorandum on the Objects of the Consumer Protection Bill, 2008, point 3.2 at 82.

consumer with a sizeable annual turnover exceeding the threshold is protected by the Act, whereas a company, i.e., a juristic person, with a similar annual turnover is excluded from its protection.

Item 2 of the Schedule in GN 294³⁵⁰ defines the annual turnover as the gross revenue of the juristic person from income in, into or from the Republic. Certain transactions are expressly included and certain amounts excluded from this calculation. The asset value is defined as the gross asset value of the juristic person without the deduction for liabilities or encumbrances.

The valuation of the annual turnover or asset value of the juristic person has to be made, according to section 5(2)(b), at the time of the transaction. As ‘transaction’ is defined in section 1 as an agreement or the supply or performance of services, the time of the conclusion of the agreement may differ from the time of the supply or the performance. This problem primarily exists in ongoing supply or service agreements like, for example, the regular delivery of beer to a restaurant. It is suggested that in these cases, the supplier has to determine the consumer’s asset value or annual turnover at least from time to time in order to comply with the Act. This is very difficult in cases where the information is not available though.³⁵¹ This approach is also impractical for high volume transactions where the sold product itself has a relatively low value which does not justify such an investigation. As the Act is silent over these questions, it is proposed that a reasonable standard must be applied. The supplier must therefore make reasonable efforts to determine the consumer’s asset value or turnover. If the latter refuses to give such information, or this information is not available otherwise, and there is no indication that the threshold is too high in terms of section 5(2)(b), the supplier cannot be blamed and that the Act does not apply. In such case, the Act should only apply where the threshold is not met as it aims to protect consumers and not suppliers. This would also be consistent with the wording of section 5(2)(b).

A warranty or declaration that the juristic person’s asset value or turnover does not exceed the threshold mentioned above raises concern. Such a clause might directly or indirectly purport to set aside or override the effect of the Act in terms of section 51(b)(iii), which means that the clause would be void. In addition, it could be unfair under section 48. Otherwise, it has to meet

³⁵⁰ In GG 34181 of 1 April 2011.

³⁵¹ See De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 84.

the requirements of section 49(3) to (5) as it is an acknowledgement of fact for purposes of section 49.³⁵²

What is more, the Act itself is silent over the question in which manner information on the annual turnover or asset value will be obtained. It is important though to have a fair basis in order to determine whether a business is 'small' enough to afford the protection of the Act.

According to Item 4(a), the calculation has to be based on the company's audited financials for the relevant period.³⁵³ If it has no audited financials, the statement must be prepared in accordance with South African Generally Accepted Accounting Standards. De Stadler argues that this approach is not practical because it might be too costly for smaller companies, especially for businesses with a high volume of small transactions. She suggests that the legislator should have included a section according to which the asset value or annual turnover of a company that is mentioned in a credit agreement should be stated as such by the juristic person who wants to determine if it is above the threshold or not.³⁵⁴

This might be a more practical approach, but not all juristic persons conclude credit agreements. Especially small businesses work on a cash-in-cash-out basis. Most of them file tax returns, however. It is therefore suggested that a combination of these two suggestions might be the best solution.

In item 4 of General Notice 294 should thus be added the following addition under (c):

'If audited financial statements are not required by law and therefore not available, for the determination of the annual turnover or the asset value, the most current tax return or balance sheet³⁵⁵ is used as a basis for the calculation of the assets or turnover. If the juristic or natural person³⁵⁶ has concluded a credit agreement during the relevant

³⁵² De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 87.

³⁵³ GN 294 in Government Gazette 34181 of 1 April 2011.

³⁵⁴ De Stadler *Consumer Law Unlocked* 8.

³⁵⁵ In its comment letter of the threshold determination of 29 October 2010, SAICA argues that any reference to 'balance sheet' should be avoided as the names used in the financial reporting standards have changed and the term 'balance sheet' is no longer commonly used. Instead, one should refer to the value of the juristic person's assets as reflected in the financial statements. See 'Consumer Protection Act, No. 68 of 2008' at <https://www.saica.co.za/Technical/LegalandGovernance/Legislation/ConsumerProtectionAct/tabid/1911/language/en-ZA/Default.aspx> under 'Legislation/Submissions and comments' (no longer available). In the above-mentioned suggested addition, a reference to 'financial statements' could create confusions with the term 'audited financial statements'. The use of 'financial statement' instead of 'balance sheet' is defensible though.

³⁵⁶ As mentioned above, also non-juristic persons whose annual turnover or asset value exceeds the threshold of s 6 should be treated like juristic persons.

*period for its business, the turnover or the asset value mentioned in this credit agreement is used as a basis for this calculation.*³⁵⁷

cc) Exemptions granted by the Minister

The Act does not apply to transactions falling within an exemption granted by the Minister in terms of subsections (3) and (4).³⁵⁸ It is regrettable that the legislator mentioned these exemptions within a provision dealing with exceptions as technically exceptions and exemptions are not identical and should be clearly separated.³⁵⁹ De Stadler distinguishes between ‘automatically exempted transactions’ and ‘application by regulatory authorities’.³⁶⁰ Although this distinction is materially correct, it perpetuates the legislator’s ambiguous terminology. For the sake of a more structured discussion, the exemptions will be discussed further below.³⁶¹

dd) Credit agreements under the National Credit Act

Excepted are also transactions which constitute a credit agreement under the National Credit Act. The goods and services that are subject of the credit agreement are not excluded from the scope of application of the Consumer Protection Act though.³⁶² This means that a product that has been purchased by the consumer on credit (for which the National Credit Act applies), is subject to the Consumer Protection Act. A credit provider will not be able to exclude its liabilities under sections 56(2) and 61 CPA, or the common law, without invoking section 51 CPA. This results, on the one hand, from section 90(2)(c) NCA which provides that a 'provision of a credit agreement is unlawful if (...) it purports to waive any common law rights that may be applicable to the credit agreement'. On the other hand, section 90(2)(g) NCA provides that a provision which 'purports to exempt the credit provider from liability, or limit such liability, for (...) any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement' is unlawful. For these reasons, the decision in *MFC (a division of*

³⁵⁷ This corresponds to SAICA's view in its comment letter of the threshold determination of 29 October 2010 where it points out that most companies and close corporations that will request protection under the Act will not apply IFRS as they will not fall within the audit threshold as prescribed by the Companies Act 71 of 2008. They will use the alternative accounting frameworks to prepare their financial statements instead. See 'Consumer Protection Act, No. 68 of 2008' at <https://www.saica.co.za/Technical/LegalandGovernance/Legislation/ConsumerProtectionAct/tabid/1911/language/en-ZA/Default.aspx> under 'Legislation/Submissions and comments' (no longer available).

³⁵⁸ Section 5(2)(c). See para 2.2 c) in this chapter.

³⁵⁹ An exception is granted by law, whereas an exemption requires an intervention by an authority, e.g., in a certain case or in special circumstances or for specific businesses ('industry-wide exemptions'). See, e.g., 'Exception v Exemption' at <https://oilpatchwriting.wordpress.com/2012/05/15/exception-vs-exemption/>.

³⁶⁰ De Stadler *Consumer Law Unlocked* 13, 16.

³⁶¹ See para 2.2 c) in this chapter.

³⁶² Section 5(2)(d) CPA.

Nedbank Ltd) v Botha,³⁶³ in which the court held that the bank was not a supplier and could exclude liability, was erroneous.

The provision of services by credit providers fall under the scope of application of the Consumer Protection Act. This becomes clear when reading the definition of ‘service’ in section 1 where other service providers are excluded, but not credit providers. The same applies to the promotion of credit, which is not excluded by section 5(2)(d). Credit marketing is regulated in sections 74 to 77 NCA which overlap with the right to fair and responsible marketing of the Consumer Protection Act.³⁶⁴ As the provisions of the National Credit Act and the Consumer Protection Act complement each other in terms of promotion, they apply concurrently pursuant to section 2(9) CPA.³⁶⁵

The application of the Consumer Protection Act may be excluded by the Financial Services Board Act³⁶⁶ as amended by the Financial Services Laws General Amendment Act, however.³⁶⁷ Although the definition of ‘financial services legislation’ and ‘financial institution’ does not refer to credit providers, it refers to ‘a bank as defined in section 1(1) of the Banks Act³⁶⁸ (...), a mutual bank as defined in section 1(1) of the Mutual Banks Act³⁶⁹ (...), or a co-operative bank as defined in section 1(1) of the Co-operative Banks Act³⁷⁰ (...), which deals with trust property as a regular feature of its business.’ Pursuant to section 28(2)(b)(i) of the Financial Services Board Act, the Act does not apply to ‘any functions, act, transaction, goods or services’ which are subject to these acts or ‘any person that performs an activity regulated under a law referred to in’ these acts.³⁷¹ One can infer from the wording of this provision that only activities governed by the statutes listed in the definition of ‘financial services legislation’ are excluded. As the National Credit Act is not included in this list, the Consumer Protection Acts still applies in the credit industry, as limited by section 5(2)(d) CPA.³⁷²

³⁶³ *MFC (a division of Nedbank Ltd) v Botha* 6981/13 [2013] ZAWCHC 107 (15 August 2013). The court incorrectly held that the respondent (Botha) could not return the vehicle he had purchased in terms of an instalment agreement with the bank to the supplier (the dealership) against a refund of the purchase price because ownership of the car vested in the credit provider which had paid the purchase price, and not Botha. However, s 56(2) CPA provides that a consumer can return the defective good to the supplier, as according to s 56(1) CPA there is an implied provision that the producer, importer, distributor and retailer each warrant that the goods are safe and of good quality pursuant to s 55 CPA.

³⁶⁴ Chapter 2 Part E CPA (ss 29 – 39).

³⁶⁵ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 96.

³⁶⁶ 97 of 1990.

³⁶⁷ 45 of 2013.

³⁶⁸ 94 of 1990.

³⁶⁹ 124 of 1993.

³⁷⁰ 40 of 2007.

³⁷¹ Paragraph (c) of the definition of ‘financial institution’ in the Financial Services Board Act.

³⁷² De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 92.

It is disputable whether so-called ‘incidental credit agreements’ must be qualified as credit agreements under the National Credit Act.³⁷³ Pursuant to section 5(2) NCA, the parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after the supplier first charges a late payment fee or interest. This could mean that before the expiration of this period, an incidental credit agreement is not considered a credit agreement in terms of the NCA. Section 5(2)(d) CPA excludes only credit agreements in terms of the National Credit Act though. Furthermore, the parties had not the intention to enter into a credit agreement at the time when the transaction was concluded. Hence, incidental credit agreements are not excluded from the scope of application of the Act.³⁷⁴

What is more, credit advertising and marketing is not excluded either from the ambit of the Consumer Protection Act. On the other hand, there is a legislative duplication because also the National Credit Act regulates credit advertising³⁷⁵ and marketing.³⁷⁶ In this case, section 2(9) CPA in terms of which the provisions of both Acts apply concurrently, applies to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.³⁷⁷ If this is not possible, the provision which extends the greater protection to the consumer prevails.³⁷⁸

ee) Employment contracts

Furthermore, transactions pertaining to services to be supplied under an employment contract are excluded from the application of the Act.³⁷⁹ The Act does not distinguish between unlimited and fixed-term employment contracts. It is therefore submitted that all types of employment contracts are excluded from the application of this statute.

³⁷³ Pursuant to s 1 NCA, an incidental credit agreement means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply: (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or (b) two prices were quoted for settlement of the accounts, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

³⁷⁴ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 310. See also De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 95.

³⁷⁵ See ss 76, 4(7) NCA.

³⁷⁶ See ss 74, 75 and 77 NCA.

³⁷⁷ Section 2(9)(a) CPA.

³⁷⁸ Section 2(9)(b) CPA.

³⁷⁹ Section 5(2)(e) CPA.

Independent contractors are not regarded as employees in terms of the Labour Relations Act,³⁸⁰ which defines ‘employee’ as any person, excluding an independent contractor, who works for another person, or the State and who receives or is entitled to receive, any remuneration.

De Stadler argues that the wording of section 5(2)(e) might have some unintended consequences where an employee purchases a service from her employer at a discount which is based on the contract of employment. Then, the employee would have no recourse against the employer if she received sub-standard service.³⁸¹ It is suggested that the phrase ‘services to be supplied under an employment contract’ must be read as ‘services to be supplied under an employment contract *by an employee*’.³⁸² Thus, only services supplied by the employee in terms of the employment contract are excluded under section 5(2)(e). The reason for this exemption is not to put too much burden on the employer/employee relationship in terms of the fulfilment of the contract. Therefore, in the example above the Act applies.

ff) Collective bargaining agreements

Transactions giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995,³⁸³ or to a collective agreement³⁸⁴ as defined in section 213 of the Labour Relations Act, 1995³⁸⁵ are also excluded from the application of the Act.

c) Exemptions

As mentioned above, the Minister³⁸⁶ may grant an exemption in terms of sections 5(3) and (4). Section 5(3) concerns industry-wide exemptions from one or more provisions of the Act if those provisions overlap or duplicate a regulatory scheme in terms of any other national legislation or any treaty, international law, convention or protocol. The competent regulatory authority must apply for such an exemption.³⁸⁷ This means that an individual supplier may not apply. ‘Regulatory authority’ is defined as an organ of state or entity established in terms of

³⁸⁰ 66 of 1995.

³⁸¹ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 102.

³⁸² Emphasis added.

³⁸³ Section 5(2)(f) CPA.

³⁸⁴ Section 5(2)(g) CPA.

³⁸⁵ 66 of 1995.

³⁸⁶ According to the definition in s 1, ‘Minister’ means the member of the Cabinet responsible for consumer protection matters.

³⁸⁷ Section 5(3).

national or provincial legislation responsible for regulating an industry, or sector of an industry.³⁸⁸

The Act is intended to offer a default regime of consumer protection. Its purpose is not to override industry-specific laws that contain more specific consumer protection schemes. If the National Consumer Commission advises that the specific industry scheme protects consumers at least as much as the Consumer Protection Act, the Minister may grant an exemption.³⁸⁹

The Minister, after having received the advice of the National Consumer Commission,³⁹⁰ makes the exemption public in the Government Gazette.³⁹¹ The Commission may grant an exemption only to the extent that the relevant regulatory scheme 'ensures the achievement of the purposes of this Act at least as well as the provisions of this Act'.³⁹²

Subsections (3) and (4) must be read together as both provisions regulate the conditions of an industry-wide exemption as well as the procedure to be followed by the Minister. Therefore, the conditions for such an exemption are the following:

- One or more provisions of the Act overlap or duplicate a regulatory scheme in terms of any other national legislation or any treaty, international law, convention or protocol (section 5(3)(a) and (b));
- the relevant regulatory scheme ensures the achievement of the purposes of the Act at least as well as the provisions of the Act (section 5(4)(a)); and
- the exemption is subject to any limits or conditions necessary to ensure the achievement of the purposes of the Act (section 5(4)(b)).

The procedure for granting an industry-wide exemption is the following:

- A regulatory scheme has to apply to the Minister for an exemption (section 5(3));
- the Minister has to receive the advice of the Commission (section 5(4)); and
- the Minister has to publish the exemption in the Government Gazette (section 5(4)).

Such exemptions may be granted permanently or temporarily.³⁹³

³⁸⁸ See definition of 'regulatory authority' in s 1.

³⁸⁹ Section 5(4). See Memorandum on the Objects of the Consumer Protection Bill, 2008, point 3.2 at 82.

³⁹⁰ See definition of 'Commission' in s 1.

³⁹¹ Section 5(4).

³⁹² Section 5(4)(a).

³⁹³ Hutchison *et al* *Law of Contract* 436 note 31. So far, the Minister has exempted fixed-term bank deposits from the application of s 14, which means that fixed-term agreements may be terminated on 20 business days' notice instead of 40 business days' notice at least. See s 14(2)(c) (GN 532 in GG 34399 of 27 June 2011), as well as the pension fund industry, the collective investment schemes industry and the security services industry until 31 March 2012 (GN 533 in GG 34400 of 27 June 2011). These industries are now exempt in terms of the Financial

Interestingly, the application must be directed to the National Consumer Commission and not to the Department of Trade and Industry. Unfortunately, the National Consumer Commission Rules³⁹⁴ do not give much guidance in terms of the substantive requirements for an application. Rule 17 merely provides that the Commission will request further information where the application is incomplete or lacks specificity in regard to the industry or sub-industry to which it applies and that the applicant has to respond to the request for further information within 20 business days. Furthermore, rule 17(4) provides that the Commission must advise the Minister within a reasonable time after having received the application.

However, in the case of goods supplied within South Africa and the existence of an exemption according to section 5(2) to (4), sections 60 and 61, which deal with the safety of goods, apply.

d) Application of sections 60 and 61

The Act also applies to goods that are supplied in terms of a transaction that is exempt from the application of the Act, but only to the extent provided for in section 5(5). This provision refers to section 60 (safety monitoring and recall) and 61 (liability for unsafe goods).³⁹⁵

This means that the buyer of a good has recourse against the supplier. This principle goes up the entire supply chain. The buyer can hence be the retailer, and the supplier can be the distributor or the producer, for instance. As the liability is joint and several, this protects retailers and distributors who have recourse against a link upwards the supply chain.³⁹⁶

This application of joint and several liability begs the question of whether the parties can exclude the liability provided in section 61 contractually. One could argue that such an exclusion is not possible as under section 51(1)(b)(ii), a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to avoid a supplier's obligation or duty in terms of the Act. A contravention against this stipulation would make the term void pursuant to section 51(3). On the other hand, the exclusion of the extended liability is possible because section 51 specifically refers to 'a transaction or agreement'. According to this argument, it would be difficult to see how section 51 can be applied to transactions which are explicitly excluded from the scope of application of the Act, e.g., when

Services Laws General Amendment Act 45 of 2013. In addition, the Minister has deferred the application of parts of the CPA to low- and medium-capacity municipalities as defined in the Local Government: Municipal Finance Management Act 56 of 2003 pursuant to item 2 of Schedule 2 to the CPA (see GN 221 in GG 34116 of 14 March 2011 and GN 898 in GG 34724 of 31 October 2011).

³⁹⁴ GN 533 in GG 34400 of 27 June 2011.

³⁹⁵ Section 5(1)(d).

³⁹⁶ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 112, 113.

the consumer is the State or a juristic person with a turnover or asset value exceeding the threshold set out in section 5(2)(b).³⁹⁷

The last argument seems to be more convincing because section 5(5) only refers to sections 60 and 61, making their application a *de iure* exception. It could be argued that if the legislature had wished the application of other provisions in terms of section 5(5), it would most probably have explicitly referred to them. This argument does not consider the common-law requirement according to which contracts must be lawful, however. Hence, it could be brought forward that anything done in direct contradiction to an express or implied prohibition in a statute is presumed to be void *ab initio*.³⁹⁸ Therefore, the application of section 61 could prevent the parties from excluding the liability because it possibly implies that the liability it imposes cannot be excluded contractually. This is a question of statutory interpretation though.

Section 4(3) provides that the Act must be interpreted purposively, i.e., the meaning that best promotes the spirit and purpose of the Act and will best improve the realisation and enjoyment of consumer rights must be preferred. One of the purposes of the Act mentioned in section 3 is the protection of vulnerable consumers, and not of significant juristic persons or the State, which is why these persons are excluded *per se* from the protection of the Act by section 5(2). On the other hand, it would be unfair if a retailer were left without recourse against its distributor or producer who has undoubtedly more control over the product quality within the supply chain than the retailer and is able to assess the risk and to insure itself against these risks. In terms of the distribution of risk for defective goods, an exclusion of liability under sections 60 and 61 thus seems not desirable in the light of a purposive construction.³⁹⁹

Once the Act covers an agreement, all contractual terms are subject to a fairness enquiry. In other words, all negotiated terms, e.g., those concerning the price or the definition of the main subject matter, as well as non-negotiated terms are covered by the Act and may be challenged.

The Consumer Protection Act therefore has an extensive material scope of application as it applies to most transactions, as well to the promotion and the supply of goods and services occurring within South Africa.

³⁹⁷ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 114, 115.

³⁹⁸ *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188A-B.

³⁹⁹ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 116.

2.3 Personal scope of application

The Act chooses the terms ‘supplier’⁴⁰⁰ and ‘consumer’⁴⁰¹ and applies to transactions between consumers and suppliers to the extent that no exception or exemption under section 5 applies.

a) Consumer

One of the most significant weaknesses of South African law, before the Act came into effect, was the absence of a uniform definition of a ‘consumer’.⁴⁰² Contrary to other pieces of legislation, where a consumer is defined as a natural person who is acting for purposes that are not related to his or her trade, business or profession,⁴⁰³ or where the definition of a ‘consumer’ provides differentiated levels of control for natural and juristic persons,⁴⁰⁴ the South African legislature sought to define consumers broadly as individuals who purchase goods and services as well as third parties who act on behalf of the consumer.⁴⁰⁵ However, the definition of ‘consumer’ in section 1 does not require that the third party acts on behalf of the consumer. This means that also those consumers are protected who had no knowledge of the transaction, and who end up being the users or beneficiaries of the goods or services. As small businesses are also vulnerable, they were granted protection from unfair contract terms too. The definition of ‘consumer’ contains the word ‘person’. In section 1, ‘person’ includes a juristic person, such as a partnership or association, a body corporate, or a trust.⁴⁰⁶ Section 5(2)(b) also regards juristic persons as consumers.

A consumer, in respect of any particular goods or services, is defined in section 1 as

- a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business,⁴⁰⁷ or
- a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of the Act by section 5(2) or (3),⁴⁰⁸ or
- if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether he was a party to a transaction concerning the supply of those goods or services,⁴⁰⁹ and

⁴⁰⁰ E.g., in s 48(1) *in pr.*

⁴⁰¹ E.g., in s 48(1)(c).

⁴⁰² GenN 1957 in GG 26774 at 25.

⁴⁰³ See art 1 Directive 1999/44/EC.

⁴⁰⁴ This is the case under the Australian Consumer Law. See Hutchison *et al Law of Contract* 437 note 42.

⁴⁰⁵ GenN 1957 in GG 26774 at 25.

⁴⁰⁶ See s 1 Trust Property Control Act 57 of 1988.

⁴⁰⁷ Section 1, definition of ‘consumer’ (a).

⁴⁰⁸ Section 1, definition of ‘consumer’ (b).

⁴⁰⁹ Section 1, definition of ‘consumer’ (c).

- a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).⁴¹⁰

It is unclear if bystanders also afford the protection of the Act when they suffer harm as a result of unsafe goods. Goods are unsafe if they, due to a characteristic, failure, defect or hazard, present an extreme risk of personal injury or property damage to the consumer *or to other persons*.⁴¹¹ What is more, section 61(5) which prescribes the forms of ‘harm’ for which a supplier may be held accountable under section 61, refers to injury death or illness of *any natural person*⁴¹² and damage or loss of any property and does not limit it to harm to consumers or their property. Therefore, bystanders seem also to be covered by the protection of the Act.⁴¹³ This is astonishing as the producer, importer, distributor or retailer of goods is liable without proof of negligence on the part of the supplier, for any harm caused by the goods.⁴¹⁴ There is no room for the law of delict, however, as a fault (negligence or intention) is not required.⁴¹⁵

As users of goods and recipients or beneficiaries of services are considered consumers in terms of the Act as well, these persons do not need to conclude their transactions directly with the given supplier.⁴¹⁶ Therefore, the recipient of a gift is also regarded as a consumer and does not need to approach the donor in case of a defective good. Instead, he or she can directly approach the supplier.⁴¹⁷ The same applies for the beneficiary of a service which is paid for by a friend or family member, e.g., a professional gardening service. Although such an extensive definition of ‘consumer’ grants broad protection to a ‘consumer’ (who is not a party to a transaction), this begs the question of whether this might not create problems between the user/recipient and the donor/service purchaser. It often seems more desirable to solve problems directly between the person who is a party of a transaction and the supplier, rather than between the end consumer benefiting from the concerned good or service and the supplier. What is more, the phrase ‘if the context so requires or permits’ in the definition of ‘consumer’ is imprecise insofar as it does not give any indication for the exact requirements, because something that might be legally required or permitted might not necessarily be required or permitted from a social perspective.

⁴¹⁰ Section 1, definition of ‘consumer’ (d).

⁴¹¹ Section 53(1)(d). Emphasis added.

⁴¹² Emphasis added.

⁴¹³ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 36.

⁴¹⁴ Melville *Consumer Protection Act* 98.

⁴¹⁵ See Van Huyssteen *et al Law of Contract* 42.

⁴¹⁶ De Stadler *Consumer Law Unlocked* 7.

⁴¹⁷ Although there is no consideration in terms of a gift, the CPA nevertheless applies as there is consideration between the supplier and the consumer (donor).

Although B2B contracts are included in the ambit of the Act, the definition of ‘consumer’ is silent about the question of whether the Act also affords protection to small businesses or individuals who purchase products for business purposes. The wording of the definition of ‘transaction’ suggests that only the supplier is to market or supply his or her products ‘in the ordinary course of (his or her) business’, but that the consumer has to purchase these products ‘privately’. In addition, the existence of a threshold means that the Act extends to small businesses when they make routine purchases or purchases of minor value for their professional activity. Van Eeden correctly reminds that there is no doctrinal necessity for the restriction of consumer protection legislation to a personal context.⁴¹⁸ The Act therefore applies to both B2C and B2B contracts.

Irrespective of the threshold contemplated in section 5(2)(b), the protection of the Act extends also to businesses whose annual turnover or asset value is above this threshold, in terms of product recalls and claims for harm caused by defective products.⁴¹⁹

The legislator also included franchisees as they are often exposed to unfair practices. A franchisee may challenge all terms of the franchise agreements, irrespective of the size of the franchisee in terms of its turnover or asset value.⁴²⁰

De Stadler criticises that the Act does not use the term ‘consumer’ throughout the Act and creates unnecessary uncertainty by also using the term ‘person’.⁴²¹ What is more, the definition of ‘consumer’ – like many other definitions of the Act – is not self-explanatory and contains many cross-references to other definitions (‘person’, ‘goods’, ‘services’, ‘transaction’), which refer themselves to other definitions. It would have been beneficial if certain cross-references had been avoided by merely rephrasing some definitions.

b) Supplier

A supplier is a person who markets any goods or services.⁴²² ‘Market’ as a verb means to promote or supply any goods or services.⁴²³ To promote means to advertise, display or offer to supply goods or services to all or part of the public for consideration, to make any representation that could reasonably be inferred as expressing a willingness to supply goods or

⁴¹⁸ Van Eeden and Barnard *Consumer Protection Law* 43.

⁴¹⁹ De Stadler *Consumer Law Unlocked* 8; ss 53-61.

⁴²⁰ Section 5(6)(b)-(e) and 7. De Stadler *Consumer Law Unlocked* 9.

⁴²¹ De Stadler ‘Section 5’ in Naudé and Eiselen (eds) *CPA Commentary* para 38.

⁴²² Section 1, definition of ‘supplier’.

⁴²³ See definition of ‘market’ in s 1.

services for consideration, or to engage in any other conduct that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.⁴²⁴

For the application of the Act, the supplier must provide the goods or services in the ordinary course of his or her business.⁴²⁵

To supply, concerning goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration, or in relation to services, to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.⁴²⁶

The word ‘includes’ in the definition above means that activities such as selling, renting and hiring are not exclusive, but only examples with respect to goods, whereas selling or performing services, causing them to be performed or provided and so forth in relation to services are exclusive. This means that no other activities are meant to be included in the definition of supplying services. ‘To grant access’ could mean that third parties are involved, for instance, agents selling tickets for spectacles.⁴²⁷

The supplier must provide the goods or services in exchange for a consideration because ‘transaction’ is defined in section 1 as an agreement, the supply or the performance of services for consideration.⁴²⁸

In terms of section 5(8)(c), the Act applies irrespective of the supplier’s legal nature. It therefore applies to individuals, juristic persons, partnerships, trusts, organs of state, entities owned or directed by an organ of state, persons contracted or licensed by an organ of state to offer or supply any goods or services, or public-private partnerships.⁴²⁹ Furthermore, it does not matter if the supplier operates on a for-profit or non-profit basis and if it is required or

⁴²⁴ See definition of ‘promote’ in s 1.

⁴²⁵ See also definition of ‘promote’ in s 1 which also requires a consideration. ‘Business’ means the continual marketing of any goods or services (s 1, definition of ‘business’), whereas ‘market’ as a verb means to promote or supply any goods or services (s 1, definition of ‘market’).

⁴²⁶ See definition of ‘supply’ in s 1.

⁴²⁷ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 315.

⁴²⁸ ‘Consideration’ is defined in s 1 widely and includes anything that has a value (money, checks, property, tickets etc.), but also labour, barter or other goods or services, loyalty credit or award, coupons or other right to assert a claim, or any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the latter.

⁴²⁹ Section 5(2)(a) excludes the application of the CPA in cases where goods or services are promoted or supplied to the State. However, when the State is the supplier, the CPA applies.

licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.⁴³⁰

2.4 Conclusion

Contract terms must be incorporated in the contract in order to be applicable in terms of the Act, and other conditions required by the Act must have been fulfilled. Unfortunately, the illogical structure of Part G of Chapter 2 does not facilitate the ‘incorporation test’ and does not clearly distinguish between incorporation control, content control and interpretational control.

As other legislation applies in conjunction with the Act, some other statutes apply concurrently with the Act where possible in cases of inconsistency between the given pieces of legislation. Consumers still may rely on common law rights because of the principle of freedom of contract. Nonetheless, the parties cannot derogate from rights that are afforded by the Act as it grants a higher level of protection to consumers. Therefore, it is likely that in most cases consumers will choose the Act’s protection rather than the application of common law rules.

Under section 2(1), the Act must not be interpreted in a way that would preclude the consumer from exercising a common-law right. Consumers should thus have the choice in terms of the applicable dispute-resolution mechanisms which exist under the Act and the common law.

As the phrase ‘occurring within the Republic’ in section 5(1) is not clear and differs from other pieces of legislation, such as the National Credit Act. The Act applies irrespective of whether the supplier resides or has its principal office within or outside the Republic. A simultaneous physical presence of the parties in South Africa is not necessary. Furthermore, a transaction can ‘occur’ several times, namely at the time of the conclusion of the agreement or the delivery of the goods or services. The determination of the moment of conclusion of the agreement is particularly difficult for electronic transactions. Sections 22(2) and 23(c) ECTA solve this problem because it is the buyer who will be the offeror in cases where websites consist of platforms of advertisements. In other cases, the usual place of business or residence is regarded as the place where the data message has been sent and received.

⁴³⁰ Section 5(8)(d).

Clauses providing that the law of a particular country will apply cannot supplant the mandatory application of the Act and will be presumed to be unfair in most cases.

The material scope of application of the Act covers every transaction occurring within South Africa unless it is exempted under section 5(2) to (4). The transaction must be made in the ordinary course of business, which excludes once-off transactions. A purposive interpretation on a case-to-case basis might be justified, and consumers must inform themselves to a reasonable degree if their supplier acts in its ordinary course of business. Section 5(6) expands the definition of ‘transaction’ to clubs and other associations, irrespective of whether their members have to pay a membership fee. The reason for this expansion is the application of sections 53 to 61 in case of defective goods.

Franchise agreements, irrespective of the franchisee’s turnover or asset value, are included in the definition of ‘transaction’ in terms of section 5(6)(b) to (e) because large franchisors could otherwise overreach small franchisees.

A further condition of ‘transaction’ is the existence of consideration, which is defined very broadly in section 1. Goods of which a certain amount is given ‘for free’ should be considered being given for consideration as the free part only concerns the supplier’s margin and not the consumer’s consideration. Non-profit organisations should be careful not to accept any ‘consideration’ in order to avoid the application of the Act.

As the consumer’s remedies differ from whether goods or services are supplied, it is important to distinguish clearly between these two categories. Both definitions in section 1 are comprehensive and not exhaustive. The definition of ‘goods’ concerns all possible tangible and intangible products. The definition of ‘service’ is more complicated and less clear. This is because of the interplay between the Act and the Financial Advisory and Intermediary Services Act, the Long-term Insurance Act and the Short-term Insurance Act as well as the Financial Services Laws General Amendment Act. The latter excludes specific industries, but not the application of the National Credit Act. Thus, the Act applies to goods or services sold in terms of a credit agreement.

What is more, the definition of ‘service’ includes rentals and certain *in rem* rights in connection to immovable property. The legislator’s legal qualification might be an over-protection of the consumer and is problematic in terms of the qualification of *in rem* rights as services.

The reason why the rights of a franchisee are mentioned in the definition of ‘service’ seems to be the liability of intermediaries. The consumer is therefore not obliged to engage in a complicated process in order to determine the liable person.

With regard to the definition of ‘promote’, in the case of cross-border advertising and new media, section 5(1)(b) seems to apply only to promotions taking place within South Africa, irrespective of the place of the ultimate transaction.

Regrettably, the Act does not provide for a definition of ‘terms and conditions’, which would ascertain a uniform application of the Act and avoid the circumvention of the Act by specific contract design measures.

Section 5(2) contains several exceptions for the application of the Act. Although the term ‘State’ is not defined, it seems that ‘State’ has a more limited meaning than the concept of ‘organ of state’. The legislator should clarify this question. This would also answer the question of whether companies where the State is a shareholder afford protection. Nonetheless, wherever the State is directly involved, even as a minority shareholder, no protection should be afforded.

Another exception in section 5(2) concerns juristic persons whose asset value or annual turnover equals or exceeds a certain threshold. Large sole proprietorship-consumers with a significant turnover are not excluded, however. This is the consequence of the purpose of the Act that defines ‘consumers’ widely, and reflects the socio-economic reality in South Africa.

The valuation of the turnover or asset value has to be made at the time of the transaction. This moment is difficult to determine as a transaction may happen several times. This applies especially to ongoing supply or service agreements. For practical reasons, it is justified in these cases that the supplier determines those values at least from time to time in order to comply with the Act. Where such information is not available, the Act should nevertheless apply in the limit of its scope of application as it aims to protect consumers and not suppliers. A warranty or declaration that the asset value or turnover is not met is not a viable solution.

The calculation of the annual turnover or asset value is based on official standards. This is problematic for small companies in terms of the costs involved. Instead, the consideration of the numbers in a credit application and/or the company’s tax return could be used.

Credit agreements under the National Credit Act are exempted from the application of the Act. This does however not apply to the goods and services which are subject of the credit

agreement. In any event, a credit provider cannot exclude its liabilities in terms of sections 56(2) and 61 or the common law. In terms of credit marketing, there is duplication with provisions of the National Credit Act, so that section 2(9) CPA applies. As the National Credit Act is not included in the statutes listed in the definition of 'financial services legislation' of the Financial Services Board Act, the Consumer Protection Act is applicable to a certain extent in the credit industry. Its application is however excluded to a certain extent in terms of the Financial Services Board Act which does not refer to credit providers but to banks, mutual banks and co-operative banks.

Incidental credit agreements are not qualified as credit agreements under the National Credit Act, which is why they are not excluded from the ambit of the Consumer Protection Act. The same applies to credit advertising and marketing, where section 2(9) CPA is applicable, i.e., the provisions of the National Credit Act and the Consumer Protection Act apply concurrently where possible. Otherwise, the provision which affords the greater protection applies.

As the Act does not distinguish between unlimited and fixed-term employment contracts, it should apply to both. It does not apply to independent contractors who are not regarded as employees in terms of the Labour Relations Act. Because section 5(2)(e) aims to not put too much a burden on the employer/employee relationship, the phrase 'services to be supplied under an employment contract' should only refer to services supplied by employees. Consequently, the Act applies where an employee receives sub-standard services by his or her employer at a discount. Collective bargaining agreements or collective agreements are also exempted from the application of the Act.

The Act shall not override industry-specific regulations with specific consumer protection schemes. This is why the Minister may grant a permanent or temporary exemption in terms of section 5(3) and (4). The substantive requirements for such an exemption are not drafted out though, which gives much room for discretion.

Despite the existence of exemptions (or exceptions) contained in section 5, there is a joint and several liability in terms of safety monitoring and recall and liability for unsafe goods under sections 60 and 61. A contractual exclusion of liability in terms of section 61 seems not to be possible, as otherwise the weakest link in the supply chain (the retailer) would be left without recourse against the upwards links of the chain, although the latter have more control over the quality of the product and can take insurance against specific risks.

The personal scope of application of the Act is extensive and comprises not only consumers to whom goods and services are marketed or who enter into a transaction with a supplier, but also persons who are not necessarily a party to the agreement as well as franchisees. The definition of ‘consumer’ is therefore very broad.

The phrase 'if the context so requires or permits' in the definition of ‘consumer’ is imprecise and gives no indication with respect to the requirements. Bystanders seem also be covered by the Act, which means that the Act introduces liability without the requirement of any negligence. As the legislature also wanted to protect small businesses, B2B contracts afford the protection of the Act too. This also applies to routine purchases or purchases of minor value for professional purposes. As the definition of ‘consumer’ contains the word ‘person’, juristic persons are regarded as consumers.

Unfortunately, the Act does not apply the term ‘consumer’ systematically and often replaces it by ‘person’. What is more, the definition of ‘consumer’ contains many cross-references which could have been avoided.

In the case of product recalls and claims for harm caused by defective products, the threshold in terms of section 5(2)(b) is irrelevant.

A supplier has to provide the goods or services in the ordinary course of its business, irrespective of its legal nature and of whether it operates on a for-profit or non-profit basis. In any event, there must be a consideration for the supplier’s provision of goods or services.

3. Notice required for certain terms and conditions

When entering into an agreement, the consumer should not be affected by a notice or provision that limits his or her rights or that could be unexpected.⁴³¹ For this reason, section 49 provides that the supplier has to draw the consumer's attention to certain notices and provisions in a manner and form that satisfies the formal requirements of section 49(3) to (5).⁴³² Section 49 therefore has a warning function and must be discussed in the context of the incorporation control.

Although the word 'notice' appears recurrently in the Act, section 1 does not contain a definition of this term. The reason might be that the Act uses this word within different contexts and meanings.⁴³³ In the context of section 49, 'notice' means a written notification or another form of information in writing to the consumer. Kirby correctly states that because of a lack of a separate definition of 'notice', section 22(1) creates the first criterion in respect of plain and understandable language, namely, that it applies to legally prescribed notices or visual representations (representation or documents which are required to accompany goods or services when the consumer acquires such goods or services).⁴³⁴

3.1 Material requirements

It is uncertain why at the beginning of section 49(1), the plural of 'consumer' ('notice to consumers') is used, as opposed to 'provision of a consumer agreement' in the same sentence. This could mean that the legislator wanted to include different communication methods, like entry tickets or notice boards because these are intended for a multitude of consumers. Van Eeden⁴³⁵ argues in this way concerning section 58(1) which refers to section 49. The fact that the wording of section 58(1) correlates rather with section 49(2) as both provisions concern activities or facilities that are subject to certain risks, and not a limitation or assumption of risk or liability, an exemption clause or an acknowledgement of fact as in section 49(1) does not

⁴³¹ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 357.

⁴³² Meumann White Attorneys 'A summary of the consumer Protection Act 68 of 2008' at: <https://meumannwhite.co.za/news-details/25>.

⁴³³ Apart from the abovementioned meaning of 'notice' which appears also for instance in the definitions of 'apply', 'clearly', 'display', 'prescribed', 'price' (a), 'this Act' and in ss 3(1)(b)(iv), 4(4)(b), the word has another meaning in ss 5(4) and 12(2), as there it means a notice in the gazette, which is a public announcement. In s 7(2) the written notice to the franchiser means the formal declaration to end the franchise agreement; the same meaning of 'notice' can be found, for example, in Schedule 2 item 6(2) CPA. Sections 100 and 101 deal with compliance notices, i.e., formal orders of the Commission.

⁴³⁴ Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>.

⁴³⁵ Van Eeden *Guide to the CPA* 179; *Consumer Protection Law* 247.

weaken this argument because section 58(1) *in fine* refers to 'the attention of consumers'⁴³⁶ and to section 49. Therefore, it is imaginable that the legislator had notices to a multitude of consumers in mind and chose to use 'consumer' in the plural form.

The formulation 'must be drawn to the attention of the consumer' (in the singular form) could be understood as an emphasis of the fact that *each* consumer's attention must be drawn to the risks mentioned above, even if a large number of consumers is affected by the notice. In other words, these notions must be visible for every single consumer in the sense of section 49(4)(a).

Section 49(1)(a) to (d) contains the cases in which the supplier has to draw the consumer's attention to certain circumstances which will be discussed in the following.

a) Limitation or assumption of risk or liability, imposition of an obligation or acknowledgement of a fact⁴³⁷

If an agreement contains provisions that limit the supplier's or someone else's risk or liability, constitute an assumption of risk or liability by the consumer, impose an obligation on the consumer to indemnify the supplier or any other person for any cause, or is an acknowledgement of any fact by the consumer, the supplier must draw the consumer's attention in the prescribed form and manner.⁴³⁸

Typical clauses that have such an effect are exemption clauses, indemnity clauses and clauses stating that no representations were made.⁴³⁹

Synonyms for 'exemption clauses' are 'exclusionary clauses', 'exception clauses' or 'disclaimers'.⁴⁴⁰ These clauses are contractual terms which have the objective to limit, alter or exclude the liability, obligations or remedies of a party to the contract that normally originate from an agreement.⁴⁴¹ The importance of exemption clauses should not be underestimated as they serve as a planning instrument to achieve an acceptable distribution of the risk.⁴⁴²

⁴³⁶ Emphasis added.

⁴³⁷ Section 49(1).

⁴³⁸ Section 49(1).

⁴³⁹ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 357.

⁴⁴⁰ Stoop 2008 *SA Merc LJ* 496.

⁴⁴¹ Stoop 2008 *SA Merc LJ* 496.

⁴⁴² Stoop 2008 *SA Merc LJ* 497.

aa) Limitation of the supplier's liability or risk⁴⁴³

Terms that limit the supplier's liability are known as disclaimers or exclusion of liability. They limit any claim of the consumer against the supplier⁴⁴⁴ or limit the amount of a consumer's claim against the supplier, even if the consumer's actual damages exceed this amount.⁴⁴⁵

Provisions by which the consumer is held liable for the loss of or damage to goods before those were delivered to the consumer fall in this category too. Such a clause does not contravene section 19(2)(c), however. The latter provides that goods will remain at the supplier's risk until they are delivered as this provision allows that the parties may agree differently.

bb) Assumption of risk or liability by the consumer⁴⁴⁶

This category comprises warranties that are more limited than those under the common law.⁴⁴⁷

cc) Consumer's obligation to indemnify⁴⁴⁸

These are terms by which the consumer bears the burden of liability or risk that would normally be borne by the supplier. Typical formulations of such clauses are, for instance, 'hold harmless against' or 'bear the risk of' or 'indemnity'.⁴⁴⁹

dd) Acknowledgement of any fact by the consumer⁴⁵⁰

In this category fall terms by which the consumer acknowledges that the contract embodies the entire agreement between the parties or that no representations were made before its conclusion. A term or condition that falsely expresses such an acknowledgement is void in under sections 51(1)(g)(i), 51(3) as it falls in the category of 'blacklisted' terms.⁴⁵¹

Provisions by which the consumer acknowledges that he or she has read and understood the terms of an agreement fall within this category too because this precludes the consumer from alleging that he or she signed the agreement under a mistaken belief.⁴⁵²

⁴⁴³ Section 49(1)(a).

⁴⁴⁴ E.g., by *voetstoots* clauses which provide that the buyer/consumer buys a good 'as is'.

⁴⁴⁵ De Stadler *Consumer Law Unlocked* 118.

⁴⁴⁶ Section 49(1)(b).

⁴⁴⁷ As to implied warranties, see s 56(1).

⁴⁴⁸ Section 49(1)(c).

⁴⁴⁹ De Stadler *Consumer Law Unlocked* 119.

⁴⁵⁰ Section 49(1)(d).

⁴⁵¹ De Stadler *Consumer Law Unlocked* 119.

⁴⁵² De Stadler *Consumer Law Unlocked* 119.

b) Risk of an unusual character or nature⁴⁵³

If a provision or notice concerns any activity or facility that is subject to any risk of an unusual character or nature,⁴⁵⁴ the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances,⁴⁵⁵ or that could result in serious injury or death,⁴⁵⁶ the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in the prescribed form and manner.⁴⁵⁷ A public swimming pool with an entirely covered slide ('tube') preventing natural light from coming through, which has a stroboscope (high frequency flashing light), and where the user gains a speed of 60 to 80 km/h can be harmful because of the risk of epilepsy for certain users (stroboscope effect). Therefore, the supplier (manager) has to draw the fact, nature and potential effect of that risk to the users.

It is not clear what exactly the formulation 'in addition to subsection (1)' at the beginning of section 49(2) means. Either it could mean that the conditions of subsection (1), e.g., the supplier's limitation of liability, have to be fulfilled cumulatively with the conditions of subsection (2), for instance, an activity of an unusual character for which the supplier wishes to limit his liability. Or it could simply mean that the supplier has to call the consumer's attention to the risks mentioned in subsection (2), irrespective of whether there is a limitation of the supplier's liability. The formulation 'if a provision or notice concerns any activity or facility that is subject to any risk' speaks for this viewpoint as it does not refer to subsection (1).

It is submitted that it is rather unlikely that the legislator had in mind to require that the conditions of both subsections (1) and (2) have to be met cumulatively as this would limit the scope of section 49 and its protective and warning function. Section 49(2) must thus be understood in the sense that the supplier must *not only* draw the consumer's attention to exemptions mentioned in section 49(1) (if any) *but also* to the risks mentioned in section 49(2), irrespective of whether there is a limitation or assumption of risk or liability. In addition, the fact that section 49(2) repeats that the requirements of subsections (3) to (5) must be met, also speaks for this solution. In this context, the fact that subsection (1) requires that the '*formal* requirements' of subsections (3) to (5) must be met, whereas subsection (2) merely refers to 'requirements' has no meaning since subsections (3) to (5) exclusively concern formal

⁴⁵³ Section 49(2).

⁴⁵⁴ Section 49(2)(a).

⁴⁵⁵ Section 49(2)(b).

⁴⁵⁶ Section 49(2)(c).

⁴⁵⁷ Section 49(2).

requirements.⁴⁵⁸ Moreover, where it refers to material requirements (e.g., ‘begins to engage the activity’), those are inseparably linked to the formal requirements.

The first possibility, for instance, a notice limiting a risk or liability of the supplier, in addition to a dangerous activity under subsection (2) to which the supplier draws the consumer’s attention, will be the most recurrent situation. It is improbable that a supplier providing for dangerous activities (e.g., parachuting) will not limit its liability. It is conceivable though that a supplier – intentionally or not – merely warns the consumer of the dangers without limiting its liability. In this case, section 49(2) still would make sense as that risk or danger has to be drawn to the consumer’s attention in plain language (so he or she understands the risk), in a conspicuous manner and form which is likely to attract his attention (so he or she actually takes notice of it), and before he or she engages in the activity (so he or she still can change his or her mind). Furthermore, the consumer has to be given an adequate opportunity to receive and comprehend the provision or notice.

3.2 Formal requirements

Section 49(1) *in fine* sets out that the supplier must specifically draw the fact, nature and potential effect of the risk to the attention of the consumer in a manner and form that satisfies the requirements of section 49(3) to (5).⁴⁵⁹

a) Plain language

According to section 49(3), the provision, condition or notice contemplated in subsection (1) or (2) has to be written in plain language, as described in section 22.⁴⁶⁰

Section 22(1) regulates that notices, documents or visual representations which are required in terms of the Act or other law be produced in plain and understandable language as well as in the prescribed form, if any.

Efforts to make legal documents more understandable date back to 1425, when a commission was appointed 'to see and examine the bulkis of law of this realme (...) and mend the laws that need amendment'. In the 16th century, Edward VI wished 'that the superfluous and tedious

⁴⁵⁸ Emphasis added.

⁴⁵⁹ Gibson and Hull *Everyone’s Guide to the CPA* 163.

⁴⁶⁰ Generally, there is no requirement that an agreement has to be in writing, but s 49 imposes this obligation. What is more, according to s 50(1), the Minister may prescribe categories of consumer agreements that are required to be in writing. These issues will be discussed at a later stage.

statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them.⁴⁶¹

Under the common law, courts were limited to objective factors when setting aside a contract, such as structure, layout, wording and language. The only applicable common-law basis for setting aside a contract was misrepresentation or mistake. The court would consider if the error was *iustus*, i.e., if a reasonable person in the given situation would have been similarly misled.⁴⁶² The doctrines of *caveat subscriptor*⁴⁶³ and *pacta sunt servanda* often led to an unsuccessful outcome for the consumer. Subjective factors such as the sophistication of the consumer, or his or her home language were difficult to utilise in this framework, even though courts were increasingly taking into account structure and wording of a contract when evaluating whether an error was *iustus*.⁴⁶⁴ Thus, the common-law principles are insufficient in order to address the problem of standard terms that are intelligible to most consumers.⁴⁶⁵

The plain language requirement is inseparably linked to the problem of standard terms as the contents of standard provisions are hidden from the consumer due to many factors, such as access, print, language, legal jargon and psychological factors.⁴⁶⁶

Section 22 is stipulated under the umbrella right of information and disclosure. When interpreting this provision, certain purposes set out in section 3 must be given effect. Section 3(1)(b)(iv) aims to promote and advance the social and economic welfare of consumers by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers whose ability to read and comprehend written documents is limited

⁴⁶¹ Office of the Scottish Parliamentary Counsel 'Plain Language and Legislation Booklet' (Feb. 2006) at 1 ('Drafting matters! guidance') at <http://www.scotland.gov.uk/Publications/2006/02/17093804/0>. See also Gouws 2010 *SA Merc LJ* 79.

⁴⁶² Naudé/Lubbe 2005 *SALJ* 454.

⁴⁶³ According to the *caveat subscriptor* principle, the parties are bound to the terms of an agreement when it is reduced in writing as signature signifies assent thereto. The burden is therefore placed on the consumer who has to protect himself by understanding the terms before signing it as he will be bound to their ordinary meaning. The CPA shifts the burden of 'understanding' to the supplier in terms of ss 22 and 50. However, the common-law principle of *caveat subscriptor* remains in existence, but the burden in terms of understanding the agreement has been shifted from the consumer to the supplier. See Tennant/Mbele 2013 *De Rebus* 17. Examples where the *caveat subscriptor* principle was held against the consumer under the common law: *Van Vuuren v Kloppers Diskontohuis (Edms) Bpk* 1979 (1) SA 1053 (O), *Die Trust Bank van Afrika Beperk v Du Toit* 1961 (3) SA 36 (T), *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (AD), *Bhikagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E), *Burger v Central South African Railways* 1903 TS 571.

⁴⁶⁴ Newman 2012 *Obiter* 638. Examples for this doctrine: *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C); *Diners Club (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C); *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W); *Roomer v Wedge Steel (Pty) Ltd* 1998 (1) SA 538 (N); *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA). These cases served as guidelines when s 22(2)(a)-(d) CPA was drafted.

⁴⁶⁵ Naudé 2006 *Stell LR* 379.

⁴⁶⁶ Eiselen 1989 *De Jure* 45.

because of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented.

Another purpose of the Act is improving consumer awareness and information, and encouraging responsible and informed consumer choice and behaviour.⁴⁶⁷ This enables consumers to compare products and prices, which has a positive effect on the efficiency of markets.⁴⁶⁸ Informed consumers are enabled to compare prices and to shop around so that markets become more effective by competition. Eventually, prices might decrease.⁴⁶⁹

Documents that are presented in a clear and understandable language also promote consumer confidence, empowerment and the development of a culture of consumer responsibility, which is another purpose of the Act.⁴⁷⁰

It can thus be said that the plain language requirement in section 22 serves transparency and procedural fairness⁴⁷¹ and makes the consumers' rights accessible to them. Without procedural fairness, there is an information asymmetry between the supplier and the consumer.⁴⁷² Procedural fairness concerns the process of contracting itself by improving the conduct of the 'potential bargaining process',⁴⁷³ whereas substantive fairness refers to the content of the agreement itself.⁴⁷⁴ Transparency is achieved by understandable language, a clear structure of the document, readability and adequate opportunity for reflection.⁴⁷⁵ Inversely, a right which is not accessible is equivalent to a non-existing right.⁴⁷⁶ Therefore, plain language is a valuable tool to promote procedural fairness proactively as it enhances disclosure and the consumers' understanding of the content of an agreement.⁴⁷⁷

Documents written in plain language are not only beneficial for consumers and their understanding of the document but also for suppliers. This is true because a document written in plain language increases the consumer's confidence in the supplier and avoids litigation because the consumer is aware of its obligations and will less likely breach the contract.

⁴⁶⁷ Section 3(1)(e).

⁴⁶⁸ Stoop/Chürr 2013 *PELJ* 530.

⁴⁶⁹ Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

⁴⁷⁰ Section 3(1)(f).

⁴⁷¹ Stoop/Chürr 2013 *PELJ* 531.

⁴⁷² Naudé 2006 *Stell LR* 377.

⁴⁷³ Naudé 2006 *Stell LR* 377.

⁴⁷⁴ Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁴⁷⁵ Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁴⁷⁶ Stoop and Chürr 2013 *PELJ* 545.

⁴⁷⁷ Stoop 2011 *Int. J. Private Law* 329, 330.

Section 22 concerns only written documents and visual representations but not oral agreements.⁴⁷⁸ Barnard is hesitant about this question though and points out that the courts will have the final say about this.⁴⁷⁹ It is submitted that the wording in section 22 is unambiguous as it concerns only notices, documents or visual representations, i.e., *written* documents. What is more, section 22(2)(d) concerns illustrations, headings or other aids to reading, which by nature only apply to written texts in a broader sense and graphical illustrations. For practical reasons, the application of section 22 to oral agreements also seems to be difficult. The assessment of whether the plain language requirements are met seems impossible *ex post facto*, save if they are recorded on tape (which would be very unusual).

Interestingly, section 22 CPA has a broader ambit as section 64 NCA because not only documents but also notices and visual representations are included.⁴⁸⁰

Although section 22 does not apply to the Consumer Protection Act – or other statutes – itself, it is regrettable that the legislature did not tend to make this statute more accessible by writing it in plain language. This does not only apply to consumers and suppliers but also to lawyers who struggle to understand the provisions and the structure of the Act.⁴⁸¹

Unfortunately, section 22 – as the rest of the Act – is far from being written in plain language. This is not only because section 22 does not offer any help in the understanding of what plain language is, save some abstract specifications as regards the content, the organisation, the vocabulary or the use of illustrations,⁴⁸² or because of the lack of guidelines published by the Commission.⁴⁸³ Above all, it is because the structure of the Act is unfortunate and not accessible for most consumers.⁴⁸⁴ The language itself of the Act is complicated and far from being understandable for most people.⁴⁸⁵ The numerous cross-references between sections⁴⁸⁶

⁴⁷⁸ Stoop/Chürr 2013 *PELJ* 531.

⁴⁷⁹ Barnard J 2014 *Tex. J. Cons. & Comm. Law* 11.

⁴⁸⁰ The National Credit Act 34 of 2005 was the first statute that required that documents be drafted in plain language. Besides the CPA, the Companies Act 71 of 2008 also defines in its s 6(4) and (5) plain language concerning the drafting of a prospect, notice, disclosure or other document that does not have a prescribed form.

⁴⁸¹ See De Stadler 'In search of the plain language standard' *Consumer Law Review* (Juta) April 2012, <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1/> (no longer available).

⁴⁸² Section 22(2)(a)-(d).

⁴⁸³ See s 22(3) and (4).

⁴⁸⁴ The CPA is divided into 6 chapters and 2 schedules. The chapters themselves are divided into different parts containing 122 sections, with probably far more than a thousand subsections, which themselves are subdivided into further subdivisions. What is more, the headings of the various parts, chapters and sections are not always understandable at first sight. For instance, the consumer's right to choose (Part C) contains provisions such as s 15 (pre-authorisation of repair or maintenance services) or s 14 (expiry and renewal of fixed-term agreements).

⁴⁸⁵ Examples are 'conspicuous' (ss 25(1)(b), (2), 49(4)(a)), 'import' (s 22(2)), or 'unconscionable' (heading of s 40).

⁴⁸⁶ Section 58(1)(c) for example refers to s 49, which itself refers further to s 22, which again refers to guidelines it subsections (3) and (4) which do not exist yet...

and even between definitions and sections⁴⁸⁷ frustrate a reasonable reading flow. Finally, the fact that there are too many open questions, uncertainties, unfortunate or ambiguous formulations and unintentional omissions⁴⁸⁸ does not facilitate the reading of the Act either.

Coertse argues that the reading of the Act is 'cumbersome (...) and requires undue effort'.⁴⁸⁹ Others, like Bekink and Botha assert that it is debatable whether pieces of legislation should be drafted to be understandable by the general population.⁴⁹⁰ This viewpoint misconceives however the fact that statutes like the Consumer Protection Act which elevate plain language to a fundamental consumer right⁴⁹¹ have to be accessible to consumers so that they can exercise their rights. Otherwise, these rights are being 'administrated' in an ivory tower where only legally trained persons can fully understand them. This cannot be the purpose of fundamental consumer rights, however. This is also Coertse's opinion.⁴⁹² This right seems not to be enforceable though because there is no evidence in the Act or the Constitution that such a right exists for statutes. Nevertheless, the legislature should aim to make statutes more accessible to the public, irrespective of whether or not they enshrine fundamental consumer rights.

aa) Meaning of 'plain language'

A document or visual representation is in plain language if the requirements of section 22(2) are met. This means that consumers must not only be able to understand the content of the document but also its meaning and effect, i.e., the legal consequences, and its express and implied meaning.⁴⁹³ Unfortunately, the legal consequences are not always apparent from the text as they are often implied. Therefore, consumers have to be explicitly informed of these implications before the plain-language requirement is fulfilled.⁴⁹⁴

Section 22(2) (a) to (d) contains a list of criteria which have to be taken into account when considering if a document is in plain language. These are the context, comprehensiveness and

⁴⁸⁷ See definitions of 'alternative dispute resolution agent' in s 1 (b) referring to s 82(6), 'clearly' referring to s 22, 'consumer' (b) referring to ss 5(2) and (3) concerning exemptions of this definition (*sic*), 'price' (a) referring to s 23 and so forth.

⁴⁸⁸ These will be discussed in this thesis as far as they concern its subject.

⁴⁸⁹ Coertse 2014 *De Rebus* 28.

⁴⁹⁰ Bekink and Botha 'Statute Law Review' at https://www.up.ac.za/dspace/bitstream/2263/3430/1/Bekink_Aspects%282007%29.pdf (this pre-copy-editing, author-produced PDF of an article accepted for publication in *Statute Law Review* following peer review seems no longer available).

⁴⁹¹ See heading of s 22, where the word 'right' is used.

⁴⁹² Coertse 2014 *De Rebus* 28.

⁴⁹³ Stoop/Chürr 2013 *PELJ* 534, De Stadler 'In search of the plain language standard' *Consumer Law Review* (Juta) April 2012 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1/> (no longer available); Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 10.

⁴⁹⁴ De Stadler *Consumer Law Unlocked* 106.

consistency of the document,⁴⁹⁵ its organisation, form and style,⁴⁹⁶ the vocabulary, usage and sentence structure,⁴⁹⁷ as well as the use of any illustrations, examples, headings or other aids to reading and understanding.⁴⁹⁸

Gouws prefers the term ‘features’ in terms of section 22(2)(a) to (d), as opposed to ‘criteria’,⁴⁹⁹ and Redish suggests that standards, contrary to guidelines, are rigid, measurable and do not require judgement.⁵⁰⁰ These distinctions seem however not to have any practical relevance because it is evident that the ‘criteria’, ‘features’ or ‘standards’ set out in section 22(2) are not sufficient in order to determine what ‘plain language’ actually means.

Gordon and Burt correctly point out that the definition contained in section 22(2) not only deals with grammar and wording but also is about the content, structure, design and style of the document, and has therefore been lauded internationally.⁵⁰¹ The definition is too broad and imprecise however and does not give much direction to suppliers.⁵⁰² The objective of plain language is, according to Stoop, to address technical and archaic vocabulary, passive voice constructions, complicated sentences and poor organisation.⁵⁰³ According to Gouws, plain language is direct and straightforward, and designed to deliver its message to the reader clearly, effectively and without undue effort. This is achieved by avoiding any obscurity, unnecessary words and complex sentences.⁵⁰⁴

In the following, section 22(2)(a) to (d) will be discussed in detail in order to give more meaning to the expression ‘plain language’.

(i) Context, comprehensiveness and consistency

‘Context’ means the circumstances around the agreement to be taken into consideration when the consumer reads the document. One can thus take into consideration previous experience.⁵⁰⁵

Gordon and Burt use the following example: A consumer who is subscribing a DVD rental

⁴⁹⁵ Section 22(2)(a).

⁴⁹⁶ Section 22(2)(b).

⁴⁹⁷ Section 22(2)(c).

⁴⁹⁸ Section 22(2)(d).

⁴⁹⁹ Gouws 2010 *SA Merc LJ* 89.

⁵⁰⁰ Redish 2008 *Clarity* 32.

⁵⁰¹ Gordon/Burt *Without Prejudice* 60.

⁵⁰² Stoop ‘Section 22’ in Naudé and Eiselen (eds) *CPA Commentary* para 6.

⁵⁰³ Stoop *Int. J. Private Law* 330.

⁵⁰⁴ Gouws 2010 *SA Merc LJ* 81.

⁵⁰⁵ Stoop/Chürr 2013 *PELJ* 534, Stoop 2011 *Int. J. Private Law* 333.

contract very likely knows what a DVD is, as it is unlikely that he or she would not be in this context if he did not.⁵⁰⁶

The context too in which a clause can be found must be taken into account. In *Royal Canin South Africa v Cooper*,⁵⁰⁷ a suretyship obligation was contained in a sentence which started with an acknowledgement that the standard terms have been read and understood. The court was of the opinion that the document was misleading. In *Diners Club v Thorburn*, the court held that the inclusion of certain terms within the context of the contract turned it 'into a trap containing onerous clauses which would not reasonably be expected by the other party'.⁵⁰⁸

'Comprehensiveness' means that the document should contain all information necessary to understand the contract. In order to assess the comprehensiveness or completeness of a document, its content must be taken into account so that consumers can make an informed choice.⁵⁰⁹

Stoop believes that comprehensiveness not only refers to the content of the document but also how it is written.⁵¹⁰ It is suggested though that this rather refers to other requirements, such as consistency, organisation, form and style, vocabulary, usage and sentence structure and illustrations, examples, headings or other aids to reading and understanding.⁵¹¹

'Consistency' means that the terminology and the style used in the document must be the same throughout the entire document. The consistent use of terminology, headings and the sentence structure have to be taken into consideration.⁵¹²

(ii) Organisation, form and style

The organisation, form and style of a document concern its structure in respect of the use of highlighted information (text boxes, bold...), the paragraph structure and the font type.⁵¹³ Newman distinguishes between typographical and linguistic readability. The former concerns the physical legibility (font size, colours, layout, headings),⁵¹⁴ whereas the latter refers to 'legal

⁵⁰⁶ Gordon/Burt *Without Prejudice* 59.

⁵⁰⁷ *Royal Canin South Africa (Pty) Ltd v Cooper* 2008 (1) SA 644 (SECLD) – hereafter *Royal Canin South Africa v Cooper*.

⁵⁰⁸ *Diners Club SA (Pty) Ltd v Thorburn* 1990 (2) SA 870 (C) – hereafter *Diners Club SA v Thorburn*.

⁵⁰⁹ Stoop/Chürr 2013 *PELJ* 534; Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 13.

⁵¹⁰ Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 13. Stoop correctly points out in para 14 that the way of how a document is written is a question of consistency.

⁵¹¹ See discussion below.

⁵¹² Stoop/Chürr 2013 *PELJ* 535.

⁵¹³ Stoop 2011 *Int. J. Private Law* 333.

⁵¹⁴ Newman 2010 *Obiter* 738, Newman 2012 *Obiter* 637.

language' which is often deterrent for consumers to read a contract.⁵¹⁵ In other words, legibility is the ease with which the given document is read.⁵¹⁶ In order to meet this requirement, no small print should be hidden, and important information should be mentioned at the top of a document, for instance.⁵¹⁷

These requirements played an important role in various court rulings. In *Diners Club SA v Livingstone*,⁵¹⁸ the court stated: '(...) a series of conditions in incredibly small print, not designed to be read without the aid of magnifying equipment'.⁵¹⁹ In *Mercurius Motors v Lopez*,⁵²⁰ the court analysed the variation in font size and format and its impact on the consumer's attention to exemption clauses.⁵²¹ In this decision, the Supreme Court had to decide on contract terms which were printed and located in a way that the consumer did not necessarily pay attention to them. It held that the standard form misled the consumer because it was unclear and confusing.⁵²² The court also decided that an exemption clause that undermines the very essence of a contract should be brought to the attention of the client and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.⁵²³

Newman correctly points out that suppliers invest a lot of time and money for their advertising. They want to attract new customers by using sophisticated techniques, such as certain font types in big sizes or contrasting colours. Besides, Naudé correctly argues that companies send out signals in advertising that contracting with them would be a positive experience and that the customer can trust the supplier.⁵²⁴ Only when drafting agreements, the same suppliers seem to forget about all these techniques which are aimed to attract the consumers' attention.⁵²⁵

(iii) Vocabulary, usage and sentence structure

'Vocabulary, usage and sentence structure' refers to the readability of the document by using short sentences, no jargon or the active voice.⁵²⁶

⁵¹⁵ Newman 2010 *Obiter* 741, Newman 2012 *Obiter* 638.

⁵¹⁶ Gouws 2010 *SA Merc LJ* 89.

⁵¹⁷ Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

⁵¹⁸ *Diners Club SA v Livingstone* 1995 (4) SA 493 (W) – hereafter *Diners Club SA v Livingstone*.

⁵¹⁹ *Diners Club SA v Livingstone* at 495I.

⁵²⁰ *Mercurius Motors v Lopez* 2008 (3) SA 572 – hereafter *Mercurius Motors v Lopez*.

⁵²¹ *Mercurius Motors v Lopez* at 574F-H, 575A-C.

⁵²² *Mercurius Motors v Lopez* at 576D-F.

⁵²³ *Mercurius Motors v Lopez* at 578A.B.

⁵²⁴ Naudé 2006 *Stell LR* 368.

⁵²⁵ Newman 2010 *Obiter* 738.

⁵²⁶ Stoop/Chürr 2013 *PELJ* 535, Stoop 2011 *Int. J. Private Law* 334.

The extension of the plain language requirement to headings is particularly interesting in this context because many contracts excluded the headings from interpretation. Section 22(2)(d) now prohibits a drafter from doing so.⁵²⁷

With regard to the term ‘plain language’, it is suggested that not the information contained in a document is made understandable but the language expressing this information, which ultimately leads to the understanding of the content. De Stadler is of the view that the term ‘plain language’ is misleading, and it would be better to speak of ‘understandable language’ instead.⁵²⁸ She equates ‘plain’ with ‘simple’, which could lead to the misconception that drafting a document in plain language would mean ‘dumbing down’ the document.⁵²⁹ Remarkably, the heading of section 22 is entitled ‘Right to information in plain and understandable language’. The legislator did not use the formulation ‘simple and understandable language’ or simply ‘understandable language’ in the provision itself though.

A look in a dictionary reveals that ‘plain’ has the following meanings: ‘not decorated or elaborate; simple or basic in character’, or ‘easy to perceive or understand; clear’, or ‘(of written or spoken usage) clearly expressed, without the use of technical or abstruse terms’. The following examples are given: ‘An insurance policy written in plain English’, or ‘I think the candidates need to be very specific and speak in plain English’.⁵³⁰

De Stadler correctly concludes that ‘plain language’ means ‘clear’ or ‘understandable’ language. The adjectives ‘plain and understandable (language)’ used in the heading of section 22 are therefore a tautology⁵³¹ and not two adjectives with different meanings.

Stoop asserts that plain language leads to effective communication and has nothing to do with anti-intellectual or anti-literary documents. Instead, it leads to clearer and often more accurate writing.⁵³² This viewpoint illustrates the objective of the plain language requirement. The legislator did not intend to oversimplify the language of documents but rather make them more understandable so that the parties can communicate effectively.

⁵²⁷ Newman 2012 *Obiter* 645.

⁵²⁸ De Stadler *Consumer Law Unlocked* 105.

⁵²⁹ De Stadler ‘In search of the plain language standard’ *Consumer Law Review* (Juta) April 2012 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1/> (no longer available).

⁵³⁰ Definitions and examples from Stevenson and Waite *Oxford Dictionary* s.v. ‘plain’.

⁵³¹ The noun ‘tautology’ is often used synonymously with ‘pleonasm’, but strictly spoken they cover different word categories. See, e.g. Stevenson and Waite *Oxford Dictionary* s.v. ‘tautology’ and ‘pleonasm’.

⁵³² Stoop 2011 *Int. J. Private Law* 334.

Newman gives some excellent examples of terms and conditions which have been redrafted by suppliers. Nedbank, for instance, changed clause 2.5 of its conditions from

'Ownership of the card vests in the bank and the cardholder shall surrender the card to the bank...'

into:

'We are the owners of the card and, when your card account is closed for whatever reason, you must give the card back to us...' (now clause 2.7).

Furthermore, Nedbank also changed clause 2.2 from

'By retaining and/or using the card, the cardholder accepts all the terms and conditions herein contained and such acceptance shall be deemed to have taken place in Johannesburg'

into:

'2.2 If you do not want the card, you must destroy it immediately without using it and also notify us in writing thereof.

2.3 By keeping and/or using the card you accept all the terms and conditions of use.'

These examples illustrate that a sentence that formerly was written in words belonging to a high register level can be made more understandable by replacing words, such as 'vest' (with the misleading preposition 'in'), 'surrender' and 'deemed', and by splitting it up in more digestible pieces. It seems however difficult to further 'simplify' this sentence without sacrificing its meaning. Plain language is not baby talk after all.

(iv) Use of illustrations, examples, headings or other aids to reading and understanding

Besides the language itself, also the visual presentation of a document (organisation, form and style, illustrations, headings or other aids to reading and understanding) must be considered when assessing if the plain-language requirement is met. These techniques aim to make the document more inviting and understandable.⁵³³ Therefore, devices such as charts, real-life examples, headings structuring the text and making it more 'digestible' help consumers to understand the document better and make it more readable. As a result, 'plain language' is not only about words, but also about how a text is laid out.⁵³⁴

A visually appealing document with a well thought out design and layout can significantly contribute to its comprehensibility. Besides, an appealing and well-structured layout empowers

⁵³³ Stoop 2011 *Int. J. Private Law* 334.

⁵³⁴ De Stadler 'In search of the plain language standard' *Consumer Law Review* (Juta) April 2012 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1> (no longer available).

the readers (consumers) to read selectively and to find clauses easily they are looking for.⁵³⁵ In *Dlamini v Standard Bank*,⁵³⁶ for example, the court outlined the necessity of a comprehensible presentation as follows:

'For lawyers and laypersons alike, the form of the Bank's standard agreement is an unappetising formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all'.⁵³⁷

The wording of section 22 is unfortunate because it seems to apply the 'plain language' requirements also to visual representations, like photos, illustrations, drawings or sketches. Doubtlessly, the caption belonging to such a visual representation, wherever it can be found (under, above, beside or on the visual representation) must meet the requirements of section 22(2). As a visual representation itself, e.g., an illustration, is technically speaking not drafted in a language, the term 'plain language' in section 22 must thus be read as 'clearly' or 'understandable'. Hence, the plain-language requirement could be interpreted in the context of the phrase 'understand the content, significance and import'.⁵³⁸ The term 'plain language' in section 22 is therefore not only misleading but also too narrow. That is why section 22(2) should have been drafted as follows:

'For the purposes of this Act, a notice or document is in plain language and a visual representation is understandable if it is reasonable to conclude...'

How a document is structured and organised can hugely contribute to its comprehensibility. Ruth Baitsewe makes some interesting suggestions that probably almost everyone who regularly deals with different kind of texts has experienced. She gives some examples of how a text can be structured in order to empower the reader (consumer) to read selectively, such as descriptive headings that help to seize the information in the text, a table of contents for a better navigation within longer texts, text boxes that highlight important information, or a legible font type⁵³⁹ and size. One should also opt for enough white spacing between paragraphs and capital

⁵³⁵ Ruth Baitsewe 'Plain Language: More than just 'plain' words' *Consumer Law Review* (Juta) June 2012 at https://jutralaw.co.za/newsletter/newsletter/consumer-law-database_jun-2012-1-1-1-1-1-1 (no longer available).

⁵³⁶ *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) – hereafter *Standard Bank of South Africa v Dlamini*. This case dealt, among other issues, with the plain language requirements. The court held at paras [48]-[50] that strictly interpreted neither s 63 nor s 64 NCA assist an illiterate person, but positively interpreted the plain language provisions of the NCA embody the right of the consumer to be informed by reasonable means of the material terms of the document he signs. In addition, the supplier bears the onus to prove that he took reasonable measures to inform the consumer of the material terms of the agreement.

⁵³⁷ *Standard Bank v Dlamini* para [53].

⁵³⁸ Section 22(2).

⁵³⁹ The drafter of a document should keep in mind that not only the font size, but also the font type can contribute to a better legibility. Some argue that the readability of longer texts is facilitated by the use of serif fonts, such as Times New Roman, rather than sans serif fonts, such as Arial. The opinions on this question differ, and drafters will be well advised if they try out different font types in order to decide which one is best suited. On the legibility

letters (only to highlight important words).⁵⁴⁰ De Stadler gives other examples, especially for the design of forms, but also for terms and conditions, such as avoiding the centring and full justification of texts, ensuring sufficient contrast between the text and the background colours, and choosing lines over blocks.⁵⁴¹

This discussion has however only a limited impact on section 49(3) because section 49(3) provides that the 'provision, condition or notice (...) must be written in plain language'. As a matter of fact, a notice, for instance, may contain visual representations, but the notice itself that limits the supplier's liability or concerns a risky activity, is rather a written document.

bb) Meaning of 'ordinary consumer'

Section 22(2) demands that 'an ordinary consumer of the class of persons for whom the (...) document (...) is intended' is able to understand the document. This definition is somewhat flexible as it takes the specific market with the targeted consumers into account. The 'ordinary consumer' is thus a consumer who is 'ordinary' in a specific market. In other words, not only lawyers and consumer protection specialists should be able to understand the agreement in question, but also 'ordinary' consumers. This is a recent phenomenon in South Africa.⁵⁴²

The phrase 'for whom the notice, document or visual representation is intended' indicates that the supplier must know its target audience in advance.⁵⁴³

Nowadays, consumer and market research specialists can define typical consumers for certain products. It is submitted though that this flexible approach has its limits because certain products cannot be limited to a specific class of consumers because the consumers and their respective markets are too heterogeneous. For instance, a loan agreement is typically concluded both by wealthy and business-experienced people (who prefer paying interests that may be lower than the interests paid out for a specific investment) as well as by poor and inexperienced consumers (who have no other choice than financing certain goods with a loan).

and readability of font types, see 'It's about legibility' at <http://www.fonts.com/content/learning/fontology/level-4/fine-typography/legibility>.

⁵⁴⁰ Ruth Baitsewe 'Plain Language: More than just 'plain' words' *Consumer Law Review* (Juta) June 2012 at https://jutralaw.co.za/newsletter/newsletter/consumer-law-database_jun-2012-1-1-1-1-1-1 (no longer available).

⁵⁴¹ De Stadler 'Plain language tip: 10 ways to design better forms' *Consumer Law Review* (Juta) June 2015 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-june-2015/> (no longer available).

⁵⁴² Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>, Gordon/Burt 2010 *Without Prejudice* 60.

⁵⁴³ Stoop/Chürr 2013 *PELJ* 533.

On the other hand, the flexible approach makes sense as the complexity of a contract may differ, depending on the complexity of the product or service.⁵⁴⁴ Terms for the sale of a hairdryer can be much 'simpler' than terms for the sale of a luxurious car or a life insurance policy, for example. What is more, a more flexible approach makes it possible to take into consideration all possible relationships between consumers and suppliers and leaves much discretion to persons who are responsible for interpreting the provisions of the Act, like the National Consumer Commission.⁵⁴⁵

This fact is however balanced by the requirement that the 'ordinary consumer' only has to have 'average literacy skills and minimal experience as a consumer of the relevant goods or services.'⁵⁴⁶ This means that in any case, the document must be drafted rather for inexperienced and unsophisticated consumers than for well-educated ones with experience.⁵⁴⁷

In this context, it is crucial to understand the South African population in terms of education. According to recent data (2017), 95 % of South Africans age 15 and over can read and write.⁵⁴⁸ Regardless of statistical errors, this is an increase of over 5 % in comparison to 2012.⁵⁴⁹ One should nevertheless bear in mind that a considerable number of South Africans are functionally illiterate and their reading and writing skills are inadequate to manage daily living and employment tasks that require reading skills beyond a basic level. The average level of education in South Africa is equal to Grade 7.⁵⁵⁰ The 2001 census revealed that over one third (33.9 %) of South African adults aged 20 or older are functionally illiterate.⁵⁵¹ According to other sources, the average literacy level in 2012 was 89 %.⁵⁵² Despite these somehow contradictory data,⁵⁵³ one gets a clear picture of the level of education in South Africa. Most

⁵⁴⁴ De Stadler 'In search of the plain language standard' *Consumer Law Review* (Juta) April 2012 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1/> (no longer available).

⁵⁴⁵ Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>.

⁵⁴⁶ Section 22(2).

⁵⁴⁷ De Stadler *Consumer Law Unlocked* 105, Barnard 2014 *Tex. J. Cons. & Comm. Law* 5.

⁵⁴⁸ See *Unesco eAtlas of Literacy* at <https://tellmaps.com/uis/literacy/#!/tellmap/-601865091>.

⁵⁴⁹ Stoop/Chürr 2013 *PELJ* 533 citing World Bank 2012 <http://worldbank.org> (no longer available).

⁵⁵⁰ Gouws 2010 *SA Merc LJ* 87.

⁵⁵¹ Aitchison and Harley 2006 *Journal of Education* 93.

⁵⁵² *Mail & Guardian* article 'SA adults lag behind in global literacy stakes' (article cited by Barnard J 2014 *Tex. J. Cons. & Comm. Law* 5 – <http://bit-ly/XeZSOw> (no longer available). See also Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁵⁵³ Aitchison and Harley lament the fact that statistical data on literacy and adult basic education is still unreliable, confused and self-contradictory, but more often simply absent, due to, among other factors, misleading claims of the Department of Education. See Aitchison and Harley 2006 *Journal of Education* 99.

South African consumers are not only unable to understand business and legal documents⁵⁵⁴ (which is not uncommon either in developed countries) but also 'basic' written information.

Having this in mind, the best way to cater for the plain language requirement is, according to Kirby, to adopt the view of an officious bystander and to apply a test of objective reasonableness on whether or not the consumer concerned is confronted with plain language.⁵⁵⁵ 'Officious bystander' is a term given to a person who looks on but has nothing to do with the activity that is in progress,⁵⁵⁶ who is a disinterested party or third person.⁵⁵⁷ Although this position tries to objectivise the reasonableness and has undeniable advantages, it is submitted that it does not go far enough because it does not adopt the consumer's view.

Better protection could be achieved by taking the view of an 'objective observer' in the position of the party to whom the document is intended, i.e., the consumer.⁵⁵⁸ Although in German civil law, this method is used for the interpretation of declarations of intent that have to be received by the other party,⁵⁵⁹ such as a notice of declaration, it would also achieve equitable outcomes for South African consumers. This approach seems more suitable in order to determine whether a supplier complies with the plain language requirement as it takes an objectivised position in the role of the consumer.

Section 22(2) not only speaks of an 'ordinary consumer' but the latter must also be 'of the class of persons' for whom the document in question is intended. This seems to suggest that there are different 'types' (classes) of ordinary consumers and that it is necessary to determine the average literacy of a particular class of consumers, and not the average literacy of consumers generally, e.g., by considering official data from Statistics South Africa.⁵⁶⁰ The threshold to

⁵⁵⁴ Gordon/Burt 2010 *Without Prejudice* 60.

⁵⁵⁵ Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>.

⁵⁵⁶ See 'Bystander' at <http://thelawdictionary.com/bystander>.

⁵⁵⁷ See <http://legal-dictionary.thefreedictionary.com/bystander>.

⁵⁵⁸ In German: '*Objektiver Dritter in der Person des Empfängers*' or '*objektiver Empfängerhorizont*'.

⁵⁵⁹ Pursuant to the so-called 'normative interpretation', a declaration of intent which has to be received by the other party (*empfangsbedürftige Willenserklärung*) is to be interpreted according to §§ 133, 157 BGB. § 133: 'When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.' § 157: 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'

⁵⁶⁰ Gouws 2010 *SA Merc LJ* 88.

meet concerning the language used in the given document is therefore low for the consumer but high for the supplier.⁵⁶¹

Some authorities suggest that suppliers would have to draft several sets of the document in question in order to cater to different target audiences.⁵⁶² Stoop and Chürr suggest that suppliers must consider that they have to draft the documents for people with 'minimal experience as a consumer of the relevant goods or services'. This means that suppliers should focus on consumers with the least experience, and not the average consumer.⁵⁶³ It is submitted that the legislator does not expect suppliers to do so because a version that caters for consumers with the least experience also caters for other consumers. Suppliers then avoid the daunting task of drafting different sets of contractual documents. The example of Nedbank's redrafted terms and condition mentioned above illustrates this well. Moreover, the assessment of the intellectual capacities and the experience of a consumer within seconds or minutes requires psychological skills that the supplier's representatives often do not have. Often it is not possible to 'classify' people with regard to their education or sophistication. Many people move around in different social classes and adapt accordingly. Even though market research tools are quite sophisticated, one cannot always conclude a consumer's level of sophistication or experience from the fact that he or she purchases a particular product or service. Although sophisticated consumers aim for a certain market segment, this is not always true *vice versa* because ultimately, 'market' is also defined by the purchasing power, which does not necessarily correlate with a consumer's sophistication. What is more, most products and services are designed for a multitude of different consumers. On the other hand, a rather sophisticated consumer can be naïve in terms of aspirational marketing and 'blind' for objective arguments as long as he or she aspires to get certain brands or products. It is also difficult to assess an average literacy of an ordinary consumer belonging to a particular class of consumers, as opposed to assessing the average literacy of a consumer in general by relying on statistical data.⁵⁶⁴

Drafting documents which suit *all* consumers also avoids other difficulties that arise when supplying a document that had been drafted for another class of persons to a consumer.

⁵⁶¹ Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>.

⁵⁶² Stoop/Chürr 2013 *PELJ* 533, Stoop 2011 *Int. J. Private Law* 334, Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁵⁶³ Stoop/Chürr 2013 *PELJ* 533.

⁵⁶⁴ Gouws 2010 *SA Merc LJ* 88.

Suppliers will most likely not take any chances and will tend to give a 'simpler' version in order to be covered.

The problem of posting documents or visual representations on a supplier's e-commerce website could also be resolved by just posting one version catering for all consumers. Usually, suppliers do not have sufficient data on consumers in terms of their literacy and sophistication. Even though the Electronic Communication and Transaction Act⁵⁶⁵ does not contain any plain language requirements, the Consumer Protection Act also applies to transactions bought online, as long as the transaction occurs within South Africa.⁵⁶⁶

Furthermore, it is a legitimate interest of both parties that suppliers do not incur extra costs that the consumers ultimately have to bear. Drafting several sets of documents which have to be updated now and then, is a time-consuming and costly undertaking.

If suppliers only have to draft one single set of their documents which can be easily understood by all consumers, the argument that in the absence of any class distinction a situation may arise where a consumer with literacy skills that exceed the average level of literacy of an ordinary consumer may escape contractual liability based on non-compliance with section 22⁵⁶⁷ is not valid anymore. A document that is understandable for all consumers always meets the plain language requirements and does therefore always comply with section 22.

The wording of section 22(2) leads to confusion. This is not, as Gouws criticises, because one must take into account different types of agreements the consumer intends to conclude, but because of the premise that the supplier has to 'assess' the different classes of consumers when drafting a document. It would have been more understandable to choose a different wording for section 22(2) that encompasses all classes of consumers:

'...if it is reasonable to conclude that an ordinary consumer with minimal literacy skills and minimal experience as a consumer...'⁵⁶⁸

Barnard contends that section 22 has to be interpreted in the light of section 3, by taking the purpose and policy of the Act into consideration.⁵⁶⁹ In her opinion, it is not sufficient to consider ordinary consumers of a particular group since there is another group which needs special protection, i.e., vulnerable consumers. Vulnerable consumers are, according to section

⁵⁶⁵ 25 of 2002.

⁵⁶⁶ See s 5(1)(a).

⁵⁶⁷ Gouws 2010 *SA Merc LJ* 88.

⁵⁶⁸ Emphasis added.

⁵⁶⁹ Barnard 2014 *Tex. J. Cons. & Comm. Law* 5.

3(1)(b), persons with a low income, persons living in remote, isolated or low-density population areas or communities, minors, seniors or other similar vulnerable consumers as well as persons whose ability to read and comprehend any advertisement, agreement, instruction and so forth is limited because of low literacy, vision impairment or limited fluency in language in which the document is produced, published or presented.

This means that suppliers must take into account vulnerable consumers in general when drafting their documents.

Another possibility is to consider each group of vulnerable consumers (low-income persons, minors, seniors, uneducated persons, etc.) as a separate group of ‘ordinary consumers’. Consequently, suppliers would need to set up different documents for each group of vulnerable consumers.⁵⁷⁰ In practice, suppliers would have to draft multiple versions of documents for the same product.

It is my submission that the first point of view is more convincing. Not only would it be challenging to draft separate documents for different groups of vulnerable persons with all the problems involved,⁵⁷¹ but also because of the different levels of education and understanding within these groups. In addition, a person might belong to different groups at the same time (e.g., a working senior with a low income and literacy difficulties living in a remote area). Therefore, when assessing whether the plain language requirements in respect of ordinary consumers of the class of persons for whom the document is intended are met, the question has to be asked if the concerned consumer is ‘vulnerable’ in the sense of section 3(1)(b)(iv) and if the supplier’s documents meet the plain language standard. It is suggested that in most cases, the ‘vulnerable consumer’ will be congruent with the ‘ordinary consumer’. Therefore, vulnerable consumers are automatically considered when drafting a document for ordinary consumers because the supplier mostly targets a specific market. Besides, as stated above, a document written in plain language already considers both vulnerable and ordinary consumers.

Barnard suggests substituting the notion of ‘ordinary’ consumer with ‘average consumer’ in order to be in keeping with international practice, such as the EU Unfair Commercial Practices Directive (UCPD).⁵⁷² The UCPD’s benchmark is the average consumer who is reasonably well informed and reasonably observant and circumspect. Social, cultural and linguistic factors are

⁵⁷⁰ Barnard 2014 *Tex. J. Cons. & Comm. Law* 12.

⁵⁷¹ See discussion above.

⁵⁷² Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 – hereafter referred to as ‘UCPD’; Barnard 2014 *Tex. J. Cons. & Comm. Law* 12.

taken into account by the UCPD.⁵⁷³ The ‘average consumer’ is not defined in the Directive, but article 5 contains an ‘average consumer test’, which, according to the Commission, is not a statistical test. The UCPD aims to strike the right balance between consumer protection and the promotion of free trade in an openly competitive market. For this reason, the notion of ‘proportionality’ plays a crucial role. Measures taken in order to protect consumers, such as the prohibition of claims that might deceive only very naïve or credulous consumers, would be disproportionate. Factors such as the cultural, linguistic and social consumer background as well as the circumstances in which the given product is sold must be taken into consideration.⁵⁷⁴

It is suggested that the substitution of ‘ordinary consumer’ by ‘average consumer’ in the Act would not bring any material advantages. The ‘ordinary’ consumer of a certain group of persons is nothing else than an ‘average’ consumer, even though the Act also includes minors, seniors and low-income groups and goes further than the UCPD. The UCPD balances this by applying the principle of proportionality and factors such as the cultural and social background of the targeted consumers. In a South African context, this is achieved by taking into consideration a consumer with average literacy skills and minimal experience. Given the lower educational level in South Africa, the solution of the Act seems to be adequate for South Africa.

Barnard also suggests that the abovementioned distinction between different classes of consumers is contrary to the preamble to the Act according to which the indifferences of consumers based on illiteracy and other forms of social and financial inequalities must be eradicated.⁵⁷⁵ This argument does not consider the fact that the distinction between different classes of consumers is not made in order to discriminate consumers but in order to enable them to make informed choices.

It is my submission that the argument of discrimination is therefore only valid where a consumer is handed out a document which was intended for a more sophisticated consumer. In this case, there is discrimination because the consumer will not be able to understand the document like a more educated person. This problem does however not exist if a supplier’s documents are drafted for *all* classes of consumers, by setting up only one set of documents.⁵⁷⁶

⁵⁷³ Preamble of the UCPD at (18).

⁵⁷⁴ Barnard 2014 *Tex. J. Cons. & Comm. Law* 6.

⁵⁷⁵ Barnard 2014 *Tex. J. Cons. & Comm. Law* 5. In fact, these objectives are not contained in the Preamble, but in s 3(1)(iv). See also Gouws 2010 *SA Merc LJ* 88.

⁵⁷⁶ See discussion above.

cc) 'Without undue effort'

The consumer must be able to understand the content, significance and import of the document 'without undue effort'.⁵⁷⁷ 'Without undue effort' is not defined in section 1, but the word 'undue' implies that the consumer must at least make some effort to ensure that he or she has understood the document. The degree of this effort depends on the circumstances, the price of the product and its complexity.⁵⁷⁸ The enumeration in section 22(2)(a) to (d)⁵⁷⁹ is an indication of what must be considered in this regard. De Stadler argues that the consumer may seek independent advice in cases where one can expect a more considerable effort to understand the terms.⁵⁸⁰ It is suggested though that this advice cannot go further than assisting the consumer. If it were necessary to explain the terms of the agreement, this would be contrary to the purpose of sections 49(3) and 22 because the document in question must be self-explanatory in order to be in plain language.

Stoop and Chürr, as well as Gordon and Burt, contend that the consultation of a dictionary or the assistance of an advisor already means that the consumer makes an 'undue effort'.⁵⁸¹ This point of view is too strict because the complexity of a contractual document increases automatically with the complexity of the underlying agreement. With the complexity of the transaction involved (e.g., a purchase of a smartphone, as opposed to a building contract), the complexity of the underlying contract changes. Complex contracts cannot be legally sound without legal terms, and consumers can be expected to seek assistance in such a case. In addition, limited assistance or the consultation of a dictionary seem to be unavoidable in cases where the document is not drafted in the consumer's first language, or in a language where he or she has a rather limited vocabulary. As mentioned above, this assistance must have its limits though because the objective of plain language is that consumers understand the content, significance and import of the document by merely reading it.⁵⁸² On the other hand, the supplier cannot be expected to 'explain' every single word or concept in a complex contract. If consumers have to seek legal advice before signing an agreement, this can be qualified without doubt as 'undue effort', however.

⁵⁷⁷ Section 22(2).

⁵⁷⁸ De Stadler *Consumer Law Unlocked* 106.

⁵⁷⁹ See discussion above.

⁵⁸⁰ De Stadler 'In search of the plain language standard' *Consumer Law Review* (Juta) April 2012 at <https://jutralaw.co.za/newsletter/newsletter/consumer-law-review-april-2012-1> (no longer available).

⁵⁸¹ Stoop/Chürr 2013 *PELJ* 534, Gordon/Burt 2010 *Without Prejudice* 60. See also Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

⁵⁸² Gouws 2010 *SA Merc LJ* 88, 89.

Furthermore, when purchasing consumables or every-day items, the consumer cannot be expected to be as vigilant as while purchasing a more expensive and complex product. Whether or not the effort is undue depends therefore on the complexity of the product too.

There could be undue effort though if the consumer is referred to additional terms or different documents which are not included in the contract. A phrase such as ‘terms and conditions apply’ on an invoice may be acceptable regarding the plain-language requirement if those standard terms are easy to access and it is clear where they can be found. It goes without saying that also in this case, such external documents to an agreement have to be written in plain language too.⁵⁸³ Under different circumstances, the reference to external documents may not fulfil the requirements of section 22(2) though, e.g., if the documents are difficult to access. It is submitted that this is the case where internet access is necessary. In South Africa, a considerable part of the population, especially in rural areas, is excluded from such access for technical and/or financial reasons. Difficult access to external documents would be contrary to the preamble of the Act according to which the Act recognises the necessity to ‘(...) fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers.’⁵⁸⁴ The requirements are therefore only met if consumers can access the abovementioned external documents in the shop (e.g., in the form of a notice or printed document) or if they are sent to them by post speedily and before they sign the contract. It is also in the supplier’s interest to present external documents at its place of business because otherwise, the consumer might change his or her mind and not conclude the contract as section 49(4)(a) and (b) requires that the notice must be drawn to the consumer’s attention before he enters into the agreement.⁵⁸⁵

The same applies to terms such as ‘to the extent permitted by law’ by which the supplier wants to prevent the clause from being illegal because it contradicts the Act.⁵⁸⁶ It cannot be expected by ‘ordinary consumers’ though that they know what is permitted by the applicable legal regime. Such terms thus infringe section 22(2).

dd) Consumer-centric approach

The objective of section 22(2) is to protect consumers from incomprehensible terms and conditions and from those that contain legal consequences that ‘ordinary consumers are not

⁵⁸³ De Stadler *Consumer Law Unlocked* 106.

⁵⁸⁴ Preamble of the CPA (a). See also Hawthorne 2012 *THRHR* 354.

⁵⁸⁵ Section 49(4) will be discussed later in detail.

⁵⁸⁶ De Stadler *Consumer Law Unlocked* 106.

able to detect. For this reason, the drafter of a document must take into account that the document is not only intended for the supplier but also for the (weaker) consumer. In other words, suppliers have to adopt a consumer-centric approach when drafting a document and ask themselves which clauses are really necessary to balance the parties' needs, if the document is understandable for consumers, and if they will be able to find specific information in order to know their rights and obligations.⁵⁸⁷

In *Standard Bank v Dlamini*⁵⁸⁸ the court held that 'non-disclosure of (...) [the consumer's right to receive a refund] violates the right of consumers to education and information (...). The Bank's selection of what parts of section 121 NCA it should record in the agreement and what it should exclude is deliberate and deceptive.'⁵⁸⁹ In this case, the agreement was not meeting the plain-language requirements but was guided by the operational requirements of the bank. Thus, the bank's approach was not consumer-centric.

The Act does not require suppliers to inform consumers of their rights. Section 32, which grants a 5-day cooling-off period for sales contracts that have been concluded by direct marketing is the only exception in the Act. This provision can be interpreted in that the legislature would have provided for other disclosure obligations if he had wanted to.⁵⁹⁰ Nonetheless, *Standard Bank v Dlamini* is interesting and somehow innovative as it recognises that the emphasis of the consumer's obligations in a contract while obscuring his rights is 'deceptive and misleading' as

'[i]nstead of informing the consumer of th[e] right [to rescind credit agreement],⁵⁹¹ the bank pitches it as an onerous bundle of obligations on the consumer to pay the bank the costs of renting and recovering the vehicle. Projecting the consumer's obligations whilst understating his rights discourages rescission which is the consumer's statutory right.'⁵⁹²

This argument reminds of section 41 under which a supplier must not, by words or conduct, directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer,⁵⁹³ fail to disclose a material fact if that failure

⁵⁸⁷ De Stadler *Consumer Law Unlocked* 107.

⁵⁸⁸ *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD). This case concerned the National Credit Act which grants consumers a right to information in plain and understandable language. The NCA defines 'plain language' in the same way as in the CPA (see s 64 (1) to (3) of the National Credit Act 34 of 2005 and s 22 (1) to (3) CPA). For this reason, this case can serve as an example for a consumer-centric approach as to the plain-language requirement of s 22(2) CPA.

⁵⁸⁹ Para [41].

⁵⁹⁰ De Stadler 'Standard Bank vs Dlamini: Plain language coup in the Durban High Court' at <https://www.esselaar.co.za/legal-articles/standard-bank-v-dlamini-plain-language-coup-durban-high-court>.

⁵⁹¹ See s 121 NCA.

⁵⁹² *Standard Bank v Dlamini* para [41].

⁵⁹³ Section 41(1)(a) CPA.

amounts to a deception,⁵⁹⁴ or fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation.⁵⁹⁵

What is more, the judgment is a reminder of the consumer's right to make 'informed choices',⁵⁹⁶ which is not possible if the consumer is deceived and misled.

One has to bear in mind though that 'plain language' is aimed not only to protect consumers but also to ensure the right balance between consumer protection and the supplier's legitimate interests.⁵⁹⁷ This is because the objective of the law of contract is to protect all the parties of an agreement and to consider their mutual interests.⁵⁹⁸

ee) Choice of language

Contrary to section 63(1) NCA, which provides that a consumer is entitled to receive any document that is required in terms of the National Credit Act in an official language that the consumer reads or understands, to the extent that this is reasonable, the Consumer Protection Act does not contain a similar provision. In the final draft of the Consumer Protection Act, a provision that at least one language of the region where the transaction took place should be used in the document provided to the consumer, was removed.⁵⁹⁹

If South African suppliers were required to draft their contractual documents in all or several official languages,⁶⁰⁰ this would entail a disproportionate financial burden for them. Unlike credit providers, rather small suppliers often do not have the same financial possibilities.⁶⁰¹ Therefore, nearly all contractual documents in South Africa are written in English at least, which is regarded as the *lingua franca*.⁶⁰²

⁵⁹⁴ Section 41(1)(b) CPA.

⁵⁹⁵ Section 41(1)(c) CPA.

⁵⁹⁶ *Standard Bank v Dlamini* para [34]. See ss 3(e)(ii) NCA ('providing consumers with adequate disclosure of standardized information to enable them to make informed choices') and 3(e) CPA ('improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour').

⁵⁹⁷ Kirby 'South Africa: Clearly clear? Plain and understandable language in terms of the Consumer Protection Act' at <http://www.mondaq.com/southafrica/x/144478/Consumer+Law/Clearly+Clear+Plain+And+Understandable+Language+In+Terms+Of+The+Consumer+Protection+Act>.

⁵⁹⁸ Otherwise, mechanisms of the law of contract, such as remedies for breach, voidness due to mistake and so forth come into play.

⁵⁹⁹ In s 26 of the Second Discussion Draft, this provision can still be found. The reason for the removal of this provision was that the industry made submissions that this requirement would have been too onerous – see Stoop/Chürr 2013 *PELJ* 537 referring to the submission of Business Unity South Africa in BUSA 2006 (www.busa.org.za – this information is no longer available).

⁶⁰⁰ Section 6(1) of the Constitution, 1996.

⁶⁰¹ This was also the position of the Business Unity South Africa Consumer Protection Bill Submissions by Business Unity South Africa (May 2006) 45-46 at <http://www.busa.org.za/docs/Final%BUSA%20Submissions%20%20Consumer%20Protection%20Bill.pdf> (no longer available).

⁶⁰² Stoop/Chürr 2013 *PELJ* 536.

As section 22(2) does not contain any obligations in respect of the use of a particular (official) language,⁶⁰³ a consumer may be handed out a document drafted in a language that he or she does not understand, although the plain-language requirement is met. This is because section 22(2) only requires that an 'ordinary consumer of the class of persons for whom the notice, document or visual representation is intended' can understand the document. This provision does however not require that a specific consumer must be able to understand the document.

If the consumer had to consult a dictionary or seek advice because he or she does not understand the language in which the document is drafted, this would be an 'undue effort' without any doubt. This is different from the situation where he or she understands the given language, but not well enough to avoid looking up individual words or seeking assistance.

It is not clear if foreigners who are permanent residents of South Africa, and who do not understand one of the eleven official languages, can be considered 'ordinary consumer[s] of the class of persons for whom the notice, document or visual representation is intended'.⁶⁰⁴ Although, under section 6(5)(a) and (b) of the Constitution, other languages than the official ones are promoted, it is my submission that such a condition would be very impractical and too much a financial and organisational burden for suppliers.

On the other hand, the Act does not require that a document be drafted in an official language, but only in plain language. It is thus imaginable that suppliers with a specific target audience coming from abroad (tourists, immigrants) might be willing to draft their contractual documents in other than the official languages. In this case, it is to the supplier's advantage if it translates its documents in the language(s) of its target audience.⁶⁰⁵

Consumers have a certain degree of protection, however. Section 40(2) provides that a supplier must not knowingly take advantage of the fact that a consumer was substantially unable to

⁶⁰³ It is interesting to note that reg 41 provides that English and Zulu for purposes of s 92(4) be used by the Commission. Reg. 41 CPA refers to ss 6(3) and 4 of the Constitution which provide that the national government and provincial governments have to use at least two official languages for the purpose of government.

Interestingly, reg. 41 CPA refers to the Zulu language as 'isiZulu' which is the Zulu and not the English spelling. Stevenson and Waite *Oxford Dictionary* s.v. 'Zulu' defines 'Zulu' as 'the Bantu language of the Zulus'. See also www.en.wikipedia.org/wiki/Zulu-language: 'Zulu (isiZulu in Zulu) is the language of the Zulu people...'. When the two aforementioned website was accessed again on 21 March 2020, the addition 'or isiZulu' had been added meanwhile. Section 6 of the Constitution (both in the English and Afrikaans version) also spells Zulu, Xhosa and other official (African) languages in their respective way, i.e., not in English or in Afrikaans. This does however not apply to other languages commonly used by communities in South Africa according to s 6(5)(b)(i) of the Constitution, like German, Greek, Portuguese and so forth. Those are written in the English or Afrikaans spelling and not as 'Deutsch', 'português' and 'ελληνικός' for instance.

⁶⁰⁴ Stoop 2011 *Int. J. Private Law* 334, Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 19.

⁶⁰⁵ See also in this sense Stoop/Chürr 2013 *PELJ* 537.

protect its own interests because of illiteracy, ignorance or inability to understand the language of an agreement.

Hence, the supplier has to ascertain in these cases that the consumer understands the agreement fully by providing additional explanations and information, or an interpreter, or even a (written) translation of the document.⁶⁰⁶ Otherwise, the agreement may be challenged under section 40(2).⁶⁰⁷

It is therefore beneficial for suppliers to draft and/or translate their documents into the languages spoken by their respective target audience.⁶⁰⁸

ff) Guidelines for the drafting of contractual documents

As the criteria set out in section 22(2) serve rather as a framework than as a plain language standard,⁶⁰⁹ sections 22(3) and (4) provide that the Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the plain language requirements. So far, no such guidelines have been published, and suppliers should take a proactive approach in order to comply with the requirements of section 22.⁶¹⁰

One approach consists of in-house style guides and other scrutiny measures. Although such an informal assessment is difficult to regulate, it ensures at least the consistency and other requirements of legal documents. Gordon and Burt suggest that suppliers develop their own evaluation methods concerning a plain language enquiry. They recommend research and user testing throughout the rewrite process so that a best practice and terminology can be achieved gradually.⁶¹¹

Another approach consists of a formal enquiry. As section 2(2)(a) provides that when interpreting or applying the Act, appropriate foreign and international law may be considered, the law of other countries can – and should – be consulted for the achievement of a plain language standard.

⁶⁰⁶ De Stadler *Consumer Law Unlocked* 112.

⁶⁰⁷ Stoop/Chürr 2013 *PELJ* 536, Stoop ‘Section 22’ in Naudé and Eiselen (eds) *CPA Commentary* para 20.

⁶⁰⁸ Stoop ‘Section 22’ in Naudé and Eiselen (eds) *CPA Commentary* para 22.

⁶⁰⁹ Stoop 2011 *Int. J. Private Law* 330.

⁶¹⁰ Stoop 2011 *Int. J. Private Law* 332.

⁶¹¹ Gordon/Burt 2010 *Without Prejudice* 60.

Stoop and Chürr⁶¹² refer to the law of the US states of Pennsylvania⁶¹³ and Connecticut⁶¹⁴ which provide general and objective standards for plain language, such as the use of short words, paragraphs and sentences as well as the avoidance of foreign or Latin words or cross-references. Especially in Connecticut, this approach has been even more objectified by prescribing the average number of words per sentence or paragraph, the average number of syllables per word or the minimum typeface. These provisions also provide for visual guidelines for the type size, line length and spacing between paragraphs, for example.

This objective approach has the advantage that computer software programmes can be used in order to assess whether the given criteria are fulfilled. Shorter words are not necessarily better understood by consumers though. Stoop gives an excellent example: while relatively longer words like ‘homeowner’ are mostly understood, shorter words such as ‘estoppel’ or ‘tort’ are not.⁶¹⁵ This is because the length of a word does not correlate with its technicality or speech register. Besides, different languages follow different rules. In some languages, longer words, such as composite words, are hardly avoidable. If they are split up in their different parts, comprehensibleness and good style might suffer because the sentence structure gets too complicated. Language is a complex subject which cannot be reduced to mere statistics.

A third approach consists of readability tests run by a computer where mathematical equations calculate the readability of a document. The Flesch reading ease test is used in most software packages such as MS Office.⁶¹⁶ These tests are of limited use with regard to complex and technical texts though. This is because even if a text ‘succeeds’ in a readability test because the abovementioned criteria are fulfilled, this does not mean that the text is sufficiently accurate in a legal context. Legal language is very technical and difficult to understand and does not necessarily become more understandable by the mere use of shorter sentences or words. Furthermore, readability formulas are based on the assumption that all consumers are alike, whereas the Act prescribes that an ‘ordinary consumer of the class of persons for whom the document is intended (...) must be able to understand the contents without undue effort’.⁶¹⁷ In

⁶¹² Stoop/Chürr 2013 *PELJ* 539.

⁶¹³ Pennsylvania Plain Language Consumer Contract Act (Pa Stat Ann Tit 73 (1997)).

⁶¹⁴ Connecticut General Statutes, 2009 (Conn Gen Stat s 42-152).

⁶¹⁵ Stoop 2011 *Int. J. Private Law* 338.

⁶¹⁶ Stoop ‘Section 22’ in Naudé and Eiselen (eds) *CPA Commentary* para 29. This test was proposed in Flesch 1948 *J. Appl. Psychol.* 221. The formula for the Flesch test is: $206.835 - 1.105 (\text{total words} / \text{total sentences}) - 86.6 (\text{total syllables} / \text{total words})$. A high score indicates easy reading (few words per sentence and few syllables per word), whereas a lower score indicates more difficult reading.

⁶¹⁷ Section 22(2).

the South African context, readability tests are therefore not an ideal solution in the pursuit of plain language.⁶¹⁸

For the elaboration of guidelines, the Commission should thus take into consideration an objective approach which is suitable for the South African environment. The Commission should keep in mind that different languages function within different sets of rules, structures and cultures. This applies even more to languages having different roots, like English (an Indo-European/West Germanic language)⁶¹⁹ and Zulu (a Niger-Congo/Southern Bantoid/Bantu language),⁶²⁰ for instance. A simple example makes this clear: The English sentence 'He is working', consisting of three words, can be expressed in Zulu by 'Uyasebenza', in only one word! Hence, an objective word-count in different languages would lead to very different results. Newman's recommendation that the average sentence length should be 22 words and that an average paragraph should not consist of more than 75 words⁶²¹ may be valid for English; for other languages, using compound words and different grammatical structures, the word count in a similar document might be very different. Furthermore, the guidelines should also provide for instructions with regard to illustrations, examples, headings and other aids mentioned in section 22(2).⁶²²

Barnard suggests general guidelines which could be adjusted to fit into a specific industry code. Whenever such an adjustment is not possible, the courts will have their final say.⁶²³ It is suggested that this alone is not sufficient. The Commission should also consider separate guidelines for each type of documents (contracts, notices, visual representations) in order to take into account their different purposes. Instead of a classical approach, the headings could have the form of questions, such as 'What am I buying?' instead of 'Object of the contract', or 'What do I have to do if I am not happy with my printer?' instead of 'Remedies'. De Stadler legitimately points out that the use of a parallel structure of headings, i.e., the same grammatical structure in a particular section of a document, is beneficial in this regard. Only when describing a different level of headings within a document, one should change the grammatical structure of the (sub-)heading.⁶²⁴

⁶¹⁸ Stoop/Chürr 2013 *PELJ* 542.

⁶¹⁹ See 'English language' at https://en.wikipedia.org/wiki/English_language.

⁶²⁰ See 'Zulu language' at https://en.wikipedia.org/wiki/Zulu_language.

⁶²¹ Newman 2012 *Obiter* 644.

⁶²² Stoop 2011 *Int. J. Private Law* 337.

⁶²³ Barnard J 2014 *Tex. J. Cons. & Comm. Law* 11.

⁶²⁴ De Stadler 'Plain language tip' *Consumer Law Review Newsletter* (Juta) June 2014 at https://jutralaw.co.za/newsletter/newsletter/consumer-law-review_01-jun-2014-2/ (no longer available).

Although plain language contributes to the fact that consumers can make informed choices, one has to consider that a plain (understandable) text is not sufficient. The suppliers' texts of the same category (e.g., quotations and contracts) within the same industry also have to be comparable. A consumer who wants to rent a car and compare not only prices, for example, but also wants to know what services are part of the contract (e.g., insurance, motorisation of the given category, included distance that can be driven without paying a supplement) is often confronted with a multitude of different terms depending on the supplier, and information which is difficult to find. Comparability would therefore also help consumers better understand what they are buying, and allow them to shop around more easily. In this sense, Barnard is certainly right as to general adjustable guidelines for specific industries.

Therefore, consumers would benefit if for certain document types of individual branches the documentation would be standardised with respect to their presentation and terminology.

As discussed above, the definition of 'plain language' in section 22 involves not only the grammar and wording but also the structure, content, style and design of the document. This enables consumers to make informed choices on the base of a transparent document. The requirement of plain language is therefore elevated to a fundamental consumer right. The Commission should provide for guidelines to drafters as to what exactly is expected from them.⁶²⁵ Without any guidelines, a certain number of otherwise avoidable jurisprudence is to be expected. As long as the Commission has not published such guidelines, courts will have to deal with the rather broad definition of 'plain language' in section 22, apply their discretion, and interpret agreements incoherently.

It is also regrettable that section 22(3) and (4) are discretionary provisions, that the publication of guidelines is not compulsory for the Commission, and that the legislator has not given more guidance for the drafting of documents in plain language. As long as no guidelines have been published, the legislator (and the Commission) leaves it to the suppliers to determine what 'plain language' means. The 'private legislation' of companies which Naudé puts forward in the context of one-sided imposition of standard terms has thus not been completely abolished yet.⁶²⁶ Consumers will not only find it difficult to assess if certain documents are 'plain', and therefore will refrain from any action against suppliers.

⁶²⁵ See also Louw *LLM dissertation* 137.

⁶²⁶ See Naudé 2006 *Stell LR* 369.

The courts have established a vast body of common-law jurisprudence as regards interpreting the plain language requirement. Newman states that it would be unfortunate if courts were obliged to consider other jurisdictions in order to fill the gaps which the Act has left, or even created. It is suggested that other jurisdictions may only serve as guidance, but can never be a substitute to own rules. The given context and historical backgrounds are too different. Only comprehensive guidelines could therefore remedy this problem.

Plain language empowers consumers to make informed choices. One should however not forget that the consumers' empowerment can eventually only be achieved by education. In order to ensure a fair market with empowered consumers, the legislature must therefore tackle the South African problems inherited from the past, not only by providing formal requirements such as plain language but also by ascertaining that young South Africans are sufficiently educated to understand more complex mechanisms and concepts. This can only be done by reforming the South African educational system, hiring well-trained and motivated teachers and providing the financial means to schools.⁶²⁷ The introduction of the plain language requirement into the Act is undoubtedly a crucial step which must be welcomed, but it is not sufficient.

gg) Legal consequences of non-compliance of section 22

It is not entirely clear what the legal effects of non-compliance with the plain language requirement are.

In terms of section 51(1)(a)(i), a supplier must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of the Act. Pursuant to section 3(1)(b)(iv), one of the purposes of the Act is to promote and advance the social and economic welfare of consumers by 'reducing and ameliorating any disadvantages experienced in access to any supply of goods or services by consumers whose ability to read and comprehend any [document] is limited because of low literacy, (...) or limited fluency in the languages in which the [document] is produced, published or presented.'

⁶²⁷ With respect to the state of the South Africa education system, see the following examples: BusinessTech of 5 January 2015: 'SA's 'real' matric pass rate: 42%' at <http://businesstech.co.za/news/general/76561/sas-real-matric-pass-rate-41/>; Daily Maverick of 8 January 2015: 'Africa Check: Can you really pass matric with a 30% average? The claim is misleading' at <http://www.dailymaverick.co.za/article/2015-01-08-africa-check-can-you-really-pass-matric-with-a-30-average-the-claim-is-misleading/#.VeWY9Mvovcc>; Mail&Guardian of 8 March 2013: 'Forgotten schools in the Eastern Cape left to rot' at <http://mg.co.za/article/2013-03-08-00-forgotten-schools-of-the-eastern-cape-left-to-rot>; The Sunday Times (South African paper version) of 11 October 2015 at 17: 'Solving SA's maths crisis is more complex than we think' by Karin Brodie.

What is more, section 51(1)(b)(i)-(iii) states that a supplier must not make a transaction or agreement if it directly or indirectly purports to (i) waive or deprive a consumer of a right in terms of the Act, (ii) avoid a supplier's obligation or duty in terms of the Act, or (iii) set aside or override the effect of any provision of the Act. The consumer has the right that the agreement be written in plain language as section 50(2)(b)(i) provides that if a consumer agreement is in writing, the supplier must provide the consumer with a free copy which must satisfy the plain language requirements of section 22.

It is my submission that this also applies to exemption clauses under section 49 which must be written in plain language (section 49(3)) since a notice which does not meet the plain language requirements deprives a consumer of a right in terms of the Act (section 51(1)(b)(i)).

If the purposes of the Act are not met in terms of sections 51(1)(a)(i), 3(1)(b)(iv), the agreement or provision is void under section 51(3) to the extent that it contravenes section 51.⁶²⁸

Nonetheless, the plain language requirement is only one of several factors that the court must take into account according to section 52(2) when considering whether a term is unfair and, therefore, void. Hence, voidness is not necessarily a consequence of non-compliance with the plain language requirements in terms of section 22.

This begs the question of whether there is any relation between the abovementioned stipulations in terms of a *lex specialis* or a *lex generalis*. The answer to this question is important in order to know which of the provisions mentioned above takes precedence.

Both section 51(1)(a)(i), referring to section 3(1)(b)(iv), and section 51((1)(b)(i)-(iii), referring indirectly to section 50((2)(b)(i), regulate that an agreement is void *per se* if the plain language requirements or another consumer right are not met. Section 51 deals with prohibited clauses, the so-called 'blacklist', whereas section 52 deals with the powers of the courts concerning the right to fair, just and reasonable terms and conditions. In other words, the abovementioned provisions can all be found in Part G of the Act. Section 52 is a procedural provision though, whereas section 51 is of substantive nature. Hence, there cannot be a *lex specialis-lex generalis* relationship between them, and none of these provisions takes precedence over another.

Although the Act does not expressly say that other types of clauses or agreements are void if they are not written in plain language, it is likely that the courts will easily declare null and

⁶²⁸ Gouws 2010 *SA Merc LJ* 90 and 91.

void clauses that do not meet the plain language requirements. This is because the purpose of the Act must be considered when interpreting ambiguous provisions. The primary purpose of the Act is to protect vulnerable consumers. After all, plain language is a factor that the courts always will have to consider when assessing standard clauses. For this reason, the use of plain language seems, in fact, to be required in all interactions between suppliers and consumers.

The role of the Commission and the other redress entities will be discussed in detail in chapter 5.

Section 22 also plays an indirect role⁶²⁹ in terms of sanctioning a supplier's unconscionable conduct,⁶³⁰ a supplier's false, misleading or deceptive representation,⁶³¹ or whether a contract term must be considered unfair.⁶³² In these cases, the court must consider the factors mentioned in section 52(2)(a) to (j) to ensure fair and just conduct and standard provisions. Under section 52(2)(g), the court must consider the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22. If the court holds that these requirements are not met, it may find that the document or agreement in question is unfair.⁶³³

b) Drawing the consumer's attention in a conspicuous manner and form

Whenever any of the conditions set out in section 49(1)(a) to (d) are met, the supplier must draw the consumer's attention concerning the fact, nature and effect of the provision or notice in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances.⁶³⁴ This must be done before the consumers enter into the agreement, begins to engage in the activity or enters or gains access to the facility⁶³⁵ or is required or expected to offer consideration for the transaction or agreement.⁶³⁶

Although subsection (4) only refers to subsection (1), it is submitted that the requirements of subsection (4) also apply to subsection (2). Otherwise, the warning function of section 49 would be thwarted. There is no reason for not applying subsection (4) to subsection (2) as consumers must be informed of the risks they face in a manner and at a time according to subsection (4).

⁶²⁹ See De Stadler *Consumer Law Unlocked* 111.

⁶³⁰ Section 40.

⁶³¹ Section 41.

⁶³² Section 48.

⁶³³ For a more detailed discussion, see ch 3 (general clause).

⁶³⁴ Section 49(4)(a).

⁶³⁵ Section 49(4)(b)(i).

⁶³⁶ Section 49(4)(b)(ii).

'Draw[ing] to the attention of the consumer' means that the agreement itself must be self-explanatory and written in plain language, and not that the consumer is entitled to further explanations beyond the contract.⁶³⁷

The phrase '[t]he fact, nature and effect' in section 49(4) indicates that the supplier has to ascertain that the consumer does not only have a superficial awareness of the risk but that the supplier must ascertain that the consumer has an adequate understanding and appreciation of the implications of the risk.⁶³⁸

The requirement that the supplier must, according to section 49(4), draw the consumer's attention to the potential effect of the risk means that clauses which exclude liability in a manner that is not comprehensible for a consumer, such as 'the supplier's liability is excluded as much as is allowed by law' or which state that the exclusion of liability does not affect the consumer's statutory rights, are ineffective. Consumers who are not specialised in consumer protection law are most likely not able to understand the legal consequences of such clauses.⁶³⁹

The supplier has the same obligation under section 49(2), i.e., if a provision or notice concerns any activity or facility that is subject to any risk.⁶⁴⁰

aa) Conspicuous manner and form

Under section 49(1) and (4)(a), the supplier must draw the consumer's attention to the effect on its risk or liability or its risk linked to an activity or facility in a conspicuous manner and form. Drawing someone's attention requires more effort than informing someone. 'Inform[ing]' means 'to give information',⁶⁴¹ whereas 'drawing someone's attention to something' means 'to attract someone to notice or focus on someone or something'⁶⁴² or 'direct someone's attention'⁶⁴³.

The supplier can draw the consumer's attention in different ways, by using specific formatting techniques, placing the text close to the 'core terms' of the agreement, such as the payment terms, or adjacent to the signature space in order to ascertain that it is read, and/or using formulations such as 'the following terms limit your ability to bring a claim against us...'.⁶⁴⁴

⁶³⁷ De Stadler *Consumer Law Unlocked* 112.

⁶³⁸ Van Eeden and Barnard *Consumer Protection Law* 247.

⁶³⁹ De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁶⁴⁰ For a more detailed discussion on s 49(2) see below.

⁶⁴¹ Stevenson and Waite *Oxford Dictionary* s.v. 'inform'.

⁶⁴² Definition from The Free Dictionary by Farlex: <https://idioms.thefreedictionary.com/draw+attention+to>.

⁶⁴³ Stevenson and Waite *Oxford Dictionary* s.v. 'draw'.

⁶⁴⁴ De Stadler *Consumer Law Unlocked* 120.

From the discussion above it becomes clear that the consumer's attention is only drawn conspicuously to the risks involved if the concerned information can be clearly distinguished from the rest of the document.

This has to be done with an 'ordinarily alert consumer'⁶⁴⁵ in mind. This means that the (not legally trained) consumer is one who is aware of the importance of the notice as a legal document and pays attention when reading it. In doing so, the circumstances⁶⁴⁶ have to be taken into account. It will depend on the complexity of the product, its price and other factors when defining an ordinarily alert consumer.⁶⁴⁷

Concerning section 49(2)(b), which refers to an ordinarily alert consumer faced with a provision concerning a risky activity or facility, it is suggested that the 'ordinarily alert consumer' must be defined by considering the surrounding circumstances, such as the nature and complexity of the given activity or facility.

The wording of the phrase 'ordinarily alert consumer' in sections 49(4)(a) and 49(2)(b) is somewhat misfortunate because it reminds of the concept of the 'ordinary consumer' in section 22(2). These are two completely different concepts, however. First, the 'ordinary consumer' is mentioned in the context of the plain language requirement, whereas the 'ordinarily alert consumer' is mentioned in respect of the limitation of risk of the supplier of which the consumer's attention must be drawn to. Second, 'ordinary' in section 22(2) is an adjective and thus refers directly to 'consumer', whereas 'ordinarily' is an adverb referring to 'alert'. This means that the consumer must be ordinarily *alert*, and not ordinary. In other words, the consumer must be ordinarily vigilant in the given circumstances.

Naudé suggests that it should generally not be sufficient to print the exemption clauses on the reverse side of a document, even if specific formatting techniques are used. She argues that most consumers would not be willing to turn, not to mention to read, the reverse side, having implicitly in mind that these terms are invariable and presented on a take-it-or-leave-it basis.⁶⁴⁸ For this reason, most consumers would act on the assumption that they cannot negotiate those terms. In addition, the 'transaction cost' by reading these assumed cumbersome terms would

⁶⁴⁵ Section 49(4)(a).

⁶⁴⁶ Section 49(4)(a).

⁶⁴⁷ See discussion above ('Without undue effort').

⁶⁴⁸ The expression 'take it or leave' it appears already in *Instone v A Schoeder Music Publishing Co Ltd* 1974 1 WLR 1308: '(The terms) have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable, Take it or leave it" (...)'.

be too high for the consumer. It is true that the content of standard contracts is usually determined unilaterally by the supplier, and that the consumer can accept the contract or walk away. The freedom of contract is therefore only theoretical so that it is easy to exploit the co-contractant with the weaker bargaining position.⁶⁴⁹ Eiselen legitimately argues that the mechanism of unilateral drafting of standard terms and how they are included in contracts is the real foundation of the problem of standard-form contracts where consumers have little or no margin for negotiation.⁶⁵⁰ Gouws argues that these terms are not only non-negotiable but also one-sided as they favour the supplier and leave no possibility for consumers to bargain with the supplier.⁶⁵¹ On the other hand, if exemption clauses are printed close to the primary terms, consumers are likely to notice and also read them. Naudé suggests that printing exemption clauses on the front page, near the primary terms, should be sufficient.⁶⁵²

This point of view is correct because it protects the consumer sufficiently and is also in the supplier's interest. This contributes to the information of the consumer and avoids litigation. Consumers are usually focused on the core terms of an agreement. A notice that is placed close to the main terms is very likely to catch the consumer's eye. Even if clauses written in plain language are not negotiable either, at least the consumer is able to understand their import.⁶⁵³

bb) Prescribed moment

The supplier has to attract the consumer's attention before the earlier of the time at which the consumer concludes the transaction or agreement, begins to engage in the activity or enters or gains access to the facility or is required or expected to offer consideration.⁶⁵⁴ By choosing such an early moment, the legislator aims to ensure that the consumer is aware of its duties and risks before taking action. Otherwise, the warning function of section 49 would be thwarted.

It is thus not sufficient to bring an exemption clause in terms of section 49(1) to the consumer's attention after the moments mentioned above.⁶⁵⁵ The requirements of section 49(4)(b) would not be fulfilled if, e.g., a white-water rafting organiser calls the consumer's attention who has booked in advance to an exemption clause when the consumer is already on-site. A payment

⁶⁴⁹ Stoop 2008 *SA Merc LJ* 497.

⁶⁵⁰ Eiselen 1989 *De Jure* 251.

⁶⁵¹ Gouws 2010 *SA Merc LJ* 81.

⁶⁵² Naudé 2009 *SALJ* 508, 509, De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 4. In the same sense: Newman 2012 *Obiter* 637.

⁶⁵³ Gouws 2010 *SA Merc LJ* 82.

⁶⁵⁴ Section 49(4)(b).

⁶⁵⁵ Naudé 2009 *SALJ* 509. See also De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

in advance, before the consumer was told about the exemption clause is not permitted either anymore under section 49(4)(b).

cc) Signing or initialling

If the provision concerns an activity or facility mentioned in section 49(2)(a) to (c), the supplier must also have signed or initialled the consumer the provision by which the latter assents to it.

There is no such obligation in terms of section 49(1). The legislature probably wanted to differentiate between the circumstances mentioned in section 49(1) and those indicated in section 49(2). The latter concern a limitation of the supplier's liability in situations that might be dangerous for the consumer, whereas section 49(1) 'only' concerns legal consequences.

The supplier is dispensed with this obligation if the consumer acts in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.⁶⁵⁶

The consumer does not need to sign the warning itself, but only the provision or notice.⁶⁵⁷ It is however not clear in which manner the consumer has to act for dispensing the supplier with its obligation to have signed the provision or notice. De Stadler suggests that if the provision or notice is sufficiently clear and prominent so that a reasonable consumer would have seen and understood it, one can assume that he or she accepted the risk by continuing using the product.⁶⁵⁸

It is not entirely clear though why the legislator introduced the additional formal obligation of signing or initialling in the case of risky activities or facilities, which does not exist in terms of section 49(1) if it renounces this obligation in situations that can be difficult to prove. It might indeed be difficult to proof whether the consumer acted in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision. A consumer might well use a risky product without being aware of the risks.

Naudé argues that the initialling or counter-signing of exemption clauses can be a double-edged sword. This formality may strengthen the supplier's position because he or she could ultimately argue that they are always fair. She goes further by stating that clauses excluding or limiting the supplier's liability for bodily injury or death caused negligently could be unfair, irrespective of whether they are signed or initialled by the consumer. This is because they might have come

⁶⁵⁶ Section 49(2) *in fine*.

⁶⁵⁷ De Stadler *Consumer Law Unlocked* 121.

⁶⁵⁸ De Stadler *Consumer Law Unlocked* 120.

to the consumer's attention only when all arrangements have already been made. An employee who is admitted in a private hospital and is confronted with an exemption clause is very unlikely to look out for another hospital. This person is also unlikely to delay his or her operation in order to compare the other hospitals' terms and conditions. What is more, this employee will already have made all kinds of arrangements to leave work and to organise around the stay in the hospital during the initially planned period.⁶⁵⁹

Naudé argues further that this situation causes a structural inequality because the term is contrary to the agreement's main purpose, i.e., the provision of medical care. This ultimately involves the patient's fundamental right to live and bodily integrity. Therefore, such an exemption clause would be substantively unfair. According to Naudé, this also applies to cases where the consumer knew about the term or could have found better terms elsewhere. Furthermore, consumers cannot protect themselves against a healthcare supplier's negligence, and will often not be insured against bodily harm or even death.⁶⁶⁰

This is why exemption clauses relating to bodily injury or death are often prohibited in some European countries,⁶⁶¹ or at least are held unfair (greylisted).⁶⁶² § 305c BGB provides that provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract. The South African common law already recognises such a principle. In *Constantia Insurance Co v Compusource*⁶⁶³ the court held that an adhering party would not be bound by an unusual contract term to which it did not and could not reasonably have been thought to agree.

In Naudé's and Lubbe's opinion, a contract clause is unexpected or surprising where it purports to vary the consequences of the contract in a manner contrary to the essence of the agreement by undermining the reciprocity between the essential obligations envisaged by the parties.⁶⁶⁴

⁶⁵⁹ See *Afrox Healthcare Bpd v Strydom* 2002 (6) SA 21 (SCA) – hereafter *Afrox Healthcare v Strydom*.

⁶⁶⁰ Naudé 2009 SALJ 510, 511.

⁶⁶¹ **§ 309 no. 7 lit. a):** '[Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:] a) (Injury to life, body or health) any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user.'

⁶⁶² **Item (a) of the Annex of Council Directive 93/13/EEC** of 5 April 1993 on unfair terms in consumer contracts, referring to its Article 3 (terms are to be regarded as unfair): 'Terms which have the object or effect of: (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier.' In this regard, see also the related discussion on reg 44(3)(a) in ch 3.

⁶⁶³ *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para [19] – hereafter *Constantia Insurance Co v Compusource*.

⁶⁶⁴ Naudé/Lubbe 2005 SALJ 454.

For the determination of the ‘essence’ of the contract, the obligations that are essential in the light of the underlying contractual purpose must be examined. In the parties' minds, the nature of the policy considerations with regard to each sub-type of contract must be considered.⁶⁶⁵

It is therefore not only doubtful that the consumer is sufficiently protected by waiving an obligation which has a warning function such as initialling or signing the notice or provision. It can also be doubted that the signing or initialling itself fulfils its protective function.

It is recommended that the legislator redraft section 49(2) by omitting the phrase 'or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.'

In order to strengthen the consumer's position, the following sentence, which follows the example of § 305c BGB, should be inserted in section 49(2) *in fine*:

'A provision or notice which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the consumer need not expect to encounter them, are not valid.'

This would apply irrespective of whether the provision or notice is drafted in plain language because such a provision or notice would be so surprising that one cannot expect a normally alert consumer to encounter it.

c) Adequate opportunity to receive and comprehend the provision or notice

In addition, the supplier must give an adequate opportunity to the consumer in the circumstances to receive and comprehend the provision or notice as contemplated in section 49(1).⁶⁶⁶ Unfortunately, the Act does not contain any definition of ‘adequate opportunity’. In any event, the supplier should be able to prove that the consumer was not confronted with a document that he or she had to sign under any form of pressure.⁶⁶⁷ Otherwise, the agreement could be declared void under section 52(4)(a)(ii).

Section 49(5) does not require that the consumer be given an adequate opportunity before the conclusion of the contract. It should therefore be sufficient if consumers are granted a cooling-off period. If any form of pressure had been put on the consumer during the conclusion of the

⁶⁶⁵ Naudé/Lubbe 2005 *SALJ* 459.

⁶⁶⁶ Section 49(5).

⁶⁶⁷ Van Eeden *Guide to the CPA* 178.

agreement, the cooling-off period can be an adequate opportunity to receive and comprehend the term.⁶⁶⁸

The question is how ‘adequate opportunity’ can be defined in order to apply this concept to every single case. ‘Opportunity’ means ‘a favourable (or appropriate) time or set of circumstances for doing something’,⁶⁶⁹ or ‘a good position, chance, or prospect, as for advancement or success’.⁶⁷⁰ This means that the consumer must have the opportunity to receive and understand the provision or notice. This opportunity must be adequate, i.e., sufficient, acceptable, satisfactory or suitable.⁶⁷¹ ‘Adequate’ is thus time-related and also refers to the surrounding circumstances.

Under section 49(5), the circumstances must be considered when assessing whether the consumer had an adequate opportunity to receive and comprehend the notice. It is striking that the circumstances are already considered when defining ‘opportunity’, and that ‘adequate’ also refers to the surrounding circumstances (otherwise, this word would not make any sense here). It is suggested that this only underlines the necessity to consider the surrounding circumstances, and not to apply the concept of ‘adequate opportunity’ in an abstract way.

On the one hand, it will depend on the type of contract the consumer enters into. A purchase agreement on a radio containing a limitation clause typically requires less reflection than a life insurance policy with complex clauses and often life-long implications. On the other hand, the type of consumer must also be taken into consideration. An alert consumer who is used to more complex transactions can be expected to comprehend the implications of a particular notice quicker than a more vulnerable and inexperienced consumer.

Therefore, ‘adequate opportunity’ can be defined as the possibility given to a consumer to receive and understand a term in consideration of the surrounding circumstances.

Even if section 49(5) does not refer to section 52(2) (nor does section 52(1) mention or refer to section 49), it is submitted that some considerations contained in section 52(2) could be used by analogy⁶⁷² for the determination of the circumstances and whether the consumer had an adequate opportunity to receive and comprehend the agreement.⁶⁷³ The following

⁶⁶⁸ De Stadler ‘Section 49’ in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁶⁶⁹ Stevenson and Waite *Oxford Dictionary* s.v. ‘opportunity’.

⁶⁷⁰ See ‘Opportunity’ at <http://dictionary.reference.com/browse/opportunity>.

⁶⁷¹ Adjectives taken from <http://www.thesaurus.com/browse/adequate?s=t>.

⁶⁷² Such an analogous application could be justified to achieve substantial coherence within the Act.

⁶⁷³ Only ss 52(2)(f) and (i) are difficult to apply by analogy to the considerations concerning the adequate opportunity requirement. This is because the consideration whether the consumer was required to do anything that

considerations could be taken into account: The (fair) value of the goods or services,⁶⁷⁴ the nature of the parties,⁶⁷⁵ the circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct of transaction occurred or agreement was made⁶⁷⁶ the conduct of the supplier and the consumer,⁶⁷⁷ whether there was any negotiation between the parties,⁶⁷⁸ the extent to which the documents in questions satisfied the plain language requirement,⁶⁷⁹ whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision,⁶⁸⁰ and whether the goods were manufactured, processed or adapted to the special order of the consumer.⁶⁸¹

One must keep in mind though that the common-law rules of incorporation of terms have not been amended by section 49 and still apply. The party alleging the contract bears the onus of proving what the contractual terms are, even if this means proving that a term alleged by the counterparty was not incorporated into the contract.⁶⁸² If the supplier can show that it took reasonably sufficient measures to bring the provisions of the contract to the consumer's notice, it does not matter whether the consumer read the terms of an agreement to which it has assented to or not.⁶⁸³ The idea behind this is that the supplier can rely on these measures and that the consumer has actually read these terms, even if this is not the case. The consumer's signature under the document may be used to establish that there was reasonable reliance of consensus under the common law.⁶⁸⁴ This does however not apply to surprising terms, unless they were

was not reasonably necessary for the legitimate interests of the supplier pursuant to s 52(2)(f) has no correlation to the adequate opportunity requirement. And for practical reasons, the circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier in terms of s 52(2)(i) are merely hypothetical and cannot be taken into consideration either in terms of s 49(5).

⁶⁷⁴ Section 52(2)(a). The value is often – but not always – an indication of the complexity of the good or service, and the complexity of the underlying agreement.

⁶⁷⁵ Section 52(2)(b). This applies to the experience and sophistication of the parties, especially of the consumer.

⁶⁷⁶ Section 52(2)(c). Where and when was the agreement concluded? In what situation was the consumer at this time, and so forth?

⁶⁷⁷ Section 52(2)(d). This concerns the question of whether any pressure was put on the consumer when signing the agreement, or if the supplier behaved unfairly.

⁶⁷⁸ Section 52(2)(e).

⁶⁷⁹ Sections 52(2)(g) and 22. This requirement is already a requirement set out in s 49(3), but could also be indirectly taken into account in terms of s 49(5) in order to assess whether the consumer was confronted with an illegible document which was difficult to understand.

⁶⁸⁰ Section 52(2)(h). Was the notice in question surprising?

⁶⁸¹ Section 52(2)(j). If so, another standard should be applied, as the supplier has an interest to protect himself from certain liabilities, especially when he followed the consumer's orders.

⁶⁸² *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA).

⁶⁸³ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA).

⁶⁸⁴ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 41; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA).

specifically pointed out to the consumer when he or she contracted⁶⁸⁵ (although it is arguable in this case that they were not surprising anymore).

3.3 Legal consequences in case of non-observance of section 49

Section 49 itself is silent about the legal consequences in case of a violation of this provision. The consequences of non-compliance are not clear.

Section 52(4) sets out that if a person alleges at court that an agreement, a term or condition, or a notice is void under the Act or failed to satisfy the requirements of section 49, the court may sever the provision or notice from the agreement, or declare it to have no force or effect.

The court may make an order if a provision or notice is void in terms of any provision of the Act, severing any part of the agreement,⁶⁸⁶ or alter it to the extent required to render it lawful, or declaring the entire agreement void.⁶⁸⁷

Naudé correctly reminds that non-compliance with section 49 will have no extra-judicial effect. A court cannot be required to pronounce the term as having no force or effect because of the limitations of judicial control. This is particularly true with regard to the costs, risk and effort of litigation to consumers.

The fact that litigation can be very time-consuming and costly might contribute to the supplier's conduct in terms of which it might easily accommodate a consumer by not insisting on the provision in question because otherwise, the court might strike it down. Naudé therefore legitimately suggests that in the event of non-compliance with section 49, the supplier may not rely on the contract term, and the consumer would only need to approach a court in the event of a dispute as to whether the supplier did actually comply with section 49.⁶⁸⁸

A provision that complies with section 49 does not prevent a court to qualify it as unfair in terms of sections 48 and 52. Section 49 merely sets out preliminary incorporation requirements. Terms might still be struck down within the content (or substantive) control.⁶⁸⁹ A notice excluding the supplier's liability for bodily injuries or death may still be unfair under section 48 as it is greylisted in regulation 44(3)(a).⁶⁹⁰ Hence, the supplier will have to bring forward

⁶⁸⁵ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

⁶⁸⁶ Section 52(4)(a)(i)(aa).

⁶⁸⁷ Section 52(4)(a)(i)(bb).

⁶⁸⁸ Naudé 2009 *SALJ* 509; De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁶⁸⁹ De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 9. Content control will be discussed in ch 3.

⁶⁹⁰ **Regulation 44(3) CPA:** 'A term of a consumer agreement subject to the provisions of subregulation (1) is presumed to be unfair if it has the purpose or effect of (a) excluding or limiting the liability of the supplier for

good reasons why the exclusion of this liability is not unfair, even if the consumer signed or initialled the term in question.⁶⁹¹

4. Written consumer agreements

The Consumer Protection Act does not require all consumer contracts to be in writing. However, in terms of section 50(1), the Minister may prescribe categories of consumer agreements that are required to be in writing. Non-compliance with the formalities prescribed in an applicable statute usually leads to the invalidity of the transaction in question, save if the applicable legislation provides otherwise.⁶⁹² Since the Act does not contain such a provision, the general rule could apply in terms of which the written form becomes a formal requirement for the validity of the agreement.⁶⁹³ Where the law requires the written form, the statute must be interpreted to determine whether the legislator intended the written form to be constitutive though. If it is not clear, the presumption prevails that the legislature did not want to change the common law more than necessary. Most authorities take the stand that the written form in the Act is not constitutive and that non-compliance does not render the agreement void.⁶⁹⁴ Section 50 itself provides that if a consumer agreement is in writing, it is applicable irrespective of whether the consumer has signed it or not. Hence, the signature is not an incorporation requirement. What is more, under section 52(2)(g), non-compliance with the plain language requirement does not nullify the agreement *per se*, but is merely a factor to be taken into account by the court.⁶⁹⁵ The wording of section 50(2) '[i]f a consumer agreement (...) is in writing' is a clear indication that the written form is no requirement for validity unless prescribed by the Minister.

For these reasons, the requirements of section 50 are part of the incorporation control.

Before discussing the provision of section 50, it is worthwhile having a look at the common law of contracts in order to better understand the formal requirement of the written form and the developments in jurisprudence in this field.

death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1) of the Act; (b) (...).

⁶⁹¹ De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

⁶⁹² Pursuant to s 5(1) of the Credit Agreement Act 75 of 1980, credit agreements had to be in writing. Section 5(2) provided that credit agreements which did not comply with this requirement should not merely for that reason be invalid, however.

⁶⁹³ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁶⁹⁴ As a general rule, only alienation of land, suretyship and executory donations require the written form in order to be valid and enforceable. See Hutchison *et al Law of Contract* 115 and 161 *et seq.*, Christie and Bradfield *Law of Contract* (2011) 134.

⁶⁹⁵ ⁶⁹⁵ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

4.1 Common law

In South African contract law, writing is a constitutive or formal requirement only for certain legal acts but not a general requirement.⁶⁹⁶ The most important agreements for consumers that need to be in writing are agreements for the sale of land,⁶⁹⁷ suretyships⁶⁹⁸ and executory donations.⁶⁹⁹ According to the Act, also franchise agreements need to be in writing to be valid.⁷⁰⁰ Otherwise, there is no requirement in common law according to which an agreement has to be in writing.⁷⁰¹ Employment contracts, for instance, do not need to fulfil any written form requirements in order to be valid. The same applies to credit agreements. Section 93(1) of the National Credit Act requires a credit provider to deliver a copy of the document recording their agreement. Non-compliance with this formality does not invalidate the consumer agreement, however.⁷⁰²

Different policies require specific formalities, and as statutes have different objectives, the formality provisions have to be interpreted accordingly.⁷⁰³ Van Eeden's argument that the signature on a written document not only indicates that the parties have read and understood its content, have consented to the terms above their signatures and agreed to them does not apply to all cases.⁷⁰⁴ Consumers too often sign contracts without having read, not to mention understood their content.⁷⁰⁵ In some instances, such as the alienation of land,⁷⁰⁶ the general object of the formal requirement of the written form and the parties' signature is not the protection of the parties. It is rather directed 'against uncertainty, disputes and possible malpractices'.⁷⁰⁷ The written form is a constitutive requirement here. The same applies to suretyships⁷⁰⁸ where the writing requirement also has the purpose of bringing the clauses of the agreement to the surety's attention that contains onerous obligations in the case of the debtor's

⁶⁹⁶ Hutchison *et al Law of Contract* 159.

⁶⁹⁷ Section 2(1) of the Alienation of Land Act 68 of 1981.

⁶⁹⁸ Section 6 of the General Law Amendment Act 50 of 1956.

⁶⁹⁹ Section 5 of the General Law Amendment Act 50 of 1956.

⁷⁰⁰ Section 7(1)(a) CPA.

⁷⁰¹ Christie *Law of Contract* 115.

⁷⁰² Christie *Law of Contract* 134. On the other hand, under s 5(1)(a) of the (now repealed) Credit Agreements Act 75 of 1980, all credit agreements had to be in writing.

⁷⁰³ Hutchison *et al Law of Contract* 160.

⁷⁰⁴ Van Eeden *Guide to the CPA* 169.

⁷⁰⁵ Hutchison *et al Law of Contract* 162.

⁷⁰⁶ See s 2(1) of the Alienation of Land Act 68 of 1981.

⁷⁰⁷ *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) at 464E. See Christie *Law of Contract* 116.

⁷⁰⁸ See s 6 of the General Law Amendment Act.

non-performance.⁷⁰⁹ The purpose of the written form for executory donations of anything but land is to make sure that the donor is serious about the conclusion of the contract.⁷¹⁰

The Supreme Court of Appeal held in *Afrox Healthcare v Strydom*⁷¹¹ that, as a rule, a contracting party has no legal duty to inform the other party about the content of their proposed agreement.⁷¹² In other words, the common law does not know any notification or transparency requirements. Six years later, in *Mercurius Motors v Lopez*,⁷¹³ the court decided though that an exemption clause by which the liability for negligence of a car dealer was limited ‘should be clearly and pertinently brought to the attention of a customer (...), and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.’⁷¹⁴ The courts trod this path of consumer protection already earlier. In *Dlovo v Brian Porter Motors Ltd*,⁷¹⁵ the court found that a supplier must not confuse or mislead the signatory by the form of the document by including an essential clause in a document which, by its heading or nature, could not be expected to contain such a provision.⁷¹⁶ Other cases decried small print of a relevant clause⁷¹⁷ or placing such a clause where nobody expected it.⁷¹⁸ These cases show a clear shift towards consumer protection as regards transparency and consumer information made possible by clearly visible and understandable clauses.

a) Non-variation clauses

Written agreements, compared to oral agreements, have obvious advantages, such as the simplification of the burden of proof, the avoidance or limitation of subsequent disagreements about the contractual provisions, and the opportunity for the parties to consider their positions and duties contemplated in the contract before signing it.⁷¹⁹ Once an agreement has been concluded in writing, the parties will be entitled to cancel it orally, unless they have provided

⁷⁰⁹ Hutchison *et al* *Law of Contract* 162.

⁷¹⁰ Hutchison *et al* *Law of Contract* 163.

⁷¹¹ 2002 (6) 21 (SCA).

⁷¹² *Afrox Healthcare v Strydom* 2002 (6) 21 (SCA) at 41.

⁷¹³ 2008 (3) SA 572 (SCA).

⁷¹⁴ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) at 578.

⁷¹⁵ 1994 (2) SA 904 (C).

⁷¹⁶ See also *Fourie v Hansen* 2001 (2) SA 823 (W).

⁷¹⁷ *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 318C, *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T) at 467B-C, 468 G-H, *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) at 495I-496A, *Fourie v Hansen* 2001 (2) SA 823 W at 833.

⁷¹⁸ *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) at 590B-592C, *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA) at 20.

⁷¹⁹ Christie and Bradfield *Law of Contract* (2011) 109 and 113.

for certain formalities for cancellation. By a so-called non-variation clause,⁷²⁰ the parties can prescribe writing as a formal precondition for variation of the contract. When it is worded widely enough, no part of the contract, including the non-variation clause itself, may be varied in any way other than in writing.⁷²¹

For years, the validity of non-variation clauses was debated, and both sides put forward the *pacta sunt servanda* principle. One side argued that the effectiveness of such a clause would amount to an unjustifiable invasion of the parties' freedom to change their minds and alter the provisions of their contract.⁷²² The other side asserted that not giving effect to a seriously intended and commercially useful clause would in itself constitute an unjustifiable limitation of the fundamental principle that the parties to a contract are free on any term, provided that it is not immoral, *contra bonos mores* or against public policy.⁷²³ The validity of non-variation clauses was finally decided in *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*⁷²⁴. The Appellate Division held that such a clause was not against public policy and that the parties could not amend their agreement orally if the clause entrenched both itself and all the other contractual provisions against oral variation. According to the court, the purpose of such a clause was to prevent disputes and problems of proof. Furthermore, it operated in favour of both parties, and giving effect to the clause was in line with the principle of *pacta sunt servanda*, by which agreements must be enforced in the public interest if they are freely and seriously concluded.⁷²⁵ The court put forward that the parties still could exercise their freedom of contract since they were still able to freely vary their agreement, provided that they complied with the formal requirements they had agreed upon.⁷²⁶ As this so-called *Shifren* principle often led to unfair results,⁷²⁷ it was challenged in *Brisley v Drotsky*.⁷²⁸ The court, however, reaffirmed its earlier decision in *Graanmaatskappy v Shifren* by referring to an analogy where the legislature or parties to a contract prescribe writing as a formal requirement for an agreement.⁷²⁹

⁷²⁰ The wording of a non-variation clause is more or less the following: 'No variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement'. Formulation from Hutchison *et al Law of Contract* 165.

⁷²¹ Van der Merwe *et al Contract General Principles* 131, Hutchison 2001 SALJ 720.

⁷²² Forsyth/Francis 80 SALJ 395.

⁷²³ See Hutchison 2001 SALJ 720, with further references.

⁷²⁴ 1964 (4) SA 760 (A) – hereafter referred to as '*Graanmaatskappy v Shifren*'.

⁷²⁵ *Graanmaatskappy v Shifren* at 767.

⁷²⁶ *Graanmaatskappy v Shifren* at 767.

⁷²⁷ For instance, where a party orally agrees to a modification of the contract, and the other party relies on this oral agreement, and then the first party later cancels the contract on this ground, relying on the non-variation clause.

⁷²⁸ 2002 (4) SA 1 (SCA).

⁷²⁹ *Brisley v Drotsky* at 11.

Another argument put forward was 'legal certainty' or 'commercial reliance and social certainty' which ultimately avoids litigation.⁷³⁰ Nonetheless, courts tend more and more to abolish the 'slavish' application of the *Shifren* principle in order to mitigate its harsh outcomes, by putting forward the argument that non-variation clauses must be interpreted restrictively as they ultimately curtail freedom of contract.⁷³¹ Some commentators investigated the reference to waiver and estoppel made by the court in the *Shifren* case, but this approach seemed too technical and complicated.⁷³² A waiver could be construed though where the creditor implicitly agreed not to enforce its right to cancel after the debtor did not fully perform his or her obligation (*pactum de non petendo*),⁷³³ or where the creditor agreed not to cancel without due warning that in future it would insist on strict compliance with the contract.⁷³⁴ In *Miller & another NNO v Dannecker*,⁷³⁵ the court did however not construe a waiver because the plaintiff did rather suspend its right to receive payment of the defendant's instalments concerning a franchise business than abandon them. Although many commentators mention waiver and estoppel in these cases, they have not been successful in any reported decision yet. On the other hand, in cases where the right waived is based on a term inserted only for the benefit of the waiving party,⁷³⁶ or where an accrued right flowing from a breach of contract is waived (e.g., the right to cancel the contract),⁷³⁷ an oral waiver might be construed despite the presence of a non-variation clause in the agreement.⁷³⁸

Another approach invokes the notion of *bona fides* directly, especially in cases where good faith is closely connected to public policy and the community's sense of what is fair, just and

⁷³⁰ Van der Merwe *et al Contract General Principles* (2007) at 140.

⁷³¹ *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 841F; *Barclays Western Bank Ltd v Ernst* 1988 (1) SA 243 (A) at 253. In this sense, any legal act which does not amount to a variation of the contract is thus not affected by the non-variation clause, such as an informal cancellation of the contract which extinguishes the agreement rather than varying it. See Van der Merwe *et al Contract General Principles* (2007) 156.

⁷³² Hutchison 2001 SALJ 722. See Tager 1976 SALJ 423 and the authors quoted at 435. See also Van Rensburg 2015 *De Rebus* 32.

⁷³³ In *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T), Hiemstra J denied the qualification of a *pactum de non petendo* as a variation of the contract. He instead implied that it was a waiver. Lubbe and Murray *Contract* at 730 note 4) however do not qualify a *pactum de non petendo* as a waiver, as the first does not extinguish the legal consequences of a transaction, but only suspends the capacity to enforce it.

⁷³⁴ Hutchison *et al Law of Contract* 168.

⁷³⁵ *Miller & another NNO v Dannecker* 2001 (1) SA 928 (C).

⁷³⁶ Hutchison 2001 SALJ 728 *et seq* is however of the opinion that such a reasoning would be artificial. This argument is also recognised by Nestadt J in *Van As v Du Preez* 1981 (3) SA 760 (T).

⁷³⁷ In such a case, the waiver does not affect the terms or the underlying contractual obligations, and therefore does not constitute a variation.

⁷³⁸ Hutchison 2001 SALJ 726.

reasonable.⁷³⁹ The Supreme Court of Appeal has however rejected the Constitutional Court's interpretation in *Barkhuizen v Napier* as authority for the view that fairness is a freestanding requirement for the exercise of a contractual right, although the Supreme Court of Appeal enquired whether the cancellation of the contract was unreasonable and unfair.⁷⁴⁰

b) Parol evidence rule

The importance of the written form in common law is also stressed by the parol evidence rule. According to this rule, extrinsic evidence which discloses an ambiguity and clarifies it or adds to the written terms of the agreement that appears to be whole is inadmissible. The rationale of this common law rule is that extrinsic evidence of past agreements or terms should not be considered when interpreting that writing because the parties had decided to ultimately leave them out of the contract when reducing their agreement to a single and final writing.⁷⁴¹

⁷³⁹ *Miller & another NNO v Dannecker* 2001 (1) SA 928 (C) at 938D-929B; *Nyandeni Municipality v Hlazo* 2010 (4) SA 261 (ECM), *GF v SH* 2011 (3) SA 1 (GNP); *Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another* (GSJ) (2009/45448) [2011] ZAGPJHC 228 (39 November 2011) (Peter AJ). *Hutchison* 2001 SALJ 722.

⁷⁴⁰ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at 483-7; *Maphango v Aengus Lifestyle Properties* 2011 (5) SA 19 (SCA) at 26-7.

⁷⁴¹ For an explanation of the parol evidence rule, see *Hutchison et al Law of Contract* 257 *et seq.* See also *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 47; *Johnston v Leal* 1980 (3) SA 927 (A) 938. Since the strict application of the parol evidence rule leads to certain difficulties, such as the distinction between background circumstances and surrounding circumstances, the courts had become less reluctant to consider the broad context in which the contract came into existence and allowing extrinsic evidence. Some authorities, especially after the case *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) were taking the view that the court would abandon the aforementioned distinction as soon as it is presented with an adequate opportunity, and at least one author, namely Wallis, was of the opinion that this distinction had no validity anymore. See Wallis 2010 SALJ 674-675. Finally, in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), the SCA held at para [12] that the distinction 'between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.' See also *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* (20044/2014) [2015] ZASCA 20 (19 March 2015). In the last decade there has been a development, and the courts no longer apply this distinction and allow all evidence in order to determine the meaning of a word or phrase, since the relevance of evidence cannot be determined before the end of a case, which of course defies the purpose of the parol evidence rule. Before, the distinction between background and surrounding circumstances could probably only survive, according to Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd*,⁷⁴¹ because it was widely ignored by trial courts. For the recent development see *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165.

c) *Caveat subscriptor* principle

With respect to the common-law principle *caveat subscriptor*,⁷⁴² the parties are bound to the terms of an agreement when it is reduced to writing and they have signed it as signature signifies assent thereto,⁷⁴³ even if a party did not read it⁷⁴⁴ or was willing to consent to it.⁷⁴⁵

This rule has sometimes been considered a rebuttable presumption that someone who signs a document knows what it contains.⁷⁴⁶ The onus to prove that the document was not signed *animo contrahendi* is ordinarily not upon the signatory, however.⁷⁴⁷ This does not apply to cases though where it is evident from the nature of the document that it embodies a contract, or where the circumstances clearly indicate that the document was meant to be a contract. In cases where a document is *ex facie* a bilateral agreement, but in reality is, for instance, an invoice,⁷⁴⁸ the person alleging that the document was signed *animo contrahendi* has the burden of proof.⁷⁴⁹

The *caveat subscriptor* rule therefore protects not only the reliance interest of the other party but also commercial relationships which would be impossible if a party could escape from its duties by simply not searching the implications of a contract.⁷⁵⁰ The need for legal and commercial certainty is balanced in situations of *iustus error* as regards the content of the contract, its nature or the identity of the parties, or in situations where a party unreasonably relied on the appearance of consensus based on the fact that the contract was signed. In these cases, the party can escape its liability. The same applies to cases of misrepresentation, duress, undue influence or commercial bribery.⁷⁵¹ In recent years, the scope of exceptions to the *caveat subscriptor* rule was significantly widened by the courts, beginning with *Du Toit v Atkinson's Motors Bpk*,⁷⁵² and other cases allowing to escape the application of the principle because of unusual or unexpected contract terms.⁷⁵³

⁷⁴² Latin for 'let the signatory beware'. A case where the classical approach of the *caveat subscriptor* rule is well demonstrated is *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

⁷⁴³ Christie and Bradfield *Law of Contract* 181. The *caveat subscriptor* rule is usually traced back in South African law to *Burger v Central South African Railways* 1903 TS 571. Originally, it derived from English law where it can be traced back to *Parker v South Eastern Railway* (1872) 2 CPD 416.

⁷⁴⁴ Eiselen 2011 *PELJ* 13.

⁷⁴⁵ Nortje 2011 *SALJ* 741.

⁷⁴⁶ Christie and Bradfield *Law of Contract* 181.

⁷⁴⁷ *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A).

⁷⁴⁸ This was the case in *WJ Lineveldt (Edms) Bpk v Immelman* 1980 (2) SA 964 (O).

⁷⁴⁹ *Gordon Wilson (Pty) Ltd v Barkhuizen* 1947 (2) SA 244 (O) at 248.

⁷⁵⁰ Hutchison *et al Law of Contract* 239.

⁷⁵¹ Hutchison *et al Law of Contract* 239. *Spindrift (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); *Van Wyk v Otten* 1963 (1) SA 415 (O).

⁷⁵² 1985 (2) SA 893 (A).

⁷⁵³ See, e.g., *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Fourie v Hansen* 2001 (2) SA 823 (W); *Dlovo v Brian Porters Motors Ltd t/a Port*

If a person signing a contract is bound to the terms above its signature, this begs the question of whether this is also applicable in cases where a contractual document merely refers to terms and conditions which are not contained in the contract itself. As mentioned above, the *caveat subscriptor* rule is sometimes expressed as a rebuttable presumption that the signatory knows what the given document contains.⁷⁵⁴ Under the doctrine of quasi-mutual assent, the signatory is bound by the document if its co-contractor is reasonably entitled to assume that the other party was signifying his or her intention to be bound by it by signing the document. Thus, the signatory is, not bound by the contractual terms if he or she did not know that the document contained such terms,⁷⁵⁵ or where the other party undertook no steps to draw the other party's attention to their existence.⁷⁵⁶ This also applies where the supplier did not explain the nature of unlimited deeds of suretyships.⁷⁵⁷ From these cases, one cannot deduct though that the other party always must expressly warn its counterpart of the content of the document before signing it.⁷⁵⁸ As discussed earlier, under section 49(1), a notice that limits the risk or liability of the supplier or any other person must be drawn to the consumer's attention. The courts deal with the question of whether one can reasonably interpret the signature as an acceptance of the conditions on a case-to-case basis.⁷⁵⁹ In cases where the signatory has not read the document but indicates expressly or impliedly that he or she wants to be bound to the contractual terms, the courts already decided that the signatory is bound by the contractual clauses.⁷⁶⁰

Motors Newlands 1994 (2) SA 518 (C); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); *Van Wyk v Otten* 1963 (1) SA 415 (O).

⁷⁵⁴ Christie and Bradfield *Law of Contract* 181. See *Burger v Central South African Railways* 1903 TS 571; *SAR v Merchiston Plains Black Wattle Co Ltd* 1921 NPD 165; *SAR & H v Conradie* 1922 AD 137; *Industrial and Mercantile Corp'n v Anastassiou Bros* 1973 (2) SA 601 (W) at 604-605. See also *Graaf-Reinet Municipality v Jansen* 1917 CPD at 604 610; *Knocker v Standard Bank of SA Ltd* 1933 AD 128 at 132; *Trans-Drakensberg Bank Ltd v Guy* 1964 (1) SA 790 (D) at 794C; *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 (3) SA 210 (T) at 215; *Stiff v Q Data Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA) at 340; *Langeveld v Union Finance Holdings (Pty) Ltd* 2007 (4) SA 572 (W).

⁷⁵⁵ *Van Wyk v Otten* 1963 (1) SA 415 (O).

⁷⁵⁶ *Payne v Minister of Transport* 1995 (4) SA 153 (C) 159E-161C.

⁷⁵⁷ *Davids v ABSA Bank Bpk* 2005 (3) SA 351 (C) 370-371,

⁷⁵⁸ See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁷⁵⁹ In *Homes Fires Transvaal CC v Van Wyk* 2002 (2) SA 375 (W) 381 and *Cape Group Construction (Pty) Ltd v Government of the United Kingdom* 2003 (5) SA 180 (SCA) it was held that a faxed document of which the reverse side containing conditions was not faxed, did not bind the other party. On the other hand, in *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA), it was stated that if the fax referred to terms and conditions on the reverse side of the document (which had not being faxed), the signatory could have asked for a copy of that other page. 'By not doing so he indicated that he was nevertheless prepared to contract on the basis of the appellant's standard conditions.'

⁷⁶⁰ *Goedhals v Massey-Harris & Co* 1939 EDL 314; *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Glenburn Hotels (Pvt) Ltd v England* 1972 (2) SA 660 (RA); *Moshall Gevisser (Trademark) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

Apart from cases of misrepresentation, fraud, illegality, duress, undue influence and *iustus error*, one has to keep in mind that only a reasonable person can rely on the doctrine of quasi-mutual assent. This leads to the conclusion that the *caveat subscriptor* rule must not be applied in cases which present an inconsistency between an advertisement, which led to the conclusion of the contract, and the contractual terms.⁷⁶¹ The same applies to representations made during the negotiations, and which are inconsistent with the terms of the actual contract,⁷⁶² or where the form of the document is confusing or misleading for the signatory, where an essential clause of a document is surprising considering the heading or nature of the document,⁷⁶³ where an important clause is in small print⁷⁶⁴ or where a clause is tucked away where it is not obvious.⁷⁶⁵ The principle according to which a contract can only bind a party if it has not been misled in respect of the nature of the document or its content leads to the conclusion that the signatory is not bound by a document containing unexpected terms that he or she had not read.⁷⁶⁶

d) Unsigned documents: 'Ticket cases'

The so-called 'ticket cases' are an example where it is practically impossible to obtain a signature from each customer. These cases concern transactions where a great number of customers conclude the same kind of transaction with the same supplier, e.g., for a sports event, or passenger transportation. Obtaining a signature from each client would cause delays and raise costs. Since no signature is required, the *caveat subscriptor* rule needs to be replaced so that the parole evidence rule can operate. The term 'ticket cases' is too narrow because these cases not only involve tickets but all transactions where a supplier places a document that contains or refers to its standard terms, and that is not intended to be signed, before the client.⁷⁶⁷

The ticket cases beg the question when a consumer is bound by the terms although it has not signed anything. In any case, the principles mentioned above do not apply where the supplier is unable to prove that the terms contained in a document were legible.⁷⁶⁸ In situations where

⁷⁶¹ *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

⁷⁶² *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A).

⁷⁶³ *Dlovo v Brian Porters Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) 526F; *Fourie v Hansen* 2001 (2) SA 823 (W) 833.

⁷⁶⁴ *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) 318C; *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T) 467B-C 468G-H; *Dlovo v Brian Porters Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) 526F; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495I-496A; *Fourie v Hansen* 2001 (2) SA 823 (W) 833.

⁷⁶⁵ *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) 590B-592C; *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA) at 20.

⁷⁶⁶ Christie and Bradfield *Law of Contract* 185 *et seq.*

⁷⁶⁷ Christie and Bradfield *Law of Contract* 186 and 187.

⁷⁶⁸ *Primesite Outdoor Advertising (Pty) Ltd v Salvati and Santori (Pty) Ltd* 1999 (1) SA 868 (W) at 879D. In this case, the document transmitted by fax contained minute print.

the consumer has read the provisions contained in such a document and enters into a contract, it is not necessary to prove that he or she actually has understood the terms.⁷⁶⁹ It is also not necessary that the customer reads a second document (e.g., the railway regulations) to which the first document (e.g., the train ticket) refers.⁷⁷⁰ If it is not possible to prove whether the consumer has read the document, he or she will nevertheless be bound to the terms contained or referred to herein if the supplier did what was reasonably sufficient, necessary or possible to draw the customer's attention to the clauses in question.⁷⁷¹

If the supplier can, on the basis of quasi-mutual assent, assume from the consumer's conduct that he or she has either read and assented to the terms or is prepared to be bound by them without reading them, the supplier can go ahead with the contract. This is regularly the case where the supplier's document itself was sufficient to draw a reasonable consumer's attention to its content. Then, the supplier has no obligation to reinforce it with other means, such as posters or a public address system.⁷⁷²

The question when a supplier's steps are sufficient to draw the consumer's attention to the terms contained in a document (ticket) was dealt with in early cases, such as *Central SAR v McLaren*⁷⁷³ (a case based on English law) and has since evolved as follows: If the consumer knows that the document in question contains terms without reading them, he or she is bound to them. If the consumer does not know that terms are printed on the ticket, he or she is only bound if the supplier took reasonable steps to draw the attention of a reasonable consumer to those terms, no matter if they are printed on the ticket, or the ticket simply refers to them.⁷⁷⁴

Whether or not these steps were sufficient has to be decided on a case-to-case basis. The nature of the given document will be the most relevant factor. The less likely the document is expected to contain contractual provisions, 'the more specific and positive must the steps be which are

⁷⁶⁹ Some court cases stating the contrary refer to outmoded English or Roman-Dutch ideas according to which true consensus is necessary for every contract, or refer to s 4 of the English Carriers Act 1830, or simply deal carelessly with this issue. Cases in which was decided that the customer also needs to understand the terms: *Naylor v Munnik* 1859 (3) S 187 at 191, *Owens v Ennis & Co* 1890 (3) SAR 233; *Zeederberg v Frank* 1894 (1) OR 118 at 122; *Davis v Lockstone* 1921 (AD) 153 at 167. Cases where it was decided that it was sufficient that the consumer reads the terms: *Essa v Divaris* 1947 (1) SA 753 (A) 763; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) 803-804.

⁷⁷⁰ *Central SAR v James* 1908 (TS) 221 at 226. See also the particular case of *Sanso Properties Joubert Street (Pty) Ltd v Kudsee* 1976 (4) SA 761 (A), where the document referred to did not become part of the contract.

⁷⁷¹ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A) 991I-992A; *Jacobs v Imperial Group (Pty) Ltd* 2010 (2) All SA 540 (SCA) at [9].

⁷⁷² Christie and Bradfield *Law of Contract* 187.

⁷⁷³ 1903 (TS) 727.

⁷⁷⁴ *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643E; *Cape Group Construction (Pty) Ltd v Government of the United Kingdom* 2003 (5) SA 180 (SCA) at 188.

taken to bring this to the attention of the other party'. On the other hand, in the case of carriage tickets and bills of lading, long-established usage has created a situation where a contracting party will be considered to know of the existence of such clauses on the relevant document, or at least of a reference to them.⁷⁷⁵ The same applies to the ECTA⁷⁷⁶ which provides that contractual provisions which are incorporated into an agreement and that are not in the public domain are regarded as having been incorporated into a data message if such information is referred to in a way in which a reasonable person would have noticed the given reference and incorporation, provided that the information is accessible in a form in which it may be read, stored and retrieved by the other party.⁷⁷⁷ Thus, a consumer is justified to ignore a document which does not appear to him, as a reasonable person, to be of a contractual nature.⁷⁷⁸ The same applies if the consumer receives the document only after the contract has been concluded,⁷⁷⁹ or where there is a combination of both factors.⁷⁸⁰ The documents need not necessarily come into the consumer's possession though. If an auctioneer, for example, refers to the printed conditions of sale and makes them available for inspection,⁷⁸¹ or the terms are posted at all entrances of a venue, and the conditions of admission were published in all the local newspapers, this shall be sufficient.⁷⁸²

e) Exemption clauses

Exemption or exception clauses, are part of nearly every single contract because suppliers aim to protect themselves from certain risks. Nonetheless, there are limits to this kind of clauses, and the courts draw on public policy to define what is allowed and what is not.⁷⁸³ An exemption clause is against public policy if it is shown that it contravenes 'some fundamental principle of justice or of general statutory law, or that it is necessarily to the prejudice of the interests of the

⁷⁷⁵ King AJ in *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C) at 569E-G.

⁷⁷⁶ 25 of 2002.

⁷⁷⁷ Section 11(3) ECTA.

⁷⁷⁸ See *Central SAR v McLaren* 1903 TS 727 (cloakroom ticket taken as a voucher to identify property); *Dyer v Melrose Steam Laundry* 1912 TPD 164 at 167-168 (laundry list taken for checking items and prices); *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C) (warehouse invoice containing conditions limiting the liability of the bailee); *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 (2) SA 709 (W) (invoice with reference to 'standard trading conditions'); *Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC) at 133 (dispatch note which required the consumer to enter the addresses of the sender and receiver).

⁷⁷⁹ *Reynolds v Donald Curry & Co* 1875 NLR (1) 14; *WJ Lineveldt (Edms) Bpd v Immelman* 1980 (2) SA 964 (O).

⁷⁸⁰ *Roseveare v Auckland Park Sporting Club* 1907 TH 230; *R v Thompson* 1926 OPD 141 at 143 (programme bought inside racecourse after the conclusion of the contract for admission at the gate).

⁷⁸¹ *Slabbert Verster & Malherbe (Noord Vrystaat) (Edms) Bpk v Gellie Slaghuijs (Edms) Bpk* 1984 (1) SA 491 (O).

⁷⁸² *Davidson v Johannesburg Turf Club* 1904 TH 260 at 265. On the contrary, in *Weiner v Calderbank* 1929 TPD 654 it was decided that the notice with letters six inches high at a prominent position in a parking garage was not sufficient. On nearly similar facts, in *King's Car Hire (Pty) v Wakeling* 1970 (4) SA 640 (N), such a notice was held sufficient though.

⁷⁸³ Christie and Bradfield *Law of Contract* 191.

public'.⁷⁸⁴ Thus, any exemption from liability for fraud is prohibited, which means that the law does not recognise contracts by which a consumer binds itself to fraudulent provisions, conduct or misrepresentations of the other party.⁷⁸⁵ A supplier can only be exempted from fraud committed by its employees or agents if the supplier does not benefit from the fraud. This is the case when the employee or agent has committed a theft, for instance. The reason is that the risk of a theft is independent from the fact that the employer has inserted an exemption clause.⁷⁸⁶

The principle of public policy must be applied to cases where the parties have fully discussed the exemption clauses and the consumer has understood them as well as in cases where a consumer has signed the clause without reading it, e.g., on a ticket. Christie rightly suggests that in circumstances where the supplier would benefit from the dishonesty, for the application of the principle of public policy, the supplier must at least act dishonestly. Where this requirement is not fulfilled, the other party can only defend itself by arguing that one could not reasonably expect to find such a clause in the document.⁷⁸⁷

4.2 Consumer Protection Act

As discussed earlier, under section 50(1), the Minister may prescribe categories of consumer agreements that are required to be in writing. So far, the Minister has not prescribed any of such categories.⁷⁸⁸

The term 'consumer agreement' is defined in section 1 as 'an agreement between a supplier and a consumer other than a franchise agreement'. The exclusion of franchise agreements from consumer agreements is somehow counterbalanced by section 7(1)(a) under which franchise agreements have to be in writing.⁷⁸⁹

⁷⁸⁴ Mason J in *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775 at 784-785.

⁷⁸⁵ *Wells v SA Alumenite Co* 1927 AD 69 at 72.

⁷⁸⁶ Cloete J in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) 99E-G. See also *Government of Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

⁷⁸⁷ Christie and Bradfield *Law of Contract* 192.

⁷⁸⁸ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

⁷⁸⁹ See reg 2 CPA.

a) Consumer's signature not required

According to section 50(2)(a), if a consumer agreement between a supplier and a consumer is in writing, whether as required by the Act⁷⁹⁰ or voluntary, the agreement applies irrespective of whether or not the consumer signs the agreement.⁷⁹¹

If a provision of the Act requires a document to be signed or initialled, that signing or initialling may be effected in any manner recognised by law, including by use of an advanced electronic signature or an electronic signature, as defined in the ECTA.⁷⁹² This is in keeping with the principle of functional equivalence according to which formal requirements are also met by electronic means.⁷⁹³ According to the definition contained in section 1 ECTA, "electronic signature" means data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature'.⁷⁹⁴ The supplier must take reasonable steps to prevent the use of a consumer's electronic signature for any purpose other than the signing or initialling of the particular document that the consumer intended to sign or initial.⁷⁹⁵ Under section 12 of the ECTA, a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and is accessible. This does not apply to alienations of land and long-term leases of immovable property in excess of twenty years.⁷⁹⁶ Floyd is of the view that section 12 should not only apply to formalities required by statute but also to those required by the parties because this provision states that

⁷⁹⁰ Insofar, the wording here is incorrect, as strictly speaking, a consumer agreement that has to be in writing pursuant to s 50(1) is not an agreement which is in writing because this formal requirement is 'required by the Act', but because of a regulation of the Minister who has been authorised to do so in terms of s 50(1) of the Act.

⁷⁹¹ Section 50(2)(a).

⁷⁹² Section 2(3) CPA. Electronic Communications and Transactions Act 25 of 2002.

⁷⁹³ Van der Merwe *et al* *ICT Law* 23.

⁷⁹⁴ This definition was largely inspired by article 2 of the UNCITRAL Model Law on Electronic Signatures, 2001, read with article 7 of the UNCITRAL Model Law of Electronic Commerce, 1996. Both the UNCITRAL Model Laws of 1996 and 2001 and the ECTA embody the principle of functional equivalence, i.e., electronic communications (and signatures) have the same legal effect and protection as physical communications and signatures. The South African definition contains a subjective element though, since the data must be intended by the user to serve as a signature. This requirement corresponds to traditional physical signatures which also need the parties' intention and complies therefore with the principle of media neutrality. What is more, the ECTA provides in its s 13(3)(a) another requirement contained in the aforementioned two Model Laws: 'Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if (a) a method is used to identify the person and to indicate the person's approval of the information communicated; (...)'. See Eiselen 2014 *PELJ* 2811 and 2813-2814. See also Eiselen 2002 *VJ* 306. It should be noted that the two aforementioned UNCITRAL Model Laws on Electronic Commerce of 1996 and 2001 have the objective to standardise and facilitate the response of domestic legal systems to the challenges of electronic commerce. They have subsequently served as a model for domestic legislation in many countries. On the other hand, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (UNECIC) provides solutions and harmonising rules on electronic communications of international transactions and thus aims at establishing legal certainty. See Eiselen *FS Kritzer* 107.

⁷⁹⁵ Section 2((4) CPA.

⁷⁹⁶ Section 4(4) read with Schedule 2 ECTA.

writing is a 'requirement *in law*' (and not *by law*) in both cases.⁷⁹⁷ This argument is convincing. Otherwise, the legislature would have chosen another formulation. What is more, there is no reason why the parties' prescribed formalities should be treated differently in these cases.

According to section 4(3) ECTA, read with Column B of Schedule 1, the ECTA does not apply to various sections of certain statutes, such as the Wills Act,⁷⁹⁸ the Alienation of Land Act,⁷⁹⁹ the Bills of Exchange Act⁸⁰⁰ or the Stamp Duties Act.⁸⁰¹ An electronic signature is data attached to, incorporated in, or logically associated with other data which is intended by the user to serve as a signature.⁸⁰² An advanced electronic signature is a signature which results from a process that has been accredited by the Accreditation Authority⁸⁰³ after an application has been properly made and a fee paid.⁸⁰⁴ Section 13 ECTA distinguishes signatures required by law and those merely required by the parties to the transaction. In cases where a signature is required by law, that signature must meet the requirements of an advanced electronic signature.⁸⁰⁵ Where the parties require an electronic signature, and they have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message, if the data message sufficiently identifies the person and indicates his or her approval.⁸⁰⁶ The fact that a consumer has not signed the document does not mean though that a contract has not been established,⁸⁰⁷ with the exception of the abovementioned cases where a written document is a formal requirement for the validity of the agreement.⁸⁰⁸ The two foundations for contractual liability under the common law are that either the supplier would have to prove that agreement was reached on all the provisions set out in writing, or that the consumer reasonably relied on that an agreement was reached.⁸⁰⁹

⁷⁹⁷ Hutchison *et al* *Law of Contract* 163.

⁷⁹⁸ 7 of 1953.

⁷⁹⁹ 68 of 1983.

⁸⁰⁰ 34 of 1964.

⁸⁰¹ 77 of 1968.

⁸⁰² Definition of 'electronic signature' in s 1 of the Electronic Communications and Transactions Act.

⁸⁰³ As yet, the LAW Trusted Third Party Services (Pty) Ltd ('LAWtrust') and the South African Post Office have been accredited in 2011 and 2013, respectively. See Eiselen 2014 *PELJ* 2816.

⁸⁰⁴ Definition of 'advanced electronic signature' in s 1 of the Electronic Communications and Transactions Act read with s 37.

⁸⁰⁵ Section 13(1) ECTA.

⁸⁰⁶ Section 13(3) ECTA. See Van der Merwe *et al* *ICT Law* 25.

⁸⁰⁷ Van Eeden *Guide to the CPA* 175, Van Eeden and Barnard *Consumer Protection Law* 241.

⁸⁰⁸ Note that a notice in terms of s 49 must be signed or initialled by the consumer, unless the consumer acted in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision (s 49(2) *in fine*).

⁸⁰⁹ Van der Merwe *et al* *Contract General Principles* 19 *et seq.*

In most transactions, a written agreement would be too burdensome for the parties. All-day or other regular transactions would not be imaginable if the written form were required. When an agreement is in writing though, irrespective of whether the written form is required by the Act or voluntarily, some authors suggest that there could be a danger of abuse by the supplier because the customer does not need to sign the agreement. This could afford an opportunity to fraudulent suppliers to insert, delete or alter certain clauses afterwards. Besides, fraudulent suppliers could pretend that an agreement has been concluded, whereas it was not.⁸¹⁰ Situations in which suppliers abuse the fact that the consumer does not have to sign the agreement would hence be imaginable.⁸¹¹ Melville does unfortunately not further elaborate her view.⁸¹² Jacobs, Stoop and van Niekerk argue that a supplier could pretend that an agreement had been concluded.⁸¹³

The requirement of a signature could create more problems than it solves, however. This experience could already be made from the English Statute of Frauds of 1677, which created a legion of litigation. The requirement of writing or signing would simply be out of touch with everyday life. In South Africa, section 2(1) of the Alienation of Land Act⁸¹⁴ caused an extensive body of jurisprudence as to the validity of subsequent oral alterations to the written (and signed) contract.⁸¹⁵ The written formality required for suretyships also serves as an example of how formalities may create unnecessary problems by the mere possibility to 'plead the statute'.⁸¹⁶ In *Northern Cape co-op Livestock Agency Ltd v John Roderick & Co Ltd*,⁸¹⁷ it was held that the contract of surety only has to contain the essential elements in order to be valid, such as the identity of the parties, the name of the principal debtor, the nature of the debt guaranteed and the guarantee's extent. The omission of other material terms could be rectified. In *First Consolidated Holdings (Pty) Ltd v Bisset*,⁸¹⁸ the court regarded it as well settled though that only the material terms of an agreement of suretyship need to be in writing and allowed the omission of other provisions only on the basis that they were not material.

⁸¹⁰ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 358.

⁸¹¹ Melville *Consumer Protection Act* 74.

⁸¹² Melville *Consumer Protection Act* 74.

⁸¹³ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 358.

⁸¹⁴ 68 of 1981.

⁸¹⁵ Against any legal effect of an oral variation: *Schoeman v Botha* 1968 (1) SA 637 (T); *Da Mata v Otto* 1971 (1) SA 763 (T) 772; *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA); For legal validity: *Sinclair v Viljoen* 1972 (3) SA 579 (W) 582; *Kaplan v Fountain Park (Pty) Ltd* 1972 (4) SA 193 (T) 196; *Barnard v Thelander* 1977 (3) SA 932 (C) 940.

⁸¹⁶ Christie and Bradfield *Law of Contract* 114.

⁸¹⁷ 1965 (2) SA 64 (O) at 69-71.

⁸¹⁸ 1978 (4) SA 491 (W) at 495H.

The fact that no written contract and signature is necessary (except in terms of section 50(1)), also facilitates situations where a consumer contacts a call centre in order to conclude a contract (e.g., a hotel booking). Usually, those phone calls are recorded, and the consumer has to confirm at the end of the conversation that the call centre representative's summary of the terms and conditions (which usually only contains the core terms) is correct. After the consumer's confirmation, an agreement has been concluded. This kind of conclusion of a contract is very advantageous for suppliers, and in some extent also convenient for consumers. In terms of proof or the necessary time for consideration, the consumer might be in a disadvantageous position, however. The cooling-off period granted by section 16 might mitigate this problem in terms of goods because the rescission period for goods only starts after delivery. For services, this period already starts on the date on which the agreement was concluded.⁸¹⁹ Section 44 ECTA contains a similar provision for electronic transactions.

The problem with service agreements concluded over the phone is that the consumer does not have a written document at hand that allows to study the contract before the service is rendered. The supplier, on the other hand, has contracted speedily and at minimum costs. A solution could consist in sending the client a copy of the transaction via mail, fax or e-mail that he or she needs to sign and send back to the supplier.⁸²⁰ This problem does not exist in terms of the ECTA though where the consumer can print out all needed information or make a screenshot.

It is noteworthy that the National Credit Act affords much better protection against fraudulent changes in agreements than the Consumer Protection Act. Even though the consumer's signature is not required for all credit agreements,⁸²¹ any changes to such an agreement or a document recording a credit agreement are void, unless after the change is made, the consumer signs or initials next to the modification, and it is recorded in writing and signed by the parties. Oral modifications are recorded electromagnetically and subsequently reduced in writing.⁸²² Although not all (initial) credit agreements need to be in writing, this provision affords better protection because the supplier cannot rely on presumed orally made modifications.

That the consumer need not sign the agreement means that the supplier still has to prove that the agreement was concluded on all the provisions set out in writing, or that there was reasonable reliance of agreement on the part of the consumer, if the supplier wishes to rely on

⁸¹⁹ Section 16(3)(a).

⁸²⁰ Van Eeden and Barnard *Consumer Protection Law* 242.

⁸²¹ See s 93 read with s 2(3) NCA. The NCA distinguishes in s 93 between small, intermediate and large credit agreements.

⁸²² See s 116 NCA.

the contract.⁸²³ It is suggested that this might cause practical problems because it will be difficult for suppliers to prove the validity of the agreement as there might not exist sufficient documentation or other evidence to do so. The same applies *vice versa*, namely in cases where the consumer wants to rely on the agreement and prove that a particular clause has been agreed upon, because in contract law, the asserter bears the onus of proof.⁸²⁴

In order to strengthen the consumer's position and to preclude a supplier's attempt to avoid its obligations by arguing that the consumer had not signed the agreement, Naudé suggests to reword section 50(2)(a) so that the consumer may rely on the agreement if it is in writing, irrespective of whether he or she has signed it.⁸²⁵ Consequently, this provision would only operate to the benefit of the consumer because the supplier would not be able to rely on an unsigned document on the basis of this paragraph alone if the consumer denies having agreed on all the clauses in the written agreement.⁸²⁶

b) Free copy or free electronic access to a copy

Pursuant to section 50(2)(b), the supplier must provide the consumer with a free copy, or free electronic access to a copy. This does not prove the existence of certain provisions of an agreement or an agreement itself though as the consumer would not be able to prove if a contract has been concluded or not by presenting an unsigned copy.

What is more, it is not clear what 'free electronic access' means. 'Free' in this context could mean 'free of charge' or 'unobstructed'.⁸²⁷ As the provision uses the adjective 'free' also in the context of 'free copy', and section 93 NCA provides that the credit provider must deliver to the consumer, *without charge*, a copy of the document that records their agreement, it is submitted that the legislator meant 'free of charge'. However, the 'electronic access' could inflict some practical problems because it is not clear where this access has to be granted. It could have to be granted either on the premises of the supplier, which would be the most convenient solution for the supplier as he or she could give the consumer easily 'free' access to a copy. In this case, the supplier could provide the consumer with a printed copy right away which he or she could read anywhere. Alternatively, it could mean that the 'electronic access'

⁸²³ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 3. South African contract law provides a number of theories, such as the will theory, the declaration theory and the reliance theory in order to determine if the parties actually have concluded a valid agreement. See Van der Merwe *et al Contract General Principles* 19-45 and Christie *Law of Contract* (2005) 1.

⁸²⁴ See Van Huyssteen *et al. Contract Law* 100.

⁸²⁵ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁸²⁶ Naudé 2009 *SALJ* 514.

⁸²⁷ See, for instance, the definition of 'free' in <http://www.thefreedictionary.com/free>.

has to be granted from anywhere. This could be problematic though for consumers who have no internet access.⁸²⁸ Suppliers could benefit from this provision also in this case by giving systematically access only to electronic copies, which is a problem for vulnerable consumers.

Section 50(2)(b) does not contain any provision in terms of which the electronically accessible copy has to be printable. It is possible today to upload documents which are not printable but only visible on screen.⁸²⁹ This has the disadvantage that the consumer can read the document only on a screen of an electronic device. This is obviously more burdensome, especially with wordy consumer agreements, even if they are written in plain language.⁸³⁰ If necessary, the consumer could make a screenshot though and print it out.

Van Eeden believes that the formulation ‘free electronic access to a copy’ implies that the copy must be printable.⁸³¹ One could argue that free electronic access to a website or a PDF document itself is not a ‘copy’ yet but only an electronic representation of the document, and that only after having printed out the document it becomes a copy. Section 65 of the National Credit Act is unambiguous in this regard because the document has to be made available to the consumer through one or more of the means mentioned in this section, for instance ‘by *printable* web-page’.⁸³² This means though that a new obstacle is created for the consumer if he or she is not able to print the document because there is no access to a printer. The consumer can download the document or make a screenshot, however. In South Africa, people with internet access mostly use their smartphones for this purpose and do not necessarily have a computer or printer.⁸³³ In addition, ‘free electronic access to a copy’ does not mean ‘free

⁸²⁸ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 358.

⁸²⁹ For instance Google Books (<https://books.google.com>).

⁸³⁰ Especially reading a long document on a smartphone can be very tiresome, not only when it becomes necessary to enlarge the document and to reposition the page constantly because the screen is too small to show a line entirely.

⁸³¹ Van Eeden *Guide to the CPA* 176 note 39, Van Eeden and Barnard *Consumer Protection Law* 242 note 116.

⁸³² Section 65(2)(a)(iv) NCA. Emphasis added.

⁸³³ According to a study produced by Orange Horizons on the provision of wi-fi in Mitchells Plain and Khayelitsha (two townships near Cape Town), 94 % of respondents said that they primarily connected to the internet with their smartphone. See <http://www.southafrica.info/business/trends/internet%20access-010715.htm#.VzA7j751SII> (no longer available). According to the General Household Survey report from Statistics South Africa (2013), 40.9 % of South African households have at least one member who either used the internet at home or had access to it elsewhere. However, only 10 % of households had internet access at home. That means that 30 % of online connections are either done at work (16 %), school/university (5.1 %) or at an internet cafe (9.6%). In metropolitan areas far more households have internet access at home (16.4 %), compared with households in rural areas (2 %) and in urban areas (9.2 %). Cell phones offer more access for rural households – 17.9 % of rural households go online using mobile devices, with a total of 30.8 % of South African households using mobile devices in order to get connected to the internet. See <https://www.webafrica.co.za/blog/general/latest-statistics-south-african-internet-penetration/> (no longer available).

printing'. This being said, section 65 NCA only requires that the web page be *printable*, and not that the consumer must technically be equipped in order to print out the web page.

Section 19(1) ECTA considerably extends the meaning of 'copy' by including a data message.⁸³⁴ In this regard, no 'materialised' copy is necessary. What is more, section 15 ECTA gives data messages the same evidential weight as other documents.⁸³⁵

This does not prevent suppliers from providing the consumer with a free (hard)copy, of course, as an additional service.

Interestingly, section 65 NCA is much more consumer-friendly in terms of the form a document has to be communicated to the consumer:

'(a) (...) the document [must be made] available to the consumer through one or more of the following: (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail; (ii) by fax; (iii) by email; or (iv) by printable web-page; and (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).'

The National Credit Act therefore not only offers more options with respect to the communication of a document. The consumer can also choose which of them he or she prefers. This 'choice' seems to be rather theoretical though as, in practice, the supplier will mostly persuade the consumer to assent to a form which will suit the supplier, i.e., an electronic form.

Naudé correctly points out that provisions with the object or effect that consumers are bound by terms for which they did not have the opportunity to consider should always be regarded as unfair under section 48.⁸³⁶ This view is legitimate because of two factors set out in section 52, namely the extent to which documents relating to the agreement satisfied the requirements of

⁸³⁴ **Section 19(1) ECTA:** 'A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time, is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.'

⁸³⁵ This is insofar interesting as in some legal systems the question of whether 'cyberwriting' is to be considered writing is still not settled. The argument against an equivalence is that words written on a computer screen do not constitute writing without being processed by transfixing the given information on a physical support, such as a CD-ROM, hard disc or other storage medium. What is more, cyber-writing has lost much of its original evidential value as it does not exist in a fixed form, unless coupled with other safeguards that ensure that the information contained remains unchanged. Eiselen is of the view that cyber-writing should be accepted as writing in law. In terms of the ECTA, this question is however settled in s 15. See Eiselen 2002 VJ 308. Indeed, at the beginning of the internet era, questions pertaining to the validity of an electronic agreement, the intervention of electronic agents on one or both sides of an agreement, time and place of contracting, formalities, incorporation of standard terms by so-called 'shrink-wrap' or 'click-wrap', as well as jurisdiction and applicable law were raised. See Van der Merwe *et al* *ICT Law* Chapter 6 at 4. This was the reason why the UNICITRAL Model Law of Electronic Commerce came into being in 1996, and in 2001 the UNICITRAL Model Law of Electronic Signatures followed.

⁸³⁶ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

section 22⁸³⁷ and whether the consumer knew or ought reasonably to have known of the existence and extent of any particular contractual clause.⁸³⁸ Naudé rightly states that the fact that the contract contains a clause by which the consumer confirms having read and understood the agreement does not prevent another clause from being surprising and thus being unfair in terms of section 48.⁸³⁹ A clause such as ‘contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used’⁸⁴⁰ would contribute to more transparency and should be inserted into the Act.

The question is though if this unbalanced provision – which is clearly in favour of the supplier – is counterbalanced by section 52.⁸⁴¹ In terms of this provision, the court is entitled to make an order under section 52(3) if the Act does not otherwise provide a remedy sufficient to correct the relevant unfairness, and after it has considered the principles, purposes and provisions of the Act. According to section 52(2)(h), the court must also consider whether the consumer knew or ought reasonably to have known of the existence and extent of any particular contractual provision that is alleged to have been unfair with regard to any custom of trade and any previous dealings between the parties.

It is submitted that section 52 cannot entirely counterbalance the shortcomings of section 50(2) for the following reasons. First, although the court has to consider whether the consumer knew or should reasonably have known the existence of a particular provision contained in the agreement, the court still may rule against the consumer who, despite any custom of trade or previous dealings between the parties, was not aware that a particular clause existed. The consumer is still the weaker party in a consumer agreement and should not bear the consequences of a shortcoming of a provision in the Act. Second, it is difficult to apprehend why a consumer should first have to go to court in order to prove that he or she agreed – or did not agree – to a particular clause. This would be time-consuming, costly, and the outcome could be against the consumer. Third, section 52(2)(h), according to which the court has to take into account customs of trade and previous dealings between the parties, reads more like a provision for B2B agreements. Business professionals know the customs of trade and can take into

⁸³⁷ Section 52(2)(g) CPA.

⁸³⁸ Section 52(2)(h) CPA.

⁸³⁹ Naudé ‘Section 50’ in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁸⁴⁰ This provision was set out in the Proposal for a Directive of the European Parliament and of the Council on Consumer rights COM (2008) 614 Final which was supposed to replace the Unfair Terms Directive and other pieces of legislation.

⁸⁴¹ Van Eeden *Guide to the CPA* 175.

account previous dealings with the same partner. Vulnerable consumers will hardly be in the position to do so when concluding an agreement, however.

For the abovementioned reasons, an *ex post facto* assessment by the court can hardly counterbalance the shortcomings of section 50(2).

aa) Plain language

The copy must satisfy the plain language requirements of section 22.⁸⁴² This is the case if 'it is reasonable to conclude that an ordinary consumer⁸⁴³ of the class of persons for whom [the document] is intended, with average literacy skills⁸⁴⁴ and minimal experience⁸⁴⁵ as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of [the document] without undue effort.'⁸⁴⁶ Aspects, such as the context, comprehensiveness and consistency⁸⁴⁷ of the document, its organisation, form and style, the vocabulary, usage and sentence structure,⁸⁴⁸ but also aids used in the document to assist the consumer in the understanding,⁸⁴⁹ must be taken into account.⁸⁵⁰

bb) Financial breakdown

Furthermore, the copy must contain an itemised breakdown of the consumer's financial obligations.⁸⁵¹ It is submitted that such a breakdown not only has to itemise all financial obligations but also has to present the consumer's financial duties chronologically until the end of the agreement (i.e., the payable instalments and their due dates). This is particularly crucial for long-term agreements.⁸⁵² Only then, the consumer would be fully aware of its financial obligations. Unfortunately, the legislator did not make more precise provisions for such a

⁸⁴² Section 50(2)(b)(i). As regards the requirements of s 22 see ch 2 para 3.2.a).

⁸⁴³ This means that not only experts, such as lawyers, should be able to understand the document, but rather the supplier's 'target audience'. See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

⁸⁴⁴ In the assessment of the 'average literacy skills', the South African context is to be taken into account. See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁸⁴⁵ The drafter of the contract has to focus on first-time consumers of the given goods or services, and not just on the average consumer. See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

⁸⁴⁶ Section 22(2).

⁸⁴⁷ This means that the circumstances, i.e., the how and when consumers read the document, have to be taken into consideration, and that the document must be complete. In addition, the terminology and structure must be consistent. See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* paras 12-14.

⁸⁴⁸ This means that there must be no hidden small print, and refers to the structure of the document. The general readability is also a factor (short sentences, active voice, no technical jargon). See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* paras 15 and 16.

⁸⁴⁹ These are devices which make the contract more inviting, as well as certain techniques for the communication of complex information. See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 17.

⁸⁵⁰ Section 22(2)(a)-(d). See Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

⁸⁵¹ Section 50(2)(b)(ii).

⁸⁵² For credit facilities in terms of the NCA see s 8(3) read with ss 107 *et seq* NCA.

breakdown as it did for the National Credit Act.⁸⁵³ Although a credit agreement usually runs over a much more extended period than other consumer agreements, and the amounts at stake are often higher, in other consumer contracts too, consumers bear financial obligations over a longer period, e.g., in the context of a fixed- or long-term agreement,⁸⁵⁴ and their financial obligations might change during the duration of the contract. Certain types of agreements, especially cell phone contracts, often have substantial economic implications for households and individuals, particularly when they do not have any upper limit in respect of data consumption so that the consumer might incur a significant economic damage. It is unfortunate that these contracts are often edited in a very intransparent fashion so that consumers do not understand what costs they might incur. It would thus have been advantageous in terms of transparency if the legislator had provided for guidelines concerning the supplier's obligations in terms of such financial breakdown (e.g., the periodicity, paid and outstanding instalments until the end of the contract and other costs). A detailed and precise breakdown of data and voice consumption could prevent displeasing surprises.

In addition, the breakdown should be comprehensive and contain positions such as taxes, especially VAT, and other charges which the supplier might convey to other entities, such as SARS, so that the consumer's financial obligations are fully reflected.

Despite the confusing insertion of section 50(2)(b)(i) in terms of the plain language requirement for the copy, this requirement applies in any event (section 22(1)(b)) to the free copy and the financial breakdown. Even if it will mostly consist of numbers, it would be desirable if its terminology and definitions contained herein were written in plain language as well. Otherwise, it could miss its target.

Interestingly, the legislator, by requiring a financial breakdown, shifted the burden to protect itself to the supplier as now the supplier must ensure that the consumer understands the terms of the agreement, especially in terms of the financial obligations involved. However, the consumer might still be bound to the contract in terms of the *caveat subscriptor* rule.⁸⁵⁵

⁸⁵³ See ss 108 to 115 NCA.

⁸⁵⁴ See s 14.

⁸⁵⁵ Tennant/Mbele 2013 *De Rebus* 17.

c) Record

If a consumer agreement is not in writing, the supplier has to keep a record of transactions entered into over the telephone or any other recordable form.⁸⁵⁶ It is not sure if this provision includes electronically concluded contracts. According to section 4(4) ECTA, read with Schedule 2, the ECTA does not apply only to certain types of electronic contracts.⁸⁵⁷

Section 50(3) might thus apply to these contracts. At first sight, it is astonishing that the legislator spells this requirement out in section 50 as good commercial practice requires that any commercial activity with clients be recorded for purposes of bookkeeping or taxes.⁸⁵⁸

Section 26(2) provides that '[a] supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied'. This also includes the electronic form in terms of section 12 ECTA. The agreement mentioned in section 50(3) must however be distinguished from the terms and conditions of the given agreement under section 50(2)(b),⁸⁵⁹ as well as the sales record in section 26(2). The latter merely reflects the commercial activity, e.g., in the form of a till slip. In other words, the record is no representation of any kind of the terms but rather comparable to a memo, report or minutes.⁸⁶⁰

Interestingly, the legislator did provide more details as regards records concerning intermediaries⁸⁶¹ and auctions.⁸⁶² For goods or services, section 26(2) applies. Here, a supplier must provide a written record of each transaction to the consumer to whom any goods or services are supplied. Insofar, it is actually not surprising that section 50(3) does not refer to section 26 as the 'sales record' in section 26 is not the same as the 'record of transactions' mentioned in section 50(3), although both can be contained in a single document.⁸⁶³

Naudé is of the view that the Act does not contain any provision entitling the consumer to access this record directly in terms of section 50(3) and that the consumer has to log a complaint

⁸⁵⁶ Section 50(3). The legislator probably chose a wide formulation in order to include other possible technological developments, such as voice recognition or agreements concluded by means of an automated device, such as a robot.

⁸⁵⁷ This applies to agreements for alienation of immovable property and those for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act 68 of 1981.

⁸⁵⁸ See also Van Eeden and Barnard *Consumer Protection Law* 334.

⁸⁵⁹ Van Eeden and Barnard *Consumer Protection Law* 241.

⁸⁶⁰ Contrary to the CPA, the NCA distinguishes clearly between the (credit) agreement and the 'document recording a (credit) agreement' in section 116: 'Any change to a document recording a credit agreement or an amended credit agreement (...)'. Furthermore, a credit provider must maintain records of all applications for credit, credit agreements and credit accounts in the prescribed manner and form and for the prescribed time. See s 170 NCA read with reg 55 and 56 NCA. Such a record only contains information prescribed in s 26(3) CPA.

⁸⁶¹ Regulation 10 read with s 27(3)(b) CPA and reg 9(2) and (3) CPA.

⁸⁶² Regulation 31 read with s 45 and reg 18 to 33 CPA.

⁸⁶³ Contrary to 'transaction', 'sale' is not defined in s 1 CPA. In any event, a sale is a transaction according to this definition.

to the NCC which can summon the supplier to furnish it with a copy of such record or to inspect it.⁸⁶⁴ However, section 26(2) provides that the supplier of goods or services must provide a written record of each transaction to the consumer. It is therefore submitted that the consumer has such a right to directly access the record. It would be incomprehensible if section 26 would not apply to section 50. It is my submission that denying such direct access would be contrary to section 2(1), read with section 3(1)(d) and (e).

In any event, this record only needs to meet the requirements of section 26(3), such as the supplier's details,⁸⁶⁵ the date of transaction,⁸⁶⁶ the delivery address,⁸⁶⁷ a name or description of the goods or services supplied or to be supplied⁸⁶⁸ and the price.⁸⁶⁹ The sales record must also contain a reference to the terms and conditions because otherwise, it could be considered unfair.

The supplier may send an unsigned document to the consumer via e-mail, ordinary mail or fax which confirms the terms and conditions of the agreement, but the consumer is very dependent on the supplier for the integrity of the document as he or she does not have ready access to the recording.⁸⁷⁰ After all, this document could only be an excerpt of the agreement or even contain provisions the consumer never consented to. Unlike section 93 NCA, according to which the supplier has to deliver a copy of the 'document that records their agreement' to the consumer, section 50(2)(b) CPA requires that the supplier provide the consumer with a 'copy (...) of the terms and conditions of that agreement'. Despite the different wording of the two sections mentioned above, the legislator's intention was the same in both cases, i.e., to provide the consumer with a copy of the entire agreement. Otherwise, the supplier would give the impression to the consumer that the provided copy reflects the entire agreement, and the supplier might be estopped from relying on the terms and conditions not sent to its counterpart.

d) Timeframe

Section 50(2) does not contain a timeframe for the supplier during which it has to deliver the free copy of the agreement or provide a free electronic copy to the consumer. An unreasonably long delay could constitute conduct contrary to the purposes and policy of the Act in terms of section 4(5), which could lead to an administrative fine under section 112. Van Eeden suggests that the Minister should specify by regulation the time period for the delivery of a copy to the

⁸⁶⁴ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 7; s 102(1)(b) CPA.

⁸⁶⁵ Section 26(3)(a).

⁸⁶⁶ Section 26(3)(c).

⁸⁶⁷ Section 26(3)(b).

⁸⁶⁸ Section 26(3)(d).

⁸⁶⁹ Section 26(3)(e) to (i).

⁸⁷⁰ Van Eeden *Guide to the CPA* 175.

consumer in order to strengthen its position and give less latitude to the supplier.⁸⁷¹ The Act does not empower the Minister to do so, however. According to regulation 120(1)(a), the Minister may make any regulations expressly authorised or contemplated elsewhere in the Act, Section 50(1) only gives the Minister the right to prescribe categories of consumer agreements that are required to be in writing, but not to prescribe further formalities or deadlines.

4.3 Non-compliance with section 50

Some authors are of the view that in South African common law, non-compliance with statutory formalities results typically in the nullity of the agreement, except if the applicable piece of legislation provides otherwise.⁸⁷² This was the case, for instance, for the Credit Agreements Act,⁸⁷³ in terms of which credit agreements had to be in writing, but which specifically provided that an agreement, which was not in writing and signed by the parties to the contract, was not necessarily invalid.⁸⁷⁴ This view misconceives however that in South African law, freedom of form is the point of departure, unless the law or the parties require otherwise.⁸⁷⁵ In cases where the law requires the written form, the given statute must be interpreted to determine whether the legislature intended the written form to be constitutive. If it is not clear, the presumption prevails that the legislature did not want to change the common law more than necessary. Most authorities take the stand that the written form in the Consumer Protection Act and the National Credit Act is not constitutive and that non-compliance does not render the agreement void.⁸⁷⁶ The wording of section 50(2) '[i]f a consumer agreement (...) is in writing' is a clear indication that the written form is no requirement for validity unless prescribed by the Minister.

According to section 52(2)(g), non-compliance with the plain language requirements does not render the agreement void *per se*, but is merely one of the court's factors to be considered when assessing the fairness of an agreement under section 48. On the other hand, courts might easily strike down contract terms which are not written in plain language.⁸⁷⁷

⁸⁷¹ Van Eeden *Guide to the CPA* 176, Van Eeden and Barnard *Consumer Protection Law* 243. See also Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

⁸⁷² Van der Merwe *et al Contract General Principles* 147. See, e.g., *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA), *Pretoria East Builders CC v Basson* 2004 (6) SA 15 (SCA). See also Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁸⁷³ 75 of 1980.

⁸⁷⁴ Section 5(2) Credit Agreements Act.

⁸⁷⁵ See Hutchison *et al Law of Contract* 161.

⁸⁷⁶ As a general rule, only alienation of land, suretyship and executory donations require the written form in order to be valid and enforceable. See Hutchison *et al Law of Contract* 115 and 161 *et seq.* Christie and Bradfield *Law of Contract* (2011) 134.

⁸⁷⁷ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

As mentioned above, the Act does not provide a timeframe as to when the supplier must furnish the consumer with a copy, which means that it is not clear at which moment one can speak of non-compliance. Common sense would suggest that the contract must be provided at the latest at the time of performance, i.e., the delivery of the given goods or services. It is clear that a supplier who did not keep a record of an agreement which is not in writing cannot rely on the agreement. This solution might be unfair *vis-à-vis* consumers who have no control over whether or not the supplier kept a record. Therefore, Naudé suggests that the legislator's intention was not to invalidate the entire contract and that the consumer's 'version' should simply be preferred.⁸⁷⁸ It is submitted though that even if this viewpoint protects the consumer, it leads to legal uncertainty and too much leeway.

5. Conclusion

Section 49 has a warning function to protect consumers who should not be surprised by notices or provisions limiting their rights. Therefore, the supplier has to draw the consumer's attention to any limitation of risk or liability or other circumstances mentioned in section 49(1).

The fact that section 49(1) uses the plural form of 'consumer' could mean that the requirements of section 49 also apply where a notice is intended for a multitude of consumers. Typical clauses for section 49(1)(a) to (d) are exemption or indemnity clauses.

Under section 49(2), the supplier has to draw the consumer's attention also to any dangerous activity or facility. The formulation '[i]n addition to subsection 1' is not clear because it could mean that the requirements of subsection (1) and (2) have to be fulfilled cumulatively. This would limit the scope of protection of section 49 though. In order to achieve better protection for consumers, subsection (2) should thus also apply to cases where there is no exclusion of liability in terms of subsection (1).

In order to comply with section 49, the supplier must set up the notice or provision in plain language. This is a milestone in South African law as the common-law principles are insufficient in this respect. This is also due to the doctrines of *caveat subscriptor* and *pacta sunt servanda*. Only in cases of misrepresentation or mistake, a court could set aside the terms of a contract. The interpretation of section 22 has to be done by taking into consideration the

⁸⁷⁸ Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

purposes of the Act (section 3). Therefore, agreements which are drafted in plain language serve transparency and procedural fairness, empower consumers, increase the consumer's trust and avoid litigation. Ultimately, also suppliers benefit from plain language.

The plain language requirement concerns only written documents, not only for practical reasons (proof) but also because of the unambiguous wording of section 22. The Act does not define the meaning of 'plain language'. Section 22(2) only contains a list of criteria to be taken into account, and which concern the wording or grammar of a document, its content, structure, design and style. With regard to the requirement of 'context', also the circumstances around the agreement and previous experience can be taken into consideration. In order to be 'comprehensive', the document must contain all relevant information and be 'consistent' in terms of terminology and style. 'Plain language' means clear and understandable, and not over-simplified language. More importantly, when drafting their documents, suppliers have to adopt a consumer-centric approach.

The Act makes use of the somewhat flexible approach of the 'ordinary consumer' of the class of persons for whom the document in question is intended. This approach takes into account the fact that most South Africans are functionally illiterate and inexperienced in business matters. Therefore, the ordinary consumer is one with 'average literacy skills and minimal experience as a consumer'.

In order to assess whether the plain language requirement is met in terms of the 'ordinary consumer', it is suggested to adopt an objectivised view that also considers the consumer's position, such as the view of an 'objective observer', which is used in German civil law.

The formulation according to which the consumer has to be 'of the class of persons' for whom the document is intended leads for many authors to the conclusion that suppliers have to draft several sets of documents. The legislator only requires though that the consumer of the class of persons to whom the document is intended understands the document. Hence, it should be sufficient to draft only one set of documents that comply with the plain language requirement, and which is understandable for *all* consumers. This would be more practical, cost saving and have numerous other advantages.

As section 22 has to be interpreted in the light of section 3, the 'vulnerable consumer' must be taken into consideration. It is submitted that suppliers have to take vulnerable consumers into account in general, and not within the context of different classes of ordinary consumers. This would be in line with the viewpoint above concerning the drafting of only one set of documents

in plain language. In most cases, the concept of the ‘vulnerable’ and the ‘ordinary’ consumer will be congruent. The substitution of the notion of ‘ordinary consumer’ with ‘average consumer’ such as in the UCPD would not take into account South African reality though.

The enumeration contained in section 22(2)(a) to (d) is only an indication of what must be considered when assessing whether a consumer has to apply an ‘undue effort’ for the understanding of the document. As the document in question has to be self-explanatory, the consumer must not be compelled to search for external advice that goes beyond a certain degree of assistance. In addition, some contracts need to be more complicated due to the complexity of the underlying agreement. The reference to external documents is only not an ‘undue effort’ if they are easily and swiftly accessible.

The language of the Act has also been discussed. It is far from being ‘plain’, and the structure of the Act is not very accessible. Statutes that elevate plain language to a fundamental consumer right should be written in plain language too. Otherwise, it is difficult for consumers to exercise their rights because of the lack of accessibility, even though it seems that this is not an enforceable right.

Contrary to section 63 of the National Credit Act, section 22 of the Consumer Protection Act does not provide that a document must be written in an official language or that the consumer must be able to understand the language in which the document is written, as long as it is written in plain language. Consumers have a certain degree of protection under section 40(2), however.

Unfortunately, the Commission has not yet published guidelines in terms of section 22(3) and (4) for methods of assessing whether a document meets the plain language requirements. Therefore, suppliers should take a proactive approach by adopting in-house style-guides, which will lead gradually to best practice. The consideration of foreign law in this regard is not always suited for the situation in South Africa. The objective approach consisting of readability tests has many disadvantages. Instead, the Commission should publish separate guidelines for each type of documents and provide for guidelines that make the supplier’s texts of the same category comparable so that consumers are able to shop around easily.

Such guidelines would also end the suppliers’ ‘private legislation’ and avoid unnecessary litigation. In the long term, making informed choices is not only about plain language but also about education. The legislature must thus tackle this problem from various angles and ultimately reform the South African educational system.

The legal implications of non-compliance of the plain language requirements have also been discussed. Section 51(1)(a)(i) provides that the supplier must not defeat the general purpose or effect of the Act, such as the promotion and advancement of social and economic welfare. Besides, consumers have the right that an agreement be in writing, and this right must not be waived or deprived in terms of sections 51(1)(b)(i) and 50(2)(b)(i). Otherwise, the agreement or term is void under section 51(3). The plain language requirement is only one factor in terms of section 52(2) that the courts will take into consideration in the fairness enquiry. They will nevertheless always consider the plain language requirement in order to protect consumers.

Section 22 also plays an indirect role as regards a supplier's unconscionable conduct, or a false, misleading or deceptive representation, or the enquiry of whether a term is unfair. Then, the court must consider the factors mentioned in section 52(2).

According to section 49(4)(a), the supplier must draw the consumer's attention in a conspicuous manner and form, having regard to the circumstances mentioned in subsections (1) and (2) so that the consumer has an adequate understanding and appreciation of the implications. 'In a conspicuous manner and form' means that the information has to be distinguishable from the rest of the document, having an 'ordinarily alert consumer' in mind. The ordinarily alert consumer is a consumer who is ordinarily vigilant in the given circumstances. The supplier has to attract the consumer's attention before the latter takes any action in order that the warning function of section 49 can fully operate.

In terms of section 49(2), the consumer must sign or initial the provision which warns him or her about specific risks. The dispensation of these requirements contained in this provision raises concern as it entails difficulties in terms of proof. Furthermore, the initialling or signing of exemption clauses can be a double-edged sword because suppliers might argue that their clauses are always fair. Exemption clauses relating to bodily injury or death are therefore often prohibited in some EU countries. In order to achieve better consumer protection, the legislator should delete the phrase 'or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision'. It should also provide that a provision or notice which is so unusual that it cannot be expected by the consumer is invalid.

Regrettably, the Act does not provide further information in respect of the meaning of 'adequate opportunity' to receive and comprehend the notice under section 49(5). A cooling-off period after the conclusion of the agreement should be sufficient though. The circumstances have also to be taken into account when considering if the consumer had an adequate

opportunity. This will depend, among other things, on the type of contract and the type of consumer as well. Some considerations contained in section 52(2) could be used as a guideline for this assessment.

The legal consequences in case of non-observance of the requirements of section 49 are not clear. The court may sever the provision or notice from the agreement or declare it to have no force or effect under section 52(4). It can also make an order and sever any part of the agreement, or alter the contract in order to render it lawful.

Non-compliance with section 49 will have no extra-judicial effect because of the limitations of judicial control. The most time- and cost-effective solution might therefore be that the supplier simply does not rely on the suspicious contract term, and the consumer only needs to approach a court when there is a dispute in terms of section 49.

A term that complies with section 49 still can be nullified as unfair, unreasonable or unjust according to sections 48 and 52.

In South African contract law, an agreement does not necessarily need to be in writing in order to become valid, with some few exceptions. The parties' signature under a contract has several functions: facilitating proof, avoid unnecessary disputes or legal certainty. Since statutes which require the written form have different objectives, the formality provisions must be interpreted according to these objectives. A party's signature does not indicate that the party has read and understood the document and consented to its terms because often consumers sign a contract without even having read it.

The *Shifren* principle confirms the validity of non-variation clauses and contributes to legal certainty. Nonetheless, the courts tend more and more to abolish the strict application of this principle when it leads to unfair results, e.g., by putting forward *bona fides* and public policy. Another approach is to construe a waiver or estoppel, although there have been no reported cases so far in this regard. A distinction must be drawn between a waiver and a simple suspension of the other party's rights. A waiver could be construed in cases where the right waived is founded on a term which operates exclusively to the benefit of the waiving party.

The parol evidence rule is another common-law principle according to which a party to a written contract cannot present extrinsic evidence as the contract is regarded to be as a whole. With respect to the *caveat subscriptor* rule, the parties' signatures entail their obligation to be

bound to their agreement since it signifies assent thereto. Only in specific cases, this principle does not apply.

An exception of the *caveat subscriptor* rule are the 'ticket cases'. Consumers are bound if they have read the terms contained on the given document and indicate that they want to go ahead with the contract; understanding the contractual content is not necessary then. In any case, where the supplier can deduct from the consumer's conduct that the latter has either read the document and assented to it or is prepared to be bound by it without having read it, the supplier can expect that the contract has been concluded, especially when he or she has drawn the other party's attention to its content.

Exemption clauses do not bind the consumer if they exempt the supplier from liability for fraud. In cases where a supplier does not benefit from its employees' or agents' fraudulent conduct, the supplier can rely on its exemption clause. The principle of public policy should not operate where the supplier does not act dishonestly. Then, the other party's defence can only be that a reasonable person could not expect to find the given terms in the contract.

Under section 50(1), the Minister may prescribe certain categories of consumer agreements that need to be in writing in order to be valid. So far, the Minister has not made use of this provision. The consumer's signature is not required when both parties set up a written agreement, whether as required by the Act or voluntary. Signing or initialling may be effected in any manner recognised by law. Some statutes however exclude electronic signatures, which in most cases are valid if the conditions of the ECTA are met. This is in line with the principle of functional equivalence. If a legal provision requires a signature, and this signature can be done electronically, it must be an advanced electronic signature.

Most transactions, especially in day-to-day transactions, do not require being in writing or signed. When a transaction is in writing, some authors suggest that situations are imaginable where fraudulent suppliers alter the agreement afterwards, or where they pretend that no agreement has been concluded. Requiring a signature would however create other problems and be disproportionate. Jurisprudence had to solve many problems caused by the formalities set out in the Alienation of Land Act, for instance. The Consumer Protection Act's objective is to facilitate transactions. The risks of abuse by a supplier are mitigated by the cooling-off period granted by section 16 of the Act and by section 44 of the ECTA.

The fact that the supplier must provide the consumer with a free copy or free electronic access to a copy causes other difficulties. It is not clear where the supplier has to grant access to a free

electronic copy. There could be practical difficulties where the consumer does not have internet access. The Act does not require that the electronic document be printable. A solution could consist of a screenshot which is printed out. In terms of section 19(1) of the ECTA, the term 'copy' is considerably extended by including a data message, which has the same evidential weight as hardcopies (section 15 ECTA). The best protection would be achieved if the supplier provided the consumer with a hardcopy which could also be available online. Even if the consumer has a choice as regards the mode of communication of a document, like in section 65 of the National Credit Act, the supplier will 'convince' him or her in a more or less subtle way to opt for electronic communication.

According to Naudé, a term which a consumer could not consider should always be unfair under section 48. Unfortunately, section 52 cannot entirely counterbalance the shortcomings of section 50 as the court might still decide in favour of the supplier, and it is difficult to understand why the consumer should bear a costly and time-consuming lawsuit first in order to enforce his or her rights.

The financial breakdown of the consumer's obligation must be itemised and should contain all payable sums, including taxes and other charges, and a chronological overview. Unfortunately, the legislator did not provide for a more detailed provision as to the financial breakdown. This would be beneficial for consumers who often have unpleasant surprises when receiving their cell phone bills or other invoices for their long-term agreements.

The record of transactions entered into over the telephone or any other recordable form should be directly accessible to the consumer in terms of section 26. What is more, this record must at least contain a reference to the terms and conditions of the agreement.

Section 50(2) does not provide for a timeframe within which the supplier has to deliver a free (electronic) copy of the contract to the consumer. The Minister is, contrary to a certain view, not empowered to specify a period by regulation.

Some authors suggest that non-compliance with section 50 renders the agreement void. This point of view misconceives that in South Africa freedom of form is the point of departure unless the law or the parties require otherwise. If the law requires the written form, it shall only be constitutive if one can determine from an interpretation of the statute in question that the legislator intended the written form to be constitutive. The wording of section 50(2) indicates that writing is not constitutive for the validity of the agreement unless the Minister prescribes otherwise.

CHAPTER 3 – CONTENT CONTROL

1. Introduction

As mentioned before, with regard to contractual terms, one can distinguish between three levels of fairness control: The first level, the incorporation control, has already been discussed further above. The second level, dealing with the so-called content – or substantive fairness⁸⁷⁹ – control, is the subject of the present chapter. Finally, in a third stage, the interpretational control comes into play. This control mechanism will be discussed at a later stage.

1.1 The *raison d'être* of content control

Incorporation and content control obviously do not exist next to each other without a certain inter-relation. Content control is first of all justified where unfair non-negotiated terms other than core terms are part of a contract⁸⁸⁰ because non-negotiated standard terms cannot be qualified as ‘the proper expression of the self-determination of both parties’,⁸⁸¹ which is the prerequisite for enforcing agreements as the parties then have expressed their freedom of contract. With regard to non-negotiated terms, a proper evaluation and balancing of the consequences of the transaction usually does not occur. As a result, where a party (mostly the supplier) effectively claims freedom of contract for it alone, whereas the other party (usually the consumer) has no influence on the wording of non-negotiated terms, the aforementioned ‘balancing’ is purely formalistic and meaningless, and there is no real freedom of contract.⁸⁸² What is more, the transaction costs for the consumer, i.e., the time and effort to read the standard terms and to find a person with authority to negotiate within the supplier’s organisation, are too high. Most consumers will thus accept any terms without reading them, save the core terms.⁸⁸³ This also applies to well-informed and sophisticated customers in a competitive market.⁸⁸⁴ Less sophisticated consumers often tend to understand standard terms as ‘official’ and invariable, and therefore do not try to read or understand them. For both,

⁸⁷⁹ ‘Substantive fairness’ is sometimes used in a wider context. For instance, Collins 1994 *O.J.L.S.* 246 includes price control, core terms control and sub-standard quality: ‘The law may be concerned about unfair bargains, under which the consumer receives poor value for money. The quality or quantity of the goods or services supplied by the trader is lower than the consumer reasonably expected, though a strict construction of the terms of the contract would not put the trader in breach. The objective is to ensure fair prices and the fulfilment of legitimate expectations, and the evil is the rip-off of the consumer.’ Content control in terms of the Act is not concerned about the quality or quantity of goods though, but concentrates on the terms and conditions of an agreement.

⁸⁸⁰ Naudé 2006 *Stell LR* 365.

⁸⁸¹ Zimmermann *New German Law of Obligations* 206.

⁸⁸² Naudé 2006 *Stell LR* 366, Maxeiner 2003 *Yale J. Int. Law* 143 and 147, Lewis 2003 *SALJ* 348.

⁸⁸³ This might even apply to international sales contracts. See Eiselen 2011 *PELJ* 16.

⁸⁸⁴ Naudé 2006 *Stell LR* 367, Rakoff 1983 *Harv LR* 1226.

sophisticated and unsophisticated consumers, standard terms are more or less presented on a take-it-or-leave-it basis which only leaves two options: either the acceptance of all terms as presented by the supplier, or not concluding the transaction.⁸⁸⁵ According to Harker, the second option is a mere ‘fictitious alternative’,⁸⁸⁶ which is certainly true in most cases because consumers most likely know that elsewhere they will find terms with the same content. Strictly speaking, from a procedural fairness point of view, one may say that the use of a long and burdensome list of non-negotiated terms already means that there is procedural unfairness because the consumer will most likely not read it.⁸⁸⁷ For all these reasons, incorporation control – which procedural fairness is part of – and content control cannot be regarded separately.

As discussed above, the fact that suppliers use standard contracts refrains consumers from exercising their autonomy because the supplier is in a better bargaining position.⁸⁸⁸ What is more, the consumer is unlikely to read the small print as he or she assumes that the contract is presented to him or her is invariable.⁸⁸⁹ Hence, the use of provisions on unfair contract terms contribute to the consumer's actual, informed consent to adverse terms and to his autonomy. It ultimately protects the consumers' right to equality because it protects them from abuse.⁸⁹⁰

Suppliers tend to take advantage of the existing ‘information asymmetry’ and the structural inequality between themselves and their consumers, irrespective of whether the consumer is sophisticated, meaning educated, or unsophisticated. Sachs J points out in his minority judgment in *Barkhuizen v Napier*⁸⁹¹ that one-sided clauses do not affect ‘only the indigent and the illiterate who in practice remain ignorant of everything the document contains; the fact that consumer protection is especially important for the poor does not imply that it is irrelevant for

⁸⁸⁵ Naudé 2006 *Stell LR* 368, Harker 1981 *SALJ* 17.

⁸⁸⁶ Harker 1981 *SALJ* 17.

⁸⁸⁷ Naudé 2006 *Stell LR* 375.

⁸⁸⁸ Eiselen 2011 *PELJ* 2.

⁸⁸⁹ In the same sense: Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 4.

⁸⁹⁰ Naudé ‘Introduction to sections 48-52’ in Naudé and Eiselen (eds) *CPA Commentary* para 9 and 10.

⁸⁹¹ *Barkhuizen v Napier* (2007) (5) SA 323 (CC).

the rich.⁸⁹² Therefore, content control protects the true autonomy of consumers, by forcing their counterparts to obtain informed consent to onerous provisions in a fair manner, instead of hiding them in small print.⁸⁹³ In addition, as already discussed, the consumer's transaction costs involved when reading complex standard terms in small print are too high, and it is therefore unlikely that the consumer will focus on other things than the core terms. Moreover, it will be difficult to negotiate most terms and take much effort to find someone who is authorised to negotiate about standard terms.⁸⁹⁴ Strictly speaking, it is the very nature of standard terms to be 'employed without variation in all transactions of a similar kind'.⁸⁹⁵ The suppliers' advertising which tends to suggest that the consumer's experience with the supplier will only be a positive one, also contributes to consumers' behaviour, especially if they take for granted 'information' contained in advertising. Most unsophisticated consumers will thus assume that standard terms are 'official'.⁸⁹⁶

Even in a market with many competitors and products, suppliers will most likely tend to offer disadvantageous terms because consumers will focus more on the core terms, especially the price, when shopping around, than on the small print. Suppliers therefore have no incentive to offer better and fairer standard terms.⁸⁹⁷

Because of the parties' unequal bargaining power, the fact that a consumer signed a standard terms contract does not mean that he or she actually agreed to the given terms. Naudé therefore correctly points out that the existence of standard term contracts can only be justified by the fact that they allow an efficient contracting process (especially for the supplier) and provide

⁸⁹² *Barkhuizen v Napier* at para [149]. Sachs J's equations indigent and/or illiterate = poor, and consequently educated = rich can only be explained from a stylistic point of view as he probably did not want to repeat the same nomenclature. As a matter of course, in modern South Africa, as in other countries, being rich does not necessarily mean being educated, and conversely, being poor does not necessarily mean being uneducated or unsophisticated (e.g., students or educated people without a job corresponding to their education). Unfortunately, the high unemployment rate sadly contributes to this phenomenon. From 2000 until 2017, the average unemployment rate was 25.41 %, with an all-time high of 31.20 % in the first quarter of 2003 and a record low of 21.50 % in the fourth quarter of 2008. South Africa's unemployment rate held steady at 29.1 % in the fourth quarter of 2019, unchanged from the previous month's 11-year high, as the number of unemployed people dropped only by 8,000 to 6.7 million. Employment increased by 45,000 to 16.42 million from 16.38 million in the prior period, likely influenced by the festive season. The expanded definition of unemployment, including people who have stopped looking for a work, was 38.7 %, up slightly from 38.5 % in the previous quarter. Also, the youth unemployment rate dropped to 58.1 % from 58.2 % in the previous period. See 'South Africa Unemployment Rate' <http://www.tradingeconomics.com/south-africa/unemployment-rate> (accessed on 19 June 2017 and 16 March 2020)).

⁸⁹³ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

⁸⁹⁴ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

⁸⁹⁵ Harker 1981 *SALJ* 16.

⁸⁹⁶ Eiselen 1989 *De Jure* 44; Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 13.

⁸⁹⁷ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 14.

the supplier with a control mechanism over his low-skilled salespersons. In complex company structures, the efficient use of expensive high-skilled workers in the management and legal departments makes it possible that lowly paid and less trained workers are able to conclude agreements with customers in a controlled fashion.⁸⁹⁸ She also argues that the public interest in maintaining the businesses' legitimate interest to organise themselves does not make the inclusion of unfair terms legitimate and that therefore an efficient content control is necessary.⁸⁹⁹ It has to be recalled though that the use of standard terms contracts is also in the consumers' interest, even though they are in a weaker bargaining position and suppliers tend to overreach consumers. What is in the supplier's interest does not necessarily have to be adverse to the consumer. In a modern economy, it is unimaginable that each time a consumer enters a shop to purchase an item or orders a service, he or she has to negotiate each provision of the contract with the supplier.⁹⁰⁰ First, this would be too time-consuming. Second, in our complex societies with their highly complex legal systems, consumers (and even suppliers or their representatives) would not be able to understand the implications of specific provisions which would certainly more than once lead to unfair outcomes and unequal treatments between different consumers.⁹⁰¹ Third, from an economic point of view, such an approach would discourage most businesses from concluding any transaction because it would not be worthwhile negotiating from scratch every single time. Ultimately, competition would suffer, and the consumer would end up with less choice and probably higher prices.

Content control is also in the public interest. Society would have to shoulder much higher costs if the risks and obligations involved were not borne by the party which is best able to prevent or bear risks from an economic point of view.⁹⁰² More than often, suppliers can easily and relatively inexpensively minimise risks and subscribe to an insurance policy. Conversely, shifting risks and obligations onto the consumer, often without his knowledge, is economically counterproductive and destroys trust. Hence, the removal of unfair terms is likely to increase consumer confidence and trust, and ultimately economic activity. Consequently, the number of burdensome and costly legal procedures will decrease.⁹⁰³

⁸⁹⁸ Naudé 2006 *Stell LR* 370, Rakoff 1983 *Harv LR* 1223.

⁸⁹⁹ Naudé 2006 *Stell LR* 370, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

⁹⁰⁰ See also Harker 1981 *SALJ* 16.

⁹⁰¹ In the same sense Harker 1981 *SALJ* 16.

⁹⁰² Naudé 2006 *Stell LR* 371.

⁹⁰³ Griggs 2005 *CCLJ* 49, Naudé 2006 *Stell LR* 361.

1.2 The advantages of black- and greylists

The use of black- and greylists as opposed to the use of merely a general clause has non-negligible advantages and provides for an efficient redress system.⁹⁰⁴ Suppliers confronted with black- and greylists are more likely to change their policies and terms and conditions for the benefit of the consumer.⁹⁰⁵ Furthermore, these lists promote self-imposed control by suppliers themselves.⁹⁰⁶ With blacklists, suppliers and consumers have immediate certainty as to what the agreement may contain.⁹⁰⁷ A system based solely on a general clause or on court-made rules under the common law, such as the requirement of legality,⁹⁰⁸ or interpretation as well as the Constitution, is burdensome in terms of costs and effort, and most consumers would rather accept unfair terms than going to court.⁹⁰⁹ This is particularly important in the light of the relatively small amounts in issue in consumer contracts.⁹¹⁰ With the certainty and proactive effect of blacklists, expensive court actions are less likely to be necessary in order to fight unfair terms.⁹¹¹ What is more, a judge-made system is always reactive, rather than proactive, and has only a limited effect because the judgment has only an *inter partes* effect. Judicial control thus always comes too late.⁹¹² Black- and greylists also allow negotiating with suppliers who do not comply with the relevant legal provisions, which also avoids litigation.⁹¹³ Since judgments of lower courts are not reported, they will most likely be ignored by other businesses, so they cannot (re)act accordingly.⁹¹⁴ Many consumers might even not know that they can challenge certain unfair terms so that proactive control is even more important with regard to effective consumer protection.⁹¹⁵ Furthermore, consumer protection legislation is more predictable if properly structured.⁹¹⁶ The inclusion of a term in a greylist means that the supplier carries the burden of proof regarding the fairness of a term. If the supplier is not able to give such evidence, the court will most probably declare the term as unfair.⁹¹⁷

⁹⁰⁴ See Section 3(1)(h).

⁹⁰⁵ Hutchison *et al* *Law of Contract* 451.

⁹⁰⁶ Naudé 2009 *SALJ* 520.

⁹⁰⁷ Sharrock 2010 *SA Merc LJ* 317, Sharrock *Judicial control* 138.

⁹⁰⁸ Pursuant to the requirement of legality, contracts may not be enforced insofar as they are contrary to public policy. See *Sasfin v Beukes* 1989 (1) SA 1 (A).

⁹⁰⁹ See Naudé 2006 *Stell LR* 362.

⁹¹⁰ Naudé 2007 *SALJ* 132.

⁹¹¹ Naudé 2009 *SALJ* 520.

⁹¹² Naudé 2007 *SALJ* 132.

⁹¹³ Hutchison *et al* *Law of Contract* 451.

⁹¹⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 3, Naudé 2007 *SALJ* 132.

⁹¹⁵ Sharrock 2010 *SA Merc LJ* 317, Sharrock *Judicial control* 139, Naudé 2007 *SALJ* 132.

⁹¹⁶ Naudé 2006 *Stell LR* 381, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* paras 7 and 18.

⁹¹⁷ Hutchison *et al* *Law of Contract* 451, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

If there were no black- or greylists, the courts would have to develop painstakingly the common law in order to provide any predictability as to what is fair. What is more, for judges, it is easier to refer to lists when motivating their decisions as those provide for guidance.⁹¹⁸ In a nutshell, black- and greylists provide for predictability at an early stage for suppliers, consumers and consumer protection organisations, and are a rather inexpensive tool. The re-writing of standard terms is definitely less expensive than litigation on a regular basis with individual consumers, even though standard terms have to be updated now and then.⁹¹⁹

Based on Naudé's arguments, the 'area of conflict' between the supplier's and the consumer's interests can only be solved by introducing mitigating factors which give more weight to the consumer's interest. Fairness standards contained in black- and greylists as well as the use of a general clause seem therefore be an ideal solution to balance the parties' interests and will ultimately lead to an overall fairness improvement of standard terms for consumers.

1.3 The approach of the Act

The Consumer Protection Act contains several provisions in sections 48 to 52 (Chapter 2 Part G) and in regulation 44 which provide for content control. However, content control is not limited by the provisions of the Act as section 2(10) provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. Contract terms which are contrary to public policy are thus still void under the common law. The common-law rules on interpretation of contracts do also apply in terms of the Act,⁹²⁰ and the common-law rule according to which a surprising term must be pointed out to the other party before one can assume reasonable reliance of consensus on that term also still finds application.⁹²¹ Besides, there are other pieces of legislation containing consumer protection provisions which are (still) applicable, such as the Constitution,⁹²² the Rental Housing Act⁹²³ or the Conventional Penalties Act.⁹²⁴

In order to determine whether a term is fair, the Act distinguishes between terms that are considered to be unfair *per se* under section 51 ('blacklist'), and terms which are presumptively

⁹¹⁸ Naudé 2007 *SALJ* 132.

⁹¹⁹ Naudé 2007 *SALJ* 132-133.

⁹²⁰ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

⁹²¹ See *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA).

⁹²² Constitution of the Republic of South Africa, 1996.

⁹²³ 50 of 1999.

⁹²⁴ 15 of 1962.

unfair pursuant to regulation 44 ('greylist'). Furthermore, section 48 contains a general clause with some guidelines for the fairness enquiry.⁹²⁵

The South African legislature chose, unlike other legal systems,⁹²⁶ to include into the fairness enquiry not only terms contained in so-called standard-term contracts but also negotiated terms,⁹²⁷ including the core terms (price, subject matter of the contract, warranty etc.).⁹²⁸ The reason for this choice could be that many South Africans are more vulnerable than consumers in other countries are, given their low level of education and bargaining power.

As discussed further above in detail, the Act covers a wide range of agreements which are subject to a fairness assessment. Hopefully, the courts, when deciding whether a term is fair or unfair, will clearly distinguish between negotiated, non-negotiated and core terms as the consumer is always aware of negotiated terms and core terms (which are of primary interest), as opposed to non-negotiated terms that are hidden in small print.⁹²⁹ The same applies to the price, which is part of the core terms. As long as it is prominently mentioned in the terms and conditions, payable in circumstances that the consumer reasonably expected, and its calculation is not surprising, there is no reason why courts should interfere unless the price is obviously adverse to the consumer or gives an excessive advantage to the supplier.⁹³⁰ Section 48(1)(a)(i) expressly prohibits unfair prices. The courts should also not interfere with the main subject matter because the consumer can be expected to be aware of it (usually the price and the main subject are the first things a consumer looks at). Furthermore, for excessive pricing control, the competition authorities are competent. These are more qualified in terms of empirical market and pricing analysis.⁹³¹ In case of market failure, i.e., where in a specific market with only few

⁹²⁵ Hutchison *et al* *Law of Contract* 449.

⁹²⁶ See §§ 305-310 BGB where the protection is limited to B2C contracts and non-negotiated, i.e., standard terms. These are terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. See § 305(1) BGB.

⁹²⁷ The concept of 'non-negotiated terms' is wider than the one of 'standard terms'. Pursuant to **art 3(2) of the Council Directive 93/13/EEC of 5 April 1993**, '[a] term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.' In terms of **§ 305(1) BGB**, '[s]tandard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract.'

⁹²⁸ Naudé 2009 *SALJ* 531, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 5, Naudé 2006 *Stell LR* 364.

⁹²⁹ Naudé 2006 *Stell LR* 364, Naudé 2009 *SALJ* 533, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁹³⁰ According to the common law, a court may set aside a price set by a third party appointed by the parties for that purpose as long as it was manifestly unjust. See *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 (3) SA 449 (C); *Van Heerden v Basson* 1998 (1) SA 715 (T).

⁹³¹ See s 8(a) of the Competition Act 89 of 1998 which prohibits a dominant firm to charge an excessive price to the detriment of consumers, that is a price for a good or service which bears no reasonable relation to the economic

suppliers all of them charge excessive prices, not the courts exercising jurisdiction under the Act but rather the competition authorities should interfere.⁹³²

Finally, consumers can be expected to know the core terms and shop around in order to find more advantageous terms or to bargain. What is more, it would create uncertainty if courts invalidated agreements merely on the basis that the agreed price exceeds the market value.⁹³³ Naudé is of the opinion that the Act goes too far by including core terms into the fairness review because the stricter common-law and constitutional control mechanisms, such as the requirement of legality and the principles concerning undue influence and misrepresentation as well as section 40 on unconscionable conduct would still provide for sufficient control over unjust core terms.⁹³⁴ Naudé's view is correct because of the reasons mentioned above. Core terms do not deserve the same treatment as other terms, especially non-negotiated ones.

Furthermore, terms that merely reflect legal provisions, so-called declaratory clauses, should have been excluded from the fairness review.⁹³⁵ Because of the inclusion of declaratory clauses, ordinary courts can indirectly attack the legal provision itself on the basis of fairness. This is however a constitutional question for which only the Constitutional Court has jurisdiction.⁹³⁶

The Act applies to B2C contracts as well as to certain B2B contracts as long as the latter fall under the scope of the Act in terms of section 5.⁹³⁷ B2B contracts falling under the Act are agreements for the supply of goods and services to juristic persons which do not exceed a maximum turnover or asset value, or to any business which is a non-juristic person.⁹³⁸ On the other hand, regulation 44 only applies to contracts between for-profit suppliers and natural persons acting for purposes wholly or mainly unrelated to their business, but not to B2B agreements.⁹³⁹ There are however no compelling reasons for including certain B2B contracts in the fairness review. Contrary to B2C contracts, B2B agreements are more diverse and require

value of that good or service and is higher than that value. This must be determined by empirical analysis. Concerning the elements in order to determine such a price see *Harmony Gold Mining Company Limited and Another v Mittal Steel South Africa Limited and Another* [2007] CPLR 37 (CT).

⁹³² Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

⁹³³ Naudé 2009 *SALJ* 533.

⁹³⁴ Naudé 2009 *SALJ* 534.

⁹³⁵ Naudé 2009 *SALJ* 534. This is the case, for example, in Germany. § 307(3) BGB: 'Subsections (1) and (2) above, and [§§] 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed.'

⁹³⁶ See s 167(4)(b) of the Constitution.

⁹³⁷ Naudé 2009 *SALJ* 531. Franchises fall under the scope of the Act irrespective of their annual turnover or asset value. See s 5(6) and (7).

⁹³⁸ Section 5(2). In terms of s 1, partnerships or associations, trusts and bodies corporate are regarded as juristic persons for the purpose of the Act.

⁹³⁹ Regulation 44(1).

a more flexible treatment, whereas B2C contracts are more or less consistent with regard to the consumer's inexperience, lacking sophistication, commercial dependence and bargaining power. Certain clauses, such as mandatory arbitration clauses, are particularly unfair *vis-à-vis* a consumer, but suitable in many B2B contracts. What is more, B2C lists often have a positive effect on B2B contracts, especially in favour of small businesses. Lists do therefore not necessarily need to apply to B2B contracts as well.⁹⁴⁰

It is hence arguable if B2B contracts deserve the same treatment as B2C contracts in terms of the fairness review, especially concerning negotiated terms. Naudé is of the view that only standard terms in B2B contracts should have been subject to a fairness enquiry simply on the basis that they are unfair, and that the Act should have provided for the possibility to challenge a term that was initially presented as one of the supplier's written standard terms and has not subsequently been changed in favour of the small business. Then, in Naudé's view, small businesses would be able to challenge a particular standard term that was not negotiated, even though if others were subject to negotiation. For the negotiated terms in B2B contracts, the stricter common-law control mechanisms are sufficient for the negotiated terms in her opinion.⁹⁴¹ Naudé's differentiation is correct because the legislator's approach undeservingly treats negotiated and non-negotiated terms in B2B contracts in the same way.

The blacklist does not make provision for regular updates. It would be beneficial if it provided that the Consumer Commission regularly review the list of prohibited terms and make recommendations to the Department of Trade and Industry based on case law. This may ultimately result in better effectiveness of the Act and the blacklist. However, the Act provides that the Consumer Commission must make recommendations to the Minister of Trade and Industry from time to time for achieving the progressive transformation and reform of consumer law.⁹⁴² Stoop argues that for the blacklist to stay relevant and in keeping with developments in commercial practice, the Act should oblige the Consumer Commission or the Department of Trade and Industry to regularly update or review the blacklist.⁹⁴³ Stoop certainly means by updating and reviewing that the Commission and the DTI make recommendations in this regard⁹⁴⁴ as otherwise, the separation of power would not be observed. Indeed, updates of

⁹⁴⁰ Naudé 2007 *SALJ* 139 and 140.

⁹⁴¹ Naudé 2009 *SALJ* 534.

⁹⁴² Section 94(c).

⁹⁴³ Stoop *LLD thesis* 102.

⁹⁴⁴ See ss 92-98.

the blacklist — unlike updates of the greylist of regulation 44(3) which can be carried out by the executive branch — can only be effected by Parliament.

The title of Chapter 2 Part G of the Act is 'Right to fair, just and reasonable terms and conditions'. As in this context, the terms 'fair', 'just' and 'reasonable' are more or less congruent without a real distinguishable difference in meaning, for brevity's sake, they will be expressed in the following by the term 'fair', except where a distinction seems necessary.

In the following discussion on content control, also the views of the former Office of Fair Trading (OFT)⁹⁴⁵ will be depicted. The OFT was a not-for-profit and non-ministerial government department of the United Kingdom, established by the Fair Trading Act 1973, and enforced both consumer protection and competition law and acted as the UK's economic regulator. It was closed down on 1 April 2014, and its responsibilities passed to several different organisations. Since the OFT's work is still valuable both in the UK and for comparative law purposes, its views will be rendered throughout the following discussion.

2. Prohibited transactions, agreements, terms and conditions

Section 51 contains a so-called 'blacklist' of prohibited terms. If an agreement contains any of these forbidden clauses, the supplier will not be able to enforce them since he or she will otherwise conduct in a prohibited manner.⁹⁴⁶ Section 51(1) must thus be read in conjunction with the definition of 'prohibited conduct' in section 1, which is defined as an act or omission in contravention of the Act.⁹⁴⁷ Section 51 CPA was largely inspired by section 90 NCA.⁹⁴⁸ The underlying principle of section 51 is that the supplier may not ask the consumer to contract out of the Act by accepting terms that directly or indirectly waive or restrict a consumer's rights under the Act as those terms are void.⁹⁴⁹ Section 51(3) expressly states that any transaction or agreement, provision, term or condition or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes section 51. What is more, the fact that the term in question constitutes prohibited conduct may entail remedies and sanctions

⁹⁴⁵ The OFT's goal was to ensure the well-functioning of markets for consumers by ensuring healthy competition between fair-dealing businesses and prohibiting unfair practices such as rogue trading, scams and cartels. Under the provisions of the Enterprise and Regulatory Reform Act 2013, the Competition and Markets Authority (CMA) was established on 1 April 2014, and many of the functions of the OFT and the Competition Commission were combined. See 'Office of Fair Trading' at <https://www.gov.uk/government/organisations/office-of-fair-trading> and Law *Oxford Dictionary of Law* s.v. 'Office of Fair Trading'.

⁹⁴⁶ Opperman and Lake *Understanding the CPA* 78.

⁹⁴⁷ Van Eeden and Barnard *Consumer Protection Law* 262.

⁹⁴⁸ 34 of 2005.

⁹⁴⁹ De Stadler *Consumer Law Unlocked* 115, Hutchison *et al Law of Contract* 450.

in terms of the Act.⁹⁵⁰ The use of a blacklist implies the pre-emptive control of fairness because the terms contained in the list are rendered ineffective irrespective of how and when they are used. The main reason for prohibiting terms is the idea that consumers should be given absolute protection where specific substantive interests or irreducible rights are involved.⁹⁵¹

The prohibitions contained in section 51 apply to all agreements covered by the Act, i.e., also to franchise agreements,⁹⁵² contrary to regulation 44.

The prohibitions of section 51 will be discussed in the following.

2.1 Section 51(1)(a) and (b)

Section 51(1)(a) and (b) prohibits any transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of the Act, mislead or deceive the consumer, or subject the consumer to fraudulent conduct.⁹⁵³ Prohibited are also terms which directly or indirectly purport to waive or deprive a consumer of a right in terms of the Consumer Protection Act, avoid a supplier's obligation or duty regulated therein, set aside or override the effect of any provision, or authorise the supplier to do anything unlawful, or fail to do anything that is required in terms of the Act.⁹⁵⁴

The legislator chose different verbs in order to cover all possible actions that could be contrary to section 51(1)(a) or (b): '*defeat* the purposes and policy of the Act',⁹⁵⁵ '*set aside* or *override* the effect of any provision',⁹⁵⁶ '*do* anything that is *unlawful* in terms of this Act',⁹⁵⁷ or '*fail to do* anything that is required in terms of this Act'.⁹⁵⁸ The practical difference between these verbs seems to be minimal or non-existent in this context though as *setting aside* or *overriding*

⁹⁵⁰ Van Eeden and Barnard *Consumer Protection Law* 262.

⁹⁵¹ Stoop *LLD thesis* 94.

⁹⁵² Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

⁹⁵³ Section 51(1)(a)(i)-(iii). See Jacobs/Stoop/Van Niekerk 2010 *PELJ* 359. It seems that provisions which mislead or deceive the consumer, or subject the consumer to fraudulent conduct would be in any case void under the common law. See *Government of Republic of South Africa v Fibre Spinners & Weavers* 1978 (2) SA 794 (A) 803; *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) 775.

⁹⁵⁴ Section 51(1)(b)(i)-(iv).

⁹⁵⁵ Section 51(1)(a)(i).

⁹⁵⁶ Section 51(1)(b)(iii). Already before the CPA came into effect, in *Bafana Finance v Makwaka and Another* 2006 (4) All SA 1 (SCA) it was held that '[a]n agreement whereby a party purports to waive the benefits conferred upon him by an Act of Parliament will be *contra bonos mores*, and therefore not enforceable if it can be shown that such agreement would deprive the party of protection which the Legislature considered should, as a matter of policy, be afforded by law' para [10].

⁹⁵⁷ Section 51(1)(b)(iv)(aa).

⁹⁵⁸ Section 51(1)(b)(iv)(bb). Emphasis added.

the effect of a provision, or *failing to do* anything that is required by law is necessarily *doing* something that is *unlawful*, for example.

Naudé therefore correctly maintains that section 51(1)(a) and (b) is unnecessarily complicated. This is certainly true because the (unnecessary) enumeration of actions in this provision could have been formulated more concisely. The legislator simply could have provided that any term or notice which directly or indirectly waives or restricts the consumer's rights under the Act, or contravenes the Act in any other way, shall be void.⁹⁵⁹ Black- or greylists should be drafted in a simple and clear language so that consumers, consumer advisers and businesses who are not lawyers can understand them.⁹⁶⁰ What is more, Stoop correctly argues that section 51(1)(a) is too imprecise. This is mainly because the list is linked to the purpose and policy of the Act. This interrelation makes it difficult to determine whether a term is prohibited or not. This provision provides that a supplier must not make a transaction or contract subject to any terms or condition if its general purpose or effect is to defeat the purposes and policy of the Act, mislead or deceive the consumer or subject the consumer to fraudulent conduct. First, the purpose and policy of the Act are drafted in broad and general terms, which makes it difficult to determine whether a term or its purpose or effect is to defeat the purposes and policy of the Act. Second, whether the purpose or effect of a term is to mislead or deceive is a subjective question. No guidance is given in order to determine whether the purpose or effect of a term is to mislead or deceive a consumer. Third, the Act does not define 'fraudulent conduct'. The wording of paragraph (a) of section 51(1) is therefore too wide and too vague.⁹⁶¹

Apart from the verbose formulation of section 51(1)(a) and (b), it is suggested that these provisions serve as a 'general clause' within section 51. Hawthorne argues that '[s]ection 51 works from the general to the specific'.⁹⁶² Hence, when assessing whether a term falls under section 51, one should first refer to the subsequent paragraphs, and then, when none of these provisions seem to fit, to section 51(1)(a) and (b). The reason why these two paragraphs have not been integrated into the 'general clause' of section 48 is that section 51 contains prohibited contract terms, whereas section 48 gives discretionary power to the courts when assessing a term's fairness.

⁹⁵⁹ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

⁹⁶⁰ Naudé 2007 *SALJ* 146.

⁹⁶¹ Stoop *LLD thesis* 98 and 99.

⁹⁶² Hawthorne 2012 *THRHR* 363.

It is not clear though why section 51 contains prohibitions that are already listed elsewhere in the Act, or provisions which fall under section 51(1)(a) or (b). These will be discussed further below.

2.2 Sections 51(1)(c)-(j) and 51(2)

The enumeration of certain prohibitions in section 51(1)(c) to (2)(c) provides for a checklist for suppliers and consumers. A more general wording would not have been possible here, also because black- and greylists may evolve gradually, and new prohibitions might be included in the future.

Section 51(1)(c) *et seq.* contains more specific prohibitions. Those can be divided into the five following categories:

a) Exemption clauses in terms of gross negligence etc.

Prior to the Consumer Protection Act, agreements often contained so-called waivers or exemption clauses by which the consumer agreed to waive the protections provided by the law, or to exempt the supplier's liability for losses he or she might otherwise be liable for. The Act has banned the use of certain of these clauses.⁹⁶³ Even though they are not prohibited outright, the legislature imposed additional validity requirements. Exemptions for gross negligence have been outlawed by the Act though.⁹⁶⁴

Under section 51(1)(c)(i), a supplier may not use exemption or indemnity agreements or terms that limit or exempt him or her from liability for any loss attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier. This includes direct or indirect losses. It is prohibited, e.g., to exclude the supplier's liability for defective goods or to pay for any harm caused to the consumer's person or property by those defective goods.

Since section 61 already regulates the liability for damage caused by defective goods, one might ask if section 51(1)(c) is not superfluous. 'Harm' in terms of section 61(1) is defined in section 61(5), *inter alia*, as 'any loss of, or physical damage to any property irrespective of whether it is movable or immovable'. In other words, 'loss' in terms of section 51 and 'harm' in section 61 are congruent. Section 51(1)(c)(i) excludes the possibility for suppliers to limit or exempt their liability for gross negligence, whereas section 61 makes them answerable for any

⁹⁶³ Melville *Consumer Protection Act* 78.

⁹⁶⁴ Hutchison *et al Law of Contract* 449, Naudé 2010 *SALJ* 515, Gibson and Hull *Everyone's Guide to the CPA* 163.

harm ‘irrespective of whether the harm resulted from *any* negligence’.⁹⁶⁵ Section 61 introduces, according to Van Eeden, a ‘modified negligence liability’ which cannot be seen as an unqualified strict liability model but rather as a regime which seeks to strike a balance between fault and no-fault liability.⁹⁶⁶ Wrongfulness is thus still required under section 61.⁹⁶⁷ Gross negligence is therefore not necessarily a condition for the application of section 61. Section 61, as opposed to section 51(1)(c)(i), does even not require a contractual *nexus* between the consumer and the supplier. This is confirmed by section 61(3) which provides that the ‘supplier’s’ (in the broad sense of subsection (1)) liability is joint and several.⁹⁶⁸ Furthermore, the personal scope of application of section 61 is expanded in that ‘supplier’ comprises also other members of the supply chain, such as the producer, the importer, the distributor or the retailer (in fact, section 61 avoids the word ‘supplier’),⁹⁶⁹ whereas section 51(1)(c)(i) sticks to the definition of the term ‘supplier’ in section 1. In addition, although section 61(1) and (2) expands the personal scope of application to all members of the supply chain, it does not expressly mention ‘person[s] acting or controlled by the supplier’, unlike section 51(1)(c)(i). Moreover, section 51(1)(c) has a broader ambit as it does not only apply to defective goods or sub-standard services. Hence, a supplier is also answerable in terms of section 51(1)(c) *before* the actual delivery of any goods or services. This is the case, for instance, where a supplier comes to the consumer’s house in order to establish a quotation⁹⁷⁰ for a new built-in kitchen, and by this occasion breaks an antique chair he or she took from the dining room when standing on it while measuring, instead of taking a ladder (this non-professional conduct clearly can be regarded as gross negligence). This becomes clear when reading the definitions of ‘supplier’ (a person who markets any goods or services) and ‘[to] market’ (to promote or supply any goods or services), read with the definition of ‘promote’, as the establishment of a quotation certainly is a ‘conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction’.⁹⁷¹ Hence, section 51(1)(c)(i) shifts forward the supplier’s liability compared to section 61.

The prohibition of exemption clauses in terms of gross negligence does however not mean that the exemption of ordinary negligence is always permitted, even if the requirements of section

⁹⁶⁵ Emphasis added.

⁹⁶⁶ Van Eeden and Barnard *Consumer Protection Law* 392.

⁹⁶⁷ Barnard 2012 *De Jure* 480.

⁹⁶⁸ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 370, Barnard 2012 *De Jure* 480.

⁹⁶⁹ The word ‘supplier’ was included in the Consumer Protection Bill in the provisions for strict liability, but the legislator chose finally to omit it in the final Act. See Barnard 2012 *De Jure* 481.

⁹⁷⁰ The Consumer Protection Act uses the word ‘estimate’. See for example the definition of ‘estimate’ in s 1.

⁹⁷¹ See definition of ‘promote’ (c) in s 1.

49 are met.⁹⁷² The exemption of ordinary negligence will be discussed in the context of section 48.

Section 51(1)(c)(i) does not prohibit exemption clauses *per se*. It offers however a clear framework to the benefit of the consumer as to what is permitted and what is not. *Afrox Healthcare Bpk v Strydom*,⁹⁷³ where an exemption clause provided that the patient 'absolve[s] the hospital and/or its employees and/or agents from all responsibility (...) for damages or loss of whatever nature (...) whatever the causes are, *except only with the exclusion of intentional omission*⁹⁷⁴ by the hospital, its employees or agents' would therefore not be permissive anymore.⁹⁷⁵ The same applies to *Mercurius Motors v Lopez*,⁹⁷⁶ where the exemption clause stated: 'I/we acknowledge that Mercurius shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (*including gross negligence*)⁹⁷⁷ of their representatives, agents or employees'.⁹⁷⁸ The exemption clause in *Naidoo v Birchwood*⁹⁷⁹ would also be prohibited: 'The guest hereby agrees (...) that the Hotel shall not be responsible for any injury to, or death⁹⁸⁰ of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft, or any cause and by whomsoever caused or arising from the negligence (*gross or otherwise*)⁹⁸¹ or wrongful acts of any person in the employment of the Hotel.'⁹⁸²

⁹⁷² Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁹⁷³ 2002 (6) SA 21 (SCA).

⁹⁷⁴ Emphasis added.

⁹⁷⁵ The SCA was of the view that an exemption clause excluding gross negligence is contrary to public policy, but the respondent had not alleged gross negligence as such, and therefore this consideration was not taken into account in this matter. Instead, the respondent put forward the unequal position between the parties (hospital/patient), that the exemption clause had the effect of exempting the hospital and its employees from properly carrying out their duties, that the clause was in conflict with the constitutional right of access to healthcare, that it was contrary to public policy and therefore unenforceable for being unreasonable, unfair and contrary to the principles of good faith.

⁹⁷⁶ 2008 (3) SA 572 (SCA).

⁹⁷⁷ Emphasis added.

⁹⁷⁸ In this case, the SCA decided in favour of the respondent, as in the court's view, the consumer had been misled, as the appellant had not drawn its attention to the exemption clause in the contract of deposit which was printed on the reverse side of the repair order form, under a carbon copy that had to be detached to reveal the terms and conditions. Furthermore, it held that the respondent failed to take reasonable steps to secure the vehicle, as it had not put in place adequate processes to ensure that the keys of the vehicles were not left in the vehicle overnight. The exemption clause therefore dealt with the very essence of the contract of deposit.

⁹⁷⁹ 2012 (6) SA 170 (GSJ).

⁹⁸⁰ The exclusion of liability for death will be discussed below in terms of reg 44(3)(a).

⁹⁸¹ Emphasis added.

⁹⁸² The court held that a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and therefore unenforceable. To deny a hotel guest judicial redress for injuries he or she suffered in exiting the hotel gate because of the negligent conduct of the hotel (not properly maintaining the gate, not warning the guest) offends against the notions of justice and fairness.

Naudé argues that the prohibition of exemption clauses as regards gross negligence is precarious unless exemption clauses dealing with ordinary negligence are greylisted.⁹⁸³ Clauses exempting ordinary negligence are often unfair as well, even though they might be initialled or signed. Naudé sets forth that the burden of persuading a court why the consumer should bear the risk of any harm caused by the supplier's negligence should be borne by the business, and not by the consumer. Such clauses should therefore be greylisted. In addition, businesses would more likely consider whether they exclude liability for negligence, instead of providing the consumer with a choice to conclude the agreement at a higher price without the exemption clause.⁹⁸⁴ It is my submission though that clauses exempting gross negligence should always be considered unfair and therefore outlawed. Consumers often do not comprehend the implications of exemption clauses. Thus, at least the most drastic clauses in terms of the degree of negligence, i.e., the exemption of gross negligence, should be blacklisted. *Afrox Healthcare Bpk v Strydom*⁹⁸⁵ would probably be decided in favour of the patient today. Furthermore, contracting at a higher price without the exemption clause is not always an option for South African consumers who often do not have the necessary financial freedom.

What is more, the assumption of risk or liability by the consumer for a loss in terms of subparagraph (ii) is prohibited.⁹⁸⁶ It is submitted that ultimately, the assumption of a risk or liability leads *de facto* to an exemption of liability of the supplier as cases are imaginable where the consumer will be discouraged by having to prove first the supplier's gross negligence.

Any obligation to pay for damages to goods displayed by a supplier due to an agreement or term imposing such an obligation is also prohibited in terms of section 51(1)(c)(iii). This does not apply however to loss or damage resulting from the consumer's gross negligence or recklessness, malicious behaviour or criminal conduct.⁹⁸⁷ In other words, so-called 'you-break-it-you-buy-it' policies are no longer permissible without qualification.⁹⁸⁸

⁹⁸³ Naudé 2009 *SALJ* 523, Naudé 2007 *SALJ* 157.

⁹⁸⁴ Naudé 2009 *SALJ* 523.

⁹⁸⁵ 2002 (6) SA 21 (SCA).

⁹⁸⁶ Section 51(1)(c)(ii).

⁹⁸⁷ Sections 51(1)(c)(iii), 18(1). Sharrock 2010 *SA Merc LJ* 318, Sharrock *Judicial control* 140, Hawthorne 2012 *THRHR* 364.

⁹⁸⁸ De Stadler *Consumer Law Unlocked* 117.

b) Transfers of the consumer's claim against the Guardian's Fund

Agreements or terms and conditions purporting to cede or set off a consumer's right to claim against the Guardian Fund⁹⁸⁹ are prohibited in terms of section 51(1)(f). This surprising provision shows the importance the legislator lays on the protection of the Guardian's Fund. Suppliers are therefore not able to 'cash in' funds administered by the Master of the High Court which the consumer has a right to claim, e.g., in his quality as an heir.

c) False acknowledgements

Section 51(1)(g) prohibits terms which falsely express an acknowledgement by a consumer that no representations or warranties were made before the agreement was concluded, or that the consumer has received goods or services or a document that is required by the Act to be delivered to the consumer. This provision is hence a 'deeming provision' as it deals with fictional declarations and fictional receipts of documents, goods or services.⁹⁹⁰

The reason for outlawing the acknowledgements mentioned in section 51(1)(g)(i) is that the exclusion of liability for words which do not appear in a standard-form contract can lead to the result that consumers are misled with impunity. Consumers typically rely on oral statements given by suppliers, but suppliers (or their agents) often embellish the contract's content to their benefit, so that there is room for bad faith.

According to Naudé, the wider formulation of the European Unfair Terms Directive's Annex⁹⁹¹ in terms of which 'limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality' may be regarded as unfair,⁹⁹² is to be preferred since it is able to catch more terms aimed at achieving the same effect.⁹⁹³ This view is correct as the EC Directive does not contain any time limit ('before the agreement was made'), and prohibits the introduction of formalities in order to make the supplier liable.

⁹⁸⁹ The Guardian's Fund falls under the administration of the Master of the High Court. It is a fund created to hold and administer funds which are paid to the Master on behalf of various persons known or unknown, for example, minors, persons incapable of managing their own affairs, unborn heirs, missing or absent persons or persons having an interest in the moneys of a usufructuary, fiduciary or fideicommissary nature. Each Master has its own Guardian's Fund. The purpose of the Guardian's Fund is to protect the funds of minors, persons lacking legal competence and capacity, known or unknown, absent as well as untraceable heirs. See 'Guardians and Custodians' at <http://www.justice.gov.za/master/guardian.html>.

⁹⁹⁰ Naudé 2007 *SALJ* 161.

⁹⁹¹ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

⁹⁹² Item (n) of the Annex read with Art 3(3) of the Unfair Terms Directive.

⁹⁹³ Naudé 2009 *SALJ* 523, Naudé 2007 *SALJ* 160.

The wording of this section requires that the term *falsely* express an acknowledgement. The word 'falsely' however is unfortunate, because what the section seeks to prohibit is an *actual*, not a *false*, acknowledgement of a non-existing – or 'false' – fact.⁹⁹⁴ Hence, the mere incorporation in a contract of an acknowledgement is not *per se* prohibited. Van Eeden correctly contends that the inclusion of such an acknowledgement amounts to prohibited conduct if in fact such representations or warranties have been made, or the consumer has not received goods, services or a document required by the Act.⁹⁹⁵ Although this section does not expressly prohibit the supplier from excluding its liability in terms of pre-contractual representations or warranties, such a prohibition seems to be implied since the purpose of this section is to ensure that a consumer may always rely on such representations or warranties. Therefore, both, entire agreement clauses,⁹⁹⁶ to the extent that they exclude additional warranties, as well as no-representations clauses⁹⁹⁷ are prohibited.⁹⁹⁸ Entire agreement clauses weaken the supplier's incentive to choose its words more wisely and to make sure that its agents do so.⁹⁹⁹

Section 51(1)(g)(ii) prohibits acknowledgements in terms of which the consumer has received goods or services, or a document that is required by the Act to be delivered to the consumer. The exclusion of such terms clearly aims to exclude cases where the supplier has actually not delivered, but the consumer is barred from his rights because he had acknowledged delivery. Here again, Naudé correctly argues that a more comprehensive formulation, such as contained in § 308 no. 5 BGB, would have caught more cases because the latter states that 'a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless a) the other party to the contract is granted a reasonable period of time to make an express declaration,

⁹⁹⁴ Sharrock 2010 *SA Merc LJ* 318, Sharrock *Judicial control* 141.

⁹⁹⁵ Van Eeden and Barnard *Consumer Protection Law* 264 note 261.

⁹⁹⁶ Clause stating that the document in question is the sole record of the contract and no reliance may be placed on any warranties, promises, undertakings and conditions not contained in this document. Sometimes referred to as 'integration clause'. Example: *'This Agreement reflects the entire agreement between the parties. Each of the parties acknowledges that, in entering into this Agreement, it does not do so in reliance on any representation, warranty or other provision except as expressly provided in this Agreement, and any conditions, warranties or other terms implied by statute or common law are excluded from this Agreement. Neither party will have any right or remedy arising from any undertaking, warranty or representation not included in this document.'* Example from Hutchison *et al Law of Contract* 410.

⁹⁹⁷ Clause excluding liability for pre-contractual representations made by or on behalf of the other party.

⁹⁹⁸ Sharrock 2010 *SA Merc LJ* 319, Sharrock *Judicial control* 141.

⁹⁹⁹ OFT *Unfair Contract Terms Guidance* (2008) para 14.1.1 and 14.1.3 at 61 – hereafter referred to as 'OFT'.

and b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time' is ineffective.¹⁰⁰⁰

Documents with regard to section 51(1)(g)(ii) only concern those which are required by the Act, such as the original copy of notices containing warnings of risks related to hazardous or unsafe goods in terms of section 58(4), or a notice in terms of section 49.¹⁰⁰¹ § 308 no. 6 BGB is much stricter in this regard as it simply blacklists 'a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract'.¹⁰⁰²

Regulation 44(3)(c) provides in its greylist that a term is presumed to be unfair if it has the purpose or effect of limiting the supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the supplier. Naudé is of the opinion that regulation 44(3)(c) will catch more types of terms aimed at achieving the same effect and that the provision of section 51(1)(g) should rather have been greylisted instead of prohibited outright. She correctly mentions that the absolute prohibition of section 51(1)(g), which is also applicable to B2B contracts, prevents two businesses from negotiating and expressly agreeing on a term to the effect that their written agreement will be the sole record of their transaction and that no party would be able to rely on alleged representations or warranties not recorded in the written agreement.¹⁰⁰³ In her opinion, such negotiated terms are not problematic and play an essential role in enhancing predictability.¹⁰⁰⁴ On the other hand, this predictability is achieved only at the price of excluding the consumer's right to redress for misrepresentations.¹⁰⁰⁵

¹⁰⁰⁰ Naudé 2007 *SALJ* 161.

¹⁰⁰¹ In terms of s 49, in most cases it will be sufficient to draw the consumer's attention in a conspicuous manner and form by putting a note at the entrance of a venue. Where a consumer books an adventure trip over the telephone and asks to be sent information by the post, such a notice will have the form of a written document to be handed out to the consumer.

¹⁰⁰² Naudé 2007 *SALJ* 161.

¹⁰⁰³ Naudé 2009 *SALJ* 523.

¹⁰⁰⁴ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 4. See also Naudé 2007 *SALJ* 160 where Naudé already mentioned this issue before the enactment of the greylist in reg 44. De Stadler is of the same opinion as regards the greylisting of this term, without substantiating further. See De Stadler *Consumer Law Unlocked* 117 note 91.

¹⁰⁰⁵ OFT *Unfair Contract Terms Guidance* (2008) para 14.1.4 at 61 and 62.

The fact that the provision has been included in section 51 rather than greylisted also protects small businesses and franchisees, which are often exploited by larger firms. Those would be excluded under regulation 44(1).¹⁰⁰⁶

d) Forfeiture of money to the supplier

Section 51((1)(h) provides that clauses which require the consumer to forfeit money to the supplier if the consumer exercises any right in terms of the Consumer Protection Act, or to which the supplier is not entitled, are prohibited. This includes, for example, a deposit which the supplier has to pay back to the consumer if the consumer cancels an advance booking in terms of section 17(2), or the price which the supplier has to refund if the consumer returns a defective good in terms of section 56(1).

It is important to note that unlike forfeiture clauses, the listing of penalty clauses in this list would be unnecessary because the Conventional Penalties Act¹⁰⁰⁷ already deals with this kind of clauses.¹⁰⁰⁸

Section 51(1)(h) has to be interpreted in that a forfeiture clause is valid unless the forfeiture is prohibited by the Act or another law. The understanding that it is invalid unless the law allows explicitly the forfeiture clause would invalidate too many clauses and would not be consistent with the presumption of statutory interpretation that legislation does not alter the existing law more than necessary.¹⁰⁰⁹ It is further submitted that the negative formulation of subparagraph (ii) ('is not entitled') speaks for this point of view, meaning that a prohibitive provision in the Act or any other law is required in order to invalid the term in question. Such a law would be, for example, the Conventional Penalties Act.¹⁰¹⁰

e) Unfair enforcement clauses

Section 51(1)(i) and (j) prohibits five types of enforcement clauses. Experience shows that the blacklisting of such clauses has induced businesses to delete or revise such unfair terms.¹⁰¹¹

¹⁰⁰⁶ Regulation 44(1) read with the definition of 'consumer agreement' in s 1.

¹⁰⁰⁷ 15 of 1962.

¹⁰⁰⁸ Naudé 2007 *SALJ* 162.

¹⁰⁰⁹ Du Plessis *Re-interpretation* 252, Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 6. See also Naudé 2009 *SALJ* 524.

¹⁰¹⁰ See, for instance, s 2(1) and (2) of the Conventional Penalties Act.

¹⁰¹¹ This is the case in the UK where the Office of Fair Trading listed such terms in its *Unfair Contract Terms Guidance* (2008) in Group 18.

aa) Authorisation to enter premises in order to repossess goods

In terms of section 51(1)(i)(i), transactions or agreements which express authorisation for any person acting on behalf of the supplier to enter the consumer's premises in order to take possession of goods to which the agreement relates are prohibited.

The rationale behind the blacklisting of such terms is that they seek to permit sanctions which generally have to be authorised by court order.¹⁰¹²

It is astonishing that only 'persons acting on behalf of the supplier' are included, and not the supplier itself. This is probably an unintended loophole. It is submitted that section 51(1)(i)(i) also includes the supplier itself because otherwise, the supplier could simply ignore this provision and legal actions and act on its own. This provision should therefore be amended accordingly.

Strictly speaking, a bailiff or sheriff does not act on behalf of the supplier, but on behalf of the State (court) which issued a repossession order. Thus, it is submitted that section 51(1)(i)(i) does not exclude legal actions following a non-payment of the consumer. Otherwise, there would be an over-protection for the consumer who could just not pay for goods and keep them.

In terms of section 4(3)(c) of the Rental Housing Act,¹⁰¹³ the tenant's rights against the landlord include his or her right not to have his or her possessions seized, except in terms of law of general application and *having first obtained an order of court*.¹⁰¹⁴ This provision makes clear that despite the tenant's (consumer's) debt against the landlord (supplier), the landlord cannot simply enforce his lien¹⁰¹⁵ but needs an order of court to do so.

It is submitted that this provision aims to prevent the supplier from stipulating in advance any enforcement in the form of repossession and taking action himself, by circumventing legal action.

bb) Undertaking to sign documents relating to enforcement

An undertaking to sign in advance documents relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed,

¹⁰¹² OFT *Unfair Contract Terms Guidance* (2008) para 18.3.2 at 74.

¹⁰¹³ 50 of 1999.

¹⁰¹⁴ Emphasis added.

¹⁰¹⁵ A lien is the right to possess or hold onto the personal property of the tenant until he has paid his debt, or the tenant's right to hold onto the leased dwelling until she or he is compensated for the improvements made. See 'Withholding of property: Time crucial for parties' by Sayed Iqbal Mohamed at www.ocr.org.za/weekly_column2011/Withholding%20of%20Property.pdf (no longer available).

is prohibited in terms of section 51(1)(i)(ii). This provision aims to protect the consumer who otherwise could be a victim of a supplier who proceeds too swiftly in terms of enforcement measures. A supplier who wants to enforce his rights must hence undertake the necessary steps after the consumer is in default, and cannot 'prepare' any enforcement in advance.

cc) Consent to a predetermined value of costs relating to enforcement

Section 51(1)(i)(iii) invalids any consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with the Act. 'Costs' are defined as 'generally signifying the sum of money a court orders one party in proceedings to pay another party as compensation for the expense of litigation incurred.'¹⁰¹⁶ The supplier shall not be able to determine in advance a value of costs in terms of enforcement as otherwise, the consumer could be liable for higher costs than the actual costs of the enforcement. In other words, the supplier shall not be better off in terms of the enforcement than before.

In cases where the parties reach a settlement before the affair is decided in court, such settlement actually might contain a provision with respect to liability for costs. According to Van Eeden, such a provision might be subject to section 51.¹⁰¹⁷ This view is correct. Although such a settlement cannot be qualified as a 'transaction' in terms of the Act,¹⁰¹⁸ it is however an 'agreement', i.e., 'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them',¹⁰¹⁹ since a settlement reached between the parties can be qualified as such.

dd) Deposit of certain documents with the supplier

It is also prohibited to stipulate a provision in terms of which the consumer agrees to deposit an identifying document or device, such as an identity document, credit or debit card, bank account or ATM access card, or any similar identifying document or device.¹⁰²⁰ This provision aims to prevent that the consumer is inhibited for further transactions by depositing an identity document or a device by which it can pay for other goods or services. Otherwise, the consumer would not be able to act normally in his daily life as for many transactions – not only in the private sector but also in the public sector – one has to present an ID or pay with a card. Section 51(1)(j)(i) also prohibits temporary possession of the abovementioned documents or cards,

¹⁰¹⁶ Van Eeden and Barnard *Consumer Protection Law* 283, *Weiner v Broekhuizen* 2001 (2) SA 715 (C) at 724H-I.

¹⁰¹⁷ Van Eeden and Barnard *Consumer Protection Law* 283.

¹⁰¹⁸ See the definition of 'transaction' in s 1, read with s 5(6).

¹⁰¹⁹ See definition of 'agreement' in s 1.

¹⁰²⁰ Section 51(1)(j)(i).

except for identification, or to make a copy thereof¹⁰²¹ which is expressly mentioned in section 51(2)(b)(i).

This provision overrides the decision in *De Beer v Keyser and others*¹⁰²² in which the Supreme Court of Appeal held that a clause in a standardised loan agreement by which the borrower is required to surrender his ATM card and PIN to the lender, is enforceable.

ee) Provision of a PIN to access an account

In terms of section 51(1)(j)(ii), it is prohibited to enter an agreement in terms of which the consumer must provide a personal identification code or number in order to access an account.

The idea behind this provision is not new. Already in terms of a regulation of the Minister concerning the Credit Agreements Act¹⁰²³ the use of personal information, such as PIN codes and bank cards as security for any money lending transactions or as collection arrangement, was prohibited.¹⁰²⁴ Contraventions constituted an offence under a regulation of the Minister.¹⁰²⁵

The rationale behind this kind of provision is that the supplier shall not be able to access the consumer's account in order to withdraw any amounts as a deposit or other security to enforce the execution of the contract.

To 'provide' in terms of section 51(1)(j)(ii) means to 'disclose' a PIN which is not the same as to 'enter' a PIN into a machine in order to conclude a transaction. It is therefore prohibited to ask a consumer to reveal his PIN directly.¹⁰²⁶ This differentiation is expressly mentioned in section 51(4) in terms of which this section does not preclude a supplier to require a personal identification code or number in order to facilitate a transaction that in the normal course of business necessitates the provision of such code or number.¹⁰²⁷ It is somehow astonishing that the legislator chose to put the contents of subsection (4) in an own subsection, and did not insert it directly into subsection (1)(j)(ii), or structurally more consequently, into subsection (2)(b)(ii). Furthermore, according to section 51(2)(b)(ii), a supplier may not request a consumer to reveal any personal identification code or number contemplated in subsection (1)(j)(ii).

¹⁰²¹ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹⁰²² *De Beer v Keyser and others* 2002 (1) SA 827 (SCA).

¹⁰²³ 75 of 1980.

¹⁰²⁴ R6959 Government Gazette 20145 of 13 December 2000.

¹⁰²⁵ See Vessio *LLD thesis* at 186.

¹⁰²⁶ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹⁰²⁷ Van Eeden and Barnard *Consumer Protection Law* 262.

It is suggested that the term 'personal identification code or number' has to be interpreted widely and also includes any credit or debit card number and other information contained on and/or in a card (e.g., in the chip or magnetic stripe), such as the card verification value code (CVV), the account number, and so forth. The phrase 'personal identification code or number' speaks for this view because not only the PIN (personal identification number), but also any code which is linked to the holder of the card is comprised. Otherwise, the protection of section 51(1)(j)(ii) and (2)(b)(ii) would fall short because with that information it is possible to conclude further unauthorised transactions online, sometimes even without being in possession of the card.

New payment methods, such as payments with a QR code or with a mobile phone, as well as future payment methods are covered by subparagraph (i) because it includes 'any similar identifying document or device'. The phrase 'or any similar identifying document or device' is wide enough to catch also other methods than those described, such as contactless payment systems, i.e., credit cards and debit cards, key fobs, smart cards or other devices, including smartphones and other mobile devices, that use radio-frequency identification (RFID) or near field communication (NFC) for making payments. With these systems, a signature or PIN is typically not required.¹⁰²⁸

f) Other provisions not falling into the categories mentioned above

Section 51(1) contains two more categories which do not fall into the abovementioned scheme.

aa) Offer prohibited in terms of negative option marketing

Under section 51(1)(d), a transaction or agreement is prohibited if it results from an offer prohibited in terms of section 31, i.e., in the form of negative option marketing.¹⁰²⁹ 'Negative option marketing' shifts the decision of whether to purchase a good or service from the consumer to the supplier. If the consumer wishes not to buy, he has to contact the supplier and cancel the order.¹⁰³⁰

¹⁰²⁸ See 'Contactless Payments Are Here to Stay. Here's How to Set Them Up on Your Phone' at <https://www.nytimes.com/wirecutter/money/credit-cards/how-to-use-contactless-payments> (article updated on 18 June 2020).

¹⁰²⁹ In terms of s 31(1), a supplier must not (a) promote any goods or services; (b) offer to enter into or modify an agreement for the supply of any goods or services; or (c) induce a person to accept any goods or services or to enter into or modify such an agreement, on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer or inducement.

¹⁰³⁰ See Nichols Kastner Attorneys-at-Law 'Negative option marketing' at <http://www.nka.com/investigation/negative-option-marketing-3> (no longer available).

Section 51(1)(d) is simply a restatement of section 31(2) according to which those transactions are void. Such terms are terms which conclude or modify an agreement for the supply of goods or services on the basis that the goods or services will be supplied, or the agreement or modification will automatically come into existence unless the consumer declines the offer (negative option marketing). In terms of the common-law, an offeree's failure to respond to an offer does not amount to acceptance, even if the offeror has stipulated that he will take the offeree's silence to be acceptance.¹⁰³¹ Provisions allegedly 'agreed to' by the consumer adopting negative option marketing are therefore prohibited.

It is not clear why the legislator restated this provision in section 51(1). A reason might be the wish to provide for a 'checklist' of prohibited terms. If this were the case, however, the legislator should also have included the wording of section 39(1)(a) into the list of section 51(1) according to which an agreement is void if the consumer is subject to an order of a court holding the consumer to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order. Either the legislator forgot to 'complete' the list in section 51(1), or section 51(1)(d) appeared in the list inadvertently.

bb) Supplementary agreement

In terms of paragraph (e), an agreement must not be subject to any term if it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a). According to section 51(2)(a), a supplier may not directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision contemplated in subsection (1).

The interplay between these two provisions is quite circular and therefore, unfortunate. Instead of cross-referencing these two subsections, the legislature merely could have provided that the supplier must not induce a consumer to enter into a supplementary agreement, or sign a document, that contains an unlawful provision in terms of the Act.

Obviously, the legislator's objective by inserting this provision is to avoid any circumvention of the protective provisions of section 51 stipulating prohibited terms in a supplementary agreement, e.g., a side-letter.

¹⁰³¹ *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) 422: 'Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon that other a condition to that effect.'

2.3 Avoidance of circumvention in terms of section 51(2)

The objective of section 51(2) is to prevent the supplier from circumventing the provisions contained in section 51(1).¹⁰³²

As discussed above, in terms of section 51(1)(e), a supplier may not require a consumer to enter into a supplementary agreement or sign a document according to which the consumer enters into an agreement that contains a prohibited term according to section 51(1). Sub-agreements or side letters which contain provisions that are prohibited in terms of section 51(1) are therefore not allowed.

The provision of section 51(2)(b) could indeed have been integrated into section 51(1)(j) rather than inflating section 51(2). It seems though that the legislator wished to group all the provisions referring to the prohibition of circumvention of subsection (1) in a different subsection. This might be commendable from a structural point of view; it complicates the reading of section 51 unnecessarily, however. The substantial difference between a term or condition which ‘expresses an agreement by the consumer’¹⁰³³ and the prohibition directed towards the supplier ‘to request or demand a consumer’¹⁰³⁴ to do something is that in the first case, the content is part of the supplier's terms and conditions, whereas in the second case, the request or demand is not, but takes another form, e.g., an oral request. To ‘request’ and to ‘demand’ in section 51(2)(b) are synonymous to a large extent, except that ‘request’ refers to a more polite way of demanding something. This differentiation can be disregarded in this context though. The same applies to section 51(2)(b)(ii) according to which a supplier may not demand a consumer to reveal any personal identification code or number contemplated in subsection (1)(j)(ii).

The purpose of section 51((2)(c) is to prevent any circumvention of the provisions contained in subsection (1) by forbidding the supplier to authorise any other person to do anything on behalf or for the benefit of the supplier. In other words, the term ‘supplier’ is extended to other persons. These persons do not have to be necessarily employees of the supplier (*‘any other person’*).¹⁰³⁵

¹⁰³² De Stadler *Consumer Law Unlocked* 117.

¹⁰³³ Section 51(1)(j).

¹⁰³⁴ Section 51(2)(b).

¹⁰³⁵ Emphasis added.

2.4 Legal consequences in terms of prohibited terms

Under section 51(3), a purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes section 51.

In terms of section 52(4), if a person alleges that a term etc. to which a transaction or agreement is purportedly subject, is void in terms of the Act, the court may declare the entire agreement void or sever the contravening term and declare it void or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole.¹⁰³⁶ The court may also make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.¹⁰³⁷

Hawthorne argues that the factors listed in section 52(2) should also apply in terms of the court's considerations when considering the total context of the transaction.¹⁰³⁸

Although section 52(2) applies, *inter alia*, to transactions or agreements that are unfair in terms of section 48, and not to forbidden terms under section 51, this view is convincing. Section 52(2) provides, besides other factors and circumstances that the court may consider, a valuable tool for the appreciation of the 'transaction, agreement [or] provision (...) as a whole' in terms of section 52(4)(a)(i)(aa). The factors listed in section 52(2) mostly concern the transaction or agreement as a whole.¹⁰³⁹ It seems that they concern only in one case individual provisions, namely in subparagraph (g). Although subparagraph (g) concerns the plain language requirement of section 22 for documents relating to the transaction or agreement, it is my submission that it also covers individual provisions contained herein.

Hawthorne is also of the opinion that section 52(3)(b)(i), (ii) and (iii) also should apply.¹⁰⁴⁰ In terms of these provisions, a court may, when it determines that a transaction or agreement, in whole or in part, is unfair, make an order (i) to restore money or property to the consumer, (ii) to compensate the consumer for losses or expenses relating to the transaction or agreement, or the proceedings of the court, and (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

¹⁰³⁶ Section 52(4)(a)(i)(aa) and (bb).

¹⁰³⁷ Section 52(4)(b).

¹⁰³⁸ Hawthorne 2012 *THRHR* 365.

¹⁰³⁹ See ss 52(2)(b), (c), (d), (e), (f), (g), (h), (i), (j).

¹⁰⁴⁰ Hawthorne 2012 *THRHR* 365 and 366.

This point of view seems to be problematic at first sight because the prerequisite for a court order under subsection (3) is that the court ‘determines’ that a transaction or agreement was unfair. If a provision is void in terms of section 51, it is not necessary though that the court ‘determines’ this invalidity as in terms of section 115(1), if a provision or an agreement has been *declared by a provision of the Act to be void*,¹⁰⁴¹ it must be regarded as having been of no force or effect at any time, unless a court has declared that the relevant provision of the Act does not apply to the impugned agreement or provision. In other words, the provision in question does not become void because the court has determined so but is void *per se*.

Under section 52(4)(b), the court may make any further order that is just and reasonable in the circumstances concerning that agreement or provision, as the case may be. It would be incomprehensible why a court when issuing an order in terms of section 52(4)(b), should not refer to an order regulated in section 52(3)(b) if it is of the opinion that this order is just and reasonable in the circumstances. What is more, Hawthorne’s viewpoint is laudable as it is an incentive for suppliers to cease any illegal practice in terms of the prohibited terms contained in section 51. Although the restoration of money or property or the compensation of the consumer for losses or expenses are individual measures with a limited financial impact on suppliers, they ultimately can serve as a deterrent since no business wants to lose money that once has been 'earned'. Besides, these measures are valuable as the consumer’s position is being restored to its previous one. The most powerful impact on businesses will have orders though which require the supplier to cease or alter any illegal practice because those can affect the supplier's business model and regular earnings.

2.5 Conclusion

Content control is especially justified for non-negotiated terms because of the imbalance between the supplier’s and the consumer’s expression of freedom of contract and autonomy. Usually, standard terms are forced upon consumers whose transaction costs to read the terms for every single transaction would be too high, or they understand them as invariable. For this reason, content control also has a procedural fairness aspect and is inter-related with incorporation control. Besides the Consumer Protection Act, other pieces of legislation, such as the Rental Housing Act or the Conventional Penalties Act, but also the Constitution and the common law ensure consumer protection. Finally, the application of common-law rules on

¹⁰⁴¹ Emphasis added.

interpretation contributes to consumer protection. Content control is in the public interest with regard to the reduction of the costs for the society. From an economic point of view, it would not make any sense if the risks and obligations involved were not borne by the party best able to cope with them, e.g., by taking insurance. Lastly, the removal of unfair terms increases consumer confidence and trust, enhances economic activity and decreases costly legal actions.

As discussed in terms of the content control, the advantages of black- and greylists are numerous. They have a deterring effect on suppliers, put consumers in a better bargaining position, give guidance, have a proactive effect, and provide predictability for all economic actors, to name but a few. Hence, they provide for an efficient system of redress.

Content control in terms of the Act is threefold as the Consumer Protection Act contains a so-called blacklist with outright prohibited terms, regulations with terms presumed to be unfair (greylist) as well as a general clause.

The South African legislator chose to include not only non-negotiated terms but also negotiated ones, comprising the core terms, as well as B2B contracts in the content control (with the exception of regulation 44 which is only applicable to B2C agreements). It would have been wiser to accept only those terms in B2B contracts which have not been changed in favour of the small business, instead of treating all terms identically. It is to be hoped though that the courts will make a distinction between negotiated, non-negotiated and core terms since consumers deserve less protection for negotiated terms and core terms, such as the price and the main subject matter of the contract. Courts should not interfere with excessive price control as the competition authorities are competent in this field. These have more expertise than the courts.

Section 51 contains prohibited terms (blacklist) and implies a pre-emptive fairness control. Under section 51(1) — a provision which is unnecessarily verbose and serves as a sort of ‘general clause’ within section 51 — any term or notice which directly or indirectly waives or restricts the consumer’s rights under the Act or in any other way contravenes the Act is void.

Section 51(1)(c) to (2)(c) contains further prohibited terms and provides a ‘check-list’ for suppliers and consumers. Section 51(1)(c)(i) prohibits exemption clauses with regard to gross negligence of the supplier or any person acting for or controlled by the supplier. Although ‘harm’ in section 61(1) and ‘loss’ in section 51(1)(c)(i) are congruent, the latter provision does not require a contractual *nexus* between the consumer and the supplier and requires gross

negligence, whereas wrongfulness is not a condition for the application of section 61. In addition, the personal scope of application of section 61 extends to other members of the supply chain, whereas section 51(1)(c)(i) also covers persons acting or controlled by the supplier. Lastly, section 51(1)(c)(i) shifts forward the supplier's liability as he or she is also responsible before the actual delivery. For these reasons, the insertion of section 51(1)(c)(i) was not superfluous; both provisions have different applications.

The blacklisting of exemption clauses for gross negligence and the greylisting of clauses dealing with ordinary negligence begs the question of whether the former should not rather be greylisted as well. Also exempting ordinary negligence can be unfair, even if the clauses in question have been initialled or signed. According to Naudé, the burden of risk of harm caused by the supplier's negligence should be borne by the supplier itself, and not by the consumer. This could be achieved by greylisting such clauses. Then the business could offer a choice between contracts with an exemption clause and those without, which would be reflected in different prices. In the South African socio-economic context, consumers often do not have a real choice and would instead opt for lower prices, however, i.e., an agreement with an exemption clause for gross negligence.

Also prohibited are clauses containing the assumption of risk or liability by the consumer for a loss contemplated in subparagraph (ii) as those often have the same impact as the exclusion of liability. 'You-break-it-you-buy-it' clauses are also prohibited.

Acknowledgements by consumers that falsely express that no representations or warranties were made before the agreement was concluded are prohibited as well. Entire agreement clauses, to the extent that they exclude additional warranties, and no-representation clauses are not allowed under this clause. This indeed serves better consumer protection but does not go far enough. The EU Unfair Terms Directive's formulation is more comprehensive, does not contain any time limit and is thus a more consumer-friendly provision. The provision in the Act also includes acknowledgements concerning goods or services, or documents which are required by the Act to be delivered to the consumer, so that the consumer is no longer barred from claiming those goods, services or documents because of a 'false' acknowledgement. The blacklisting of section 51(1)(g) also protects small businesses which would be included if this provision would be greylisted instead. Indeed, a greylisting would enhance predictability in terms of B2B contracts, but exclude consumers from claiming their right to redress for misrepresentation.

Certain forfeiture clauses, e.g., concerning deposits or refunds, have also been outlawed by the Act. Unfair enforcement clauses, such as the authorisation to enter the consumer's premises in order to repossess goods, undertakings to sign documents relating to enforcement, the consent to a predetermined value of costs relating to enforcement, the deposit of certain documents with the supplier or the provision of a PIN to access an account are prohibited. The rationale of these provisions is manifold: The supplier is not allowed to exercise any self-administered justice, the supplier is prevented from taking enforcement measures too swiftly, or taking advantage in terms of the costs, consumers shall not be inhibited in their daily lives because they have deposited their bank card or a similar document with the supplier, or the supplier shall not be able to access the consumer's bank account with the consumer's PIN. New technologies, such as the payment with a QR code or contactless payment systems, or future payment methods, are included in this provision. Subparagraph (i) should be interpreted widely, so that any personal information on a bank card, for instance, falls under this provision.

Offers prohibited in terms of negative option marketing (a simple restatement of section 31(2)) as well as supplementary agreements which aim to circumvent the protection afforded in section 51 are also prohibited. Supplementary agreements by which the objectives set out in section 51 could be circumvented are forbidden in terms of section 51(2) too. The integration of this clause in section 51(1) would have been beneficial for a better understanding of section 51, though.

A term which contravenes section 51 is void. A court may declare the entire agreement void or sever the contravening term and declare it void or alter it to the extent required to render it lawful. The factors contained in section 52(2) are a valuable tool for the appreciation of the whole transaction in terms of section 52(4)(a)(i)(aa). Furthermore, section 52(3)(b)(i), (ii) and (iii) should also be applicable in terms of section 51 as the court may, according to section 52(4)(b), make any further order that is just and reasonable in the circumstances. Such an order also could have a deterrent effect on suppliers.

3. Terms presumed to be unfair

3.1 Overview

Regulation 44(3) of the Consumer Protection Act contains a so-called ‘greylist’ of terms. Contrary to the terms of the so-called blacklist in section 51, which are prohibited outright, the terms in the greylist are merely presumed to be unfair. Such a presumption means that the supplier, if the term in question is challenged, has to prove that the term is fair under the specific circumstances; otherwise, the term will be considered unfair. Hence, there is a shift of the onus since usually the consumer would have to prove that a specific term is unfair, which is the case for terms contained in section 51.¹⁰⁴²

Regulation 44 is of limited application and applies only to consumers who entered into the transaction for purposes wholly or mainly unrelated to their business or profession.¹⁰⁴³ If consumers are acting for the purposes of their businesses, the legislator assumes that they have specialised knowledge about the goods or services they are buying and therefore do not afford the same protection as other consumers.¹⁰⁴⁴ Since regulation 44 only applies to consumer agreements as defined in section 1, franchise agreements are also excluded from the ambit of the regulation.¹⁰⁴⁵

The list contained in regulation 44(3) is indicative,¹⁰⁴⁶ which means that terms that are presumed to be unfair may still be fair in the particular circumstances of the case.¹⁰⁴⁷ Thus, there is an interplay between regulation 44 and the ‘unfairness standard’ of section 48.

What is more, the list is non-exhaustive,¹⁰⁴⁸ i.e., that non-listed terms may still be unfair in terms of section 48.¹⁰⁴⁹ The Consumer Protection Act itself does not contain a ‘greylist’.¹⁰⁵⁰ The Law Commission had initially not in mind to integrate such a list but proposed twenty-six ‘factors instead’ to be taken into consideration whether a contract or term is unreasonable, unconscionable or oppressive under the general clause.¹⁰⁵¹ The fact that a greylist has finally

¹⁰⁴² De Stadler *Consumer Law Unlocked* 122.

¹⁰⁴³ Regulation 44(1).

¹⁰⁴⁴ Opperman and Lake *Understanding the CPA* 69.

¹⁰⁴⁵ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹⁰⁴⁶ Naudé is of the opinion that the term ‘indicative’ is too cryptic and should be replaced by a simpler word. See Naudé 2006 *Stell LR* 381 note 115.

¹⁰⁴⁷ Van Eeden and Barnard *Consumer Protection Law* 267, Naudé 2007 *SALJ* 129.

¹⁰⁴⁸ Naudé is of the view that also the term ‘non-exhaustive’ is too cryptic and should be replaced by a more understandable word. See Naudé 2006 *Stell LR* 381 note 115.

¹⁰⁴⁹ Van Eeden and Barnard *Consumer Protection Law* 267.

¹⁰⁵⁰ See Naudé 2007 *SALJ* 130.

¹⁰⁵¹ Section 2 of the Bill proposed by the SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998). See Naudé 2007 *SALJ* 128.

been ‘included’ into the content control by means of regulation 44 is an important step in order to have a well-balanced content control mechanism as will be shown below. It is important to note that because of their more ‘open’ nature the provisions contained in the greylist have to be interpreted in the light of the general clause of section 48 and any guidelines intended for their application.¹⁰⁵² A greylist is also crucial because a blacklist is unable to cover all unfair or potentially unfair terms.¹⁰⁵³

Regulation 44 was issued by the Minister under section 120(1)(d),¹⁰⁵⁴ according to which the Minister may make regulations relating to unfair, unreasonable or unjust contract terms. The parliamentary Portfolio Committee on Trade and Industry agreed, after submission to Parliament, that a greylist should be inserted in order to protect consumers, and in the following, it obtained an undertaking from the DTI that a greylist would be included in the regulations instead of being inserted into the Consumer Protection Act.¹⁰⁵⁵ Section 120(1)(d) was included in the final version of the Consumer Protection Bill in response to a submission to Parliament that a greylist would be essential for proactive and effective reactive control of unfair terms.¹⁰⁵⁶ The mechanism adopted by the legislator, according to which the Minister may make regulations relating to unfair contract terms is coherent with the principle adopted in *Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa and others*¹⁰⁵⁷ that Parliament is not allowed, in an act, to delegate to the Executive the power to amend the Act itself.

The greylist in regulation 44(3) and the exceptions in regulation 44(4) are largely inspired by the list of the EC Unfair Contract Terms Directive¹⁰⁵⁸ and the similar lists in the EC Proposal for a Consumer Rights Directive.¹⁰⁵⁹ In addition, some items are based on Australian Consumer Law,¹⁰⁶⁰ the German Civil Code¹⁰⁶¹ and the South African Law Commission’s list of relevant

¹⁰⁵² Naudé 2007 *SALJ* 130.

¹⁰⁵³ Sharrock 2010 *SA Merc LJ* 321, Sharrock *Judicial control* 144.

¹⁰⁵⁴ See wording of subreg 44(1).

¹⁰⁵⁵ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 2.

¹⁰⁵⁶ Naudé 2009 *SALJ* 521. See para 1 of Naudé’s submission to Parliament, available at www.pmg.org.za/files/docs/080826proftjakiesub.doc.

¹⁰⁵⁷ 1995 (4) SA 877 (CC) paras [51]-[62].

¹⁰⁵⁸ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

¹⁰⁵⁹ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 Final, submitted on 8 October 2008.

¹⁰⁶⁰ Schedule 2 to the Competition and Consumer Act, 2010.

¹⁰⁶¹ §§ 308 and 309 BGB.

factors in their proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms of 1998.¹⁰⁶²

Despite the structural disruption caused by the fact that the greylist is not included in the Consumer Protection Act but takes the form of a regulation, this approach has the advantage that no act of Parliament — unlike any modifications of the blacklist contained in section 51 — is required in order to add, remove or update the list. Under section 94(c), the Commission must report from time to time to the Minister with recommendations for achieving the progressive transformation and reform of law contemplated in this section.¹⁰⁶³ In terms of flexibility and the fact that South Africa has practically no experience with greylists, a regulation, compared to an act of parliament, is a valuable tool because in the future, changes to the greylist might be necessary. Naudé contends that it would be better if the greylist were included in the Act itself as it would have greater legitimacy then and be more prominent and accessible, especially for non-lawyers. She points out that this list would not necessitate frequent amendments as lists from other legislation, such as the greylist of the EC Unfair Terms Directive of 1993 has been very steady in the course of time.¹⁰⁶⁴ It is my submission though that unless courts have not formed out a substantial jurisdictional body in terms of presumed unfair terms yet, and future amendments have not been undertaken, the current place of the greylist is justified. What is more, it remains to be seen if the South African government, with its often inflationary approach of enacting mutually superseding (and contradictory) laws and amendments by the intermediary of Parliament, will change its policy and adopt a more comprehensive approach in the future which sees the legislative body more holistically. Consumer protection legislation would undoubtedly benefit from such a change of policy.

3.2 Advantages of greylists

The general advantages of lists in consumer protection legislation, such as self-control, cost-effectiveness, predictability and their general effect have been already discussed above. Compared to blacklists, greylists offer a number of further – or better: complementary – advantages. They empower consumer protection bodies to take preventive action during the negotiations with businesses which use unfair terms, for instance, which deflects costs, risk and effort of litigation for consumers, not to speak of the shift of the onus of proof from the

¹⁰⁶² Section 2 of the Bill proposed by the SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998).

¹⁰⁶³ See also s 98.

¹⁰⁶⁴ Naudé 2009 *SALJ* 521.

consumer to the supplier.¹⁰⁶⁵ It would be difficult, even impossible for consumers to bring evidence as to why a term is unfair because only a business can bring the evidence as to what are the business reasons for the insertion of a particular term, and proof that the term in question is fair. In the absence of such proof, it will be difficult for courts to decide whether a term is unfair.¹⁰⁶⁶ A blacklisting of terms is therefore not always necessary because the greylisting is already dissuasive enough in many cases.¹⁰⁶⁷ Furthermore, greylisting rather than blacklisting a term might increase the chance of self-imposed control in a wider range of clauses and strengthen the powers of administrative bodies or consumer organisations.¹⁰⁶⁸ Naudé is of the opinion that greylists offer many advantages over blacklists, particularly in a country like South Africa with practically no experience of the general control of unfair contract terms.¹⁰⁶⁹ This is without a doubt true in general. One should not forget that blacklists offer, even in an inexperienced country in terms of consumer protection, the unquestionable advantage to ban right away specific terms which cannot be fair under any circumstances. Thus, a combination of black and greylists as well as a general clause seems to be the best and most flexible option. Although subregulation (2)(b) states that the list is not exhaustive, it would be advantageous if new items were inserted from time to time, if necessary. Judges could then rely on a quite extensive and regularly updated 'checklist', the newly inserted provisions would deter suppliers, and the protection of consumers would be extended since all economic actors would have more certainty of what is presumed to be unfair. The Minister is given guidance on what terms could be included in regulation 44(3) by section 48, read in conjunction with section 3.¹⁰⁷⁰

As compared to a mere list of 'factors', a greylist is more precise than a list of factors, like the one proposed by the Law Commission, although those factors can be taken into consideration, especially if the greylist is not exhaustive.¹⁰⁷¹ A greylist has furthermore the advantage of

¹⁰⁶⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 3, Naudé 2009 *SALJ* 520 and 521.

¹⁰⁶⁶ This was a problem in *Napier v Barkhuizen* (2007) (5) SA 323 (CC), since there was a lack of evidence on the business reasons for the particular term, which is why the court was reluctant to declare the term as being contrary to public policy. See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para [9].

¹⁰⁶⁷ Sharrock 2010 *SA Merc LJ* 321, Sharrock *Judicial control* 144.

¹⁰⁶⁸ These arguments are also contained in the Law Commissions Report where the insertion of guidelines is justified, para 2.6.4, at 168: 'The Commission supports the view that no preventative action is possible without guidelines and that informed self-control by drafters of standard and model contracts, action by representative bodies, negotiations with a view to settling disputes, etc., are all heavily dependent upon there being a large measure of predictability regarding the question of what will be acceptable and what not in regard of contracts.' See also Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

¹⁰⁶⁹ Naudé 2007 *SALJ* 137.

¹⁰⁷⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

¹⁰⁷¹ See reg 44(2)(b).

emphasising suspicious terms¹⁰⁷² and offers more guidance for consumers and suppliers than a list of factors.

There have been many objections against greylists, however, especially during the ongoing discussion of whether or not a greylist should be part of South African consumer protection legislation. One argument against a greylist referred to the apprehension that the courts might stick to greylists too much and regard unlisted terms as unimpeachable as they could consider themselves bound to the list. Consequently, consumers would be afforded less protection.¹⁰⁷³ This argument is not valid however if the greylist is well drafted so that judges understand from the outset that it is merely a guideline and open to other terms; this means that it has to be spelt out clearly that the list is non-exhaustive,¹⁰⁷⁴ which is the case in terms of regulation 44(2)(b). In other words, also other terms may be unfair for purposes of section 48. Furthermore, subregulation (2)(a) indicates that the list is indicative only, so that a term listed therein may be fair because of the particular circumstances of the case.

In addition, a clearly drafted greylist is not to be equated with ‘a mechanical application of precedent’, and does not preclude a ‘real value judgment instead of claims of neutrality’, as Barnard puts it, who favours legislation which is as open-ended as possible.¹⁰⁷⁵

Furthermore, in the absence of any greylist, judges with a more conservative mindset might not vigorously use the open standard in a general clause, without any further and more direct indications as to when they must have good reasons not to pronounce a clause unfair.¹⁰⁷⁶ By serving as a ‘guideline’ a greylist therefore simplifies the judges’ task to reach a decision.¹⁰⁷⁷

By and large, the aversion against greylists is not convincing, and the advantages of the inclusion of such a list outnumber the disadvantages by far. As Van Eeden correctly argues, the threefold structure for tackling unfairness, i.e., the interplay of section 51, regulation 44 and section 48, ‘supports a contractual regime where the consumer and the supplier are held to their respective obligations, and makes a significant start in the pursuit of striking a balance in consumer contracts.’¹⁰⁷⁸

¹⁰⁷² Naudé 2007 *SALJ* 137.

¹⁰⁷³ Naudé 2007 *SALJ* 134.

¹⁰⁷⁴ Naudé 2007 *SALJ* 134-135.

¹⁰⁷⁵ Barnard *LLD thesis* 240.

¹⁰⁷⁶ Naudé 2007 *SALJ* 134.

¹⁰⁷⁷ Sharrock 2010 *SA Merc LJ* 321, Sharrock *Judicial control* 144.

¹⁰⁷⁸ Van Eeden and Barnard *Consumer Protection Law* 267.

3.3 Structure and scope of regulation 44

According to regulation 44(1), regulation 44(3) is only applicable for consumer agreements between suppliers operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession, and individual consumers who entered into the agreement for purposes wholly or mainly unrelated to their business or profession. A term is presumed to be unfair if it has the purpose or effect of a term listed in subregulation (3), and does not fall within the ambit of subregulation (4).

The legislator chose the term ‘individual consumer(s)’ in order to underline the fact that the protection is limited to natural persons.¹⁰⁷⁹ It is submitted that the inclusion of the plural form could mean that it intended to include also groups of consumers composed of individuals joining for a once-off transaction. This would be the case, for instance, where several individuals privately purchase a camping car from a car dealer.

Since South Africa has no experience in generalised unfair terms legislation, the legislator decided that the greylist should find no direct application to suppliers who are not 'businesses' or 'professionals', or to any B2B-transactions covered by the Act.¹⁰⁸⁰ In such cases, section 48 applies, and the consumer has the onus of proof.¹⁰⁸¹

It is furthermore suggested that the distinction made by the legislature between ‘business’ and ‘profession’ in regulation 44(1) could mean that not only businesses in the sense of companies, but also freelancers who do not operate in the context of a formal company, are included. In terms of the definition of ‘business’ in section 1 (i.e., the continual marketing of any goods or services), this distinction is superfluous though because free-lancers are included in the definition of ‘business’.

Hence, subregulation (1) regulates the personal scope of application (supplier operating on a for-profit basis and acting at least mainly for business-related purposes/consumer acting at least mainly for business-unrelated purposes), but also partly the material scope of application (consumer agreement), whereas subregulation (3) regulates the material scope of application and contains a list of terms presumed to be unfair.

¹⁰⁷⁹ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹⁰⁸⁰ See s 5(6)(a).

¹⁰⁸¹ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 5.

Since only consumer agreements (B2C contracts) fall into the ambit of regulation 44, its scope of application is narrower than that of the Act itself. Thus, regulation 44 does not apply to franchise agreements.¹⁰⁸² As discussed before, South Africa has no experience in an overarching consumer protection legislation, which is the reason for the legislator's decision not to include B2B contracts into the ambit of regulation 44, at least at the initial stage.¹⁰⁸³ Naudé points out correctly that the exclusion of B2B contracts from the ambit of regulation 44 does not mean that a court may not use the list contained therein as a guideline in relation to section 48, especially for smaller, unsophisticated businesses *vis-à-vis* bigger companies. The reasoning behind this idea is that smaller businesses are often comparable to individual consumers in terms of their vulnerability. Therefore, regulation 44 might also have a 'reflective effect' in terms of B2B contracts where smaller businesses are involved, especially if the transaction has no relation to the small business's core expertise, or where it had not much bargaining power.¹⁰⁸⁴

Natural persons who order goods or services that are intended to serve for a future (i.e., not current) business, e.g., concerning a home working scheme, are currently excluded from the ambit of regulation 44 as they do not purchase those goods or services for purposes wholly or mainly unrelated to their business or profession. At the time of the purchase they are nevertheless comparable to vulnerable consumers, and they should afford the protection of regulation 44. Naudé thus favours an amendment of the wording of regulation 44. The current distinction between a consumer who purchases an item for private use, such as a computer, and who decides at a later stage to establish a business and to use the good in question for business purposes then, and someone who at the time of the purchase has not established his business yet, but buys goods or services intending to establish a business, is artificial. Especially in South Africa, where many people are unemployed and decide to work on a freelance basis, using their personal affairs, this distinction draws a line where no line should be. Therefore, Naudé's view is laudable and correct.

It is recommended that the Minister open up the application of regulation 44 to small businesses as they are entirely comparable to individual consumers in terms of their vulnerability. This also applies to franchisees. Their exclusion from the ambit of regulation 44 by forwarding the

¹⁰⁸² Van Eeden and Barnard *Consumer Protection Law* 267. See also 'consumer agreements' in s 1 which expressly excludes franchise agreements.

¹⁰⁸³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹⁰⁸⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 6. This is also the case in Germany or the Netherlands, for instance.

argument that South African courts do not have much experience in terms of consumer protection is not valid. As discussed before, the interplay between a blacklist, a greylist and a general clause is a well-balanced mechanism which ensures fairness. Barring small businesses and franchisees from the scope of application of regulation 44 disturbs this balance unnecessarily and prevents courts from gaining valuable experience in this field. Finally, there is no reason to apply thresholds under section 5(2)(b) only in terms of provisions contained in the Act, but not to regulation 44. These thresholds ensure that only vulnerable individuals and businesses afford protection. In my opinion, the problem in South Africa is not only a lack of *experience* in consumer protection questions but also a lack of consumer protection *per se*. For the reasons mentioned above, the distinction in terms of the personal scope of application made between the Act and regulation 44 should be abolished.

According to subregulation (2)(a), the list in subregulation (3) is indicative only, so that a term listed therein may be fair in view of the particular circumstances of the case.

Naudé contends that the term ‘indicative’ in subregulation 44(2)(a) should be deleted as it might be confusing.¹⁰⁸⁵ In her opinion, the wording of subregulation 44(3) according to which the terms listed herein ‘are presumed to be unfair’ should be sufficient in order to avoid any confusion. She refers to European legislation which had led to some confusion in some Member States in terms of the term ‘indicative’ due to the absence of a clear presumption of unfairness for terms contained in the Directive's¹⁰⁸⁶ list. In this regard, it is suggested that the problems experienced in Europe will not necessarily appear in South Africa because in Europe, the effect of the black and the greylist was not clear in an early stage. The current wording of subregulation 44(2)(a) gives guidance to judges. What is more, ‘indicative’ is strictly speaking not necessarily congruent with ‘presumed to be’. The rebuttable presumption triggered by the latter formulation means that the court has to consider the terms contained in the list in subregulation 44(3) unfair unless there is an indication to the contrary, whereas ‘indicative’ refers to a more black-and-white scheme ‘fair/unfair’. Eventually, ‘indicative’ also means that a term contained in the list might also be fair. The current wording can serve as a guidance and a reminder to judges and should therefore be kept in the current state.

¹⁰⁸⁵ In an earlier publication, Naudé was of the opinion that the term ‘indicative’ is too cryptic and should be replaced by a simpler one. See Naudé 2006 *Stell LR* 381 note 115.

¹⁰⁸⁶ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

Naudé also asserts that some of the terms listed in regulation 44(3) will never be fair and that therefore the qualification that they may be fair in the particular circumstances of the case, should be deleted.¹⁰⁸⁷ This would deprive some guidance — and a reminder — for judges, however. One must not forget that most terms listed may be fair in the particular circumstances, and the deletion of the qualification contained in regulation 44(2) would be misleading in my view.

According to subregulation (2)(b), this list is non-exhaustive, so that other terms may also be unfair for purposes of section 48. The legislator considered it necessary to insert this provision in order to avoid that non-lawyers consider subregulation 44(3) exhaustive and cast in stone.¹⁰⁸⁸

Subregulation (2)(c) makes clear that a term which falls within the scope of subregulation (4) remains subject to sections 48 to 52. Subregulation (4) contains a list of exceptions from the application of subregulation (3) for certain suppliers and transactions.

Although the Act does not apply to credit agreements which fall in the ambit of the National Credit Act, the 'goods and services that are the subject of the credit agreement are not excluded from the ambit of the [Act]'.¹⁰⁸⁹ Section 92(2)(g) of the National Credit Act prohibits clauses purporting to exempt the credit provider from liability or limit such liability for an act, omission or representation by a person acting on behalf of the credit provider, or any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement. Item (b) of regulation 44(3) does not apply to exemption clauses in credit agreements. If these clauses exclude common-law warranties, they are void *per se*, and a presumption in terms of regulation 44(3) does not apply. Therefore, credit providers are still liable in terms of the common-law 'warranties', for instance, the warranty against eviction, or the warranty against latent defects.¹⁰⁹⁰

Furthermore, according to subregulation 2(d), the regulation does not derogate from provisions in the Act or other law in terms of or in respect of which a term of an agreement is prohibited, which is the obvious statement that the provisions of the Act take precedence over the regulations.¹⁰⁹¹ This means that if the Consumer Protection Act affords non-derogable rights

¹⁰⁸⁷ See reg 44(2)(a) *in fine*. Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

¹⁰⁸⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

¹⁰⁸⁹ Section 5(2)(d).

¹⁰⁹⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 13.

¹⁰⁹¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

or remedies to a consumer, the presumption of regulation 44(3) does not apply, and the non-derogable right or remedy takes precedence.

Terms will not be regarded as unfair if they are required by legislation, a rule of law or international conventions to which South Africa is a party. This principle also applies to cases in which a term is required by, or incorporated as a result of a decision of a competent authority acting within its statutory jurisdiction or any of its functions, provided that the authority is not itself a party to the given contract), or terms that are required by legislation or a rule of law.¹⁰⁹² Regulation 44 does not expressly contain this internationally accepted principle, contrary to the legislation of other countries.¹⁰⁹³

Finally, it should be reminded that terms to which the exceptions in regulation 44(4) are applicable are still subject to the fairness enquiry of sections 48 to 52.¹⁰⁹⁴

3.4 Analysis of contract terms that are presumed to be unfair

The items in regulation 44(3) can be grouped into seven categories which will be discussed in the following. Suppliers do not need to draft their terms exactly as the items contained in regulation 44(3). This results from the phrase by which they merely need to have ‘the purpose or effect of’ a listed term.¹⁰⁹⁵ Therefore, one need not to stick to the wording of a term, but rather to its purpose or effect.

In the following, the various items listed in regulation 44(3) will be discussed in detail.

3.4.1 Exemption clauses for the limitation or exclusion of the supplier’s legal liability, and similar terms by which the consumer gives up existing rights

Terms excluding or limiting liability, also referred to as exemption clauses or disclaimers, may appear in different forms. When assessing whether an exemption clause is fair, one has to keep in mind that the parties' rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their respective contractual obligations and the legal provisions. Terms which undermine the value of such obligations by putting obstacles for the consumer in terms of his or her redress, when the supplier has not complied with its obligations, are suspicious in terms of fairness. An exemption clause by which one party is allowed to act

¹⁰⁹² Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 14.

¹⁰⁹³ See para 1(1) of Schedule 3 (Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts - Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

¹⁰⁹⁴ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 9.

¹⁰⁹⁵ Regulation 44(3) 1st sent. *in fine*. Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 16.

unreasonably or negligently without consequences is likely to be considered unfair when liability for breach of 'implied' terms that the law presumes is excluded, especially if such terms do not reflect what a reasonable person would have agreed.¹⁰⁹⁶

Some suppliers bring forward arguments which are supposed to justify the use of over-extensive claimers, which however are not valid. One argument is that the term in question is intended only to deal with unjustified demands. However, the effect of a term, and not just the intention behind it, has to be taken into consideration. As such terms not only concern unjustified demands but also have an effect on justified ones, they are likely to be unfair. A second argument is that a particular term does not actually operate by excluding liability. Thus, a term which has the effect of an unfair exemption clause will be unfair, irrespective of its form or mechanism. This is the case for terms which 'deem' things to be the case, for example. Thirdly, statements declaring that the consumer's statutory rights are not affected are unfair if no explanation is given in terms of what the statutory rights are. In this regard, the supplier does not have to include every single detail of information about the rights it is referring to in a single document. This could be unhelpful as the consumer will most likely not read (or understand) lengthy terms and conditions.¹⁰⁹⁷ An executive summary or other forms of written guidance could be very valuable though in this context.¹⁰⁹⁸ Otherwise, terms that merely refer to statutory rights etc. are too technical and unclear as regards their practical effect and cannot be understood by non-lawyers. The same applies to exclusions 'so far as the law permits' or terms providing that liability is excluded to the extent permitted by the Consumer Protection Act or the Regulations.¹⁰⁹⁹ The assessment of whether a term is unfair requires the

¹⁰⁹⁶ OFT *Unfair Contract Terms Guidance* (2008) paras 1.1-1.3 at 13 and 14.

¹⁰⁹⁷ This problem has already been discussed on various occasions. How far this can go is shown by several experiments in Britain which aimed to sensibilise consumers: Purple, a Wi-Fi-provider, offered its allegedly advantageous services. In its terms and conditions the consumer obliged him- or herself to various, rather disgusting activities, such as cleaning public toilets for 1,000 hours, or emptying sewage pipes barehanded. More than 22,000 people agreed to these terms and conditions. Furthermore, the London IT security firm F-Secure offered in 2014 a free of charge internet access in return of the user's first-born child. Six Brits agreed to these terms and conditions. In 2010, the game producer Gamestation modified its terms and conditions to the effect that its customers had to cede their right of ownership of their souls. 7,500 clients agreed. These, admittedly rather funny experiments point out to the fact that most consumers just do not read terms and conditions. Pursuant to an online survey of the German Institute for Trust and Security (Institut für Vertrauen und Sicherheit), only 20 % of consumers admitted reading terms and conditions, although 86 % would like to know their content. This, at first sight contradictory result only shows that terms and conditions still are often not very legible and/or too long. See *Süddeutsche Zeitung* of 17 July 2017 '22 000 Menschen willigen ein, Klos zu putzen' at <http://www.sueddeutsche.de/digital/agbs-menschen-willigen-ein-klos-zu-putzen-1.3589917>.

¹⁰⁹⁸ OFT *Unfair Contract Terms Guidance* (2008) para 9.4 at 50.

¹⁰⁹⁹ OFT *Unfair Contract Terms Guidance* (2008) para 1.5-1.7 at 14 and 15 (slightly adjusted).

consideration of many factors, including the circumstances in which it is used. Only trained lawyers are able to ensure this kind of work.¹¹⁰⁰

Terms excluding problems with the supplier's subcontractor have to be viewed as if the problem goes back to the supplier's own fault since consumers have no influence on or contractual rights against them.¹¹⁰¹

a) Excluding or limiting liability for death or personal injury

Pursuant to item (a) of regulation 44(3), terms excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61(1) are presumed to be unfair.

Regulation 44(3)(a) refers to injury or death caused by a reason other than a defective good, e.g., harm caused by sub-standard service delivery, as it is not permitted in terms of section 61 to exclude liability for harm caused by defective, unsafe or hazardous goods or those that suffer from a product failure. Since already regulation 44(2)(d) provides that regulation 44 does not derogate from provisions in the Act or other law in terms of or in respect of which a term of an agreement is prohibited, the referral to section 61 is somehow confusing and should be deleted according to Naudé.¹¹⁰² On the other hand, serves as a valuable reminder within the — admittedly — very confusing structure of the Act.

The almost similar item (a) of the Annex of the Council Directive¹¹⁰³ served as a model for this item.

Section 51(1)(c)(i) blacklists terms that purport to limit or exempt a supplier from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier. Read together with regulation 44(3)(a), the latter only refers to exemption clauses excluding liability which is not based on gross negligence and which does not fall into the ambit of section 61.¹¹⁰⁴

In the view of the aforementioned non-derogable right in terms of section 61(1), Van Eeden correctly alleges that the presumption of unfairness in terms of regulation 44(3)(a) does not apply to the exclusion or limitation of liability for 'harm' in terms of section 61(5), i.e., death

¹¹⁰⁰ In the same sense see OFT *Unfair Contract Terms Guidance* (2008) para 1.8 at 15.

¹¹⁰¹ OFT *Unfair Contract Terms Guidance* (2008) para 1.9 at 15.

¹¹⁰² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

¹¹⁰³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹¹⁰⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

or personal injury caused to the consumer other than by virtue of an act or omission of the producer, importer, distributor or retailer subject to section 61(1), illness of any natural person, any loss or physical damage to any movable or immovable property, or economic loss resulting from the death of, or injury to any natural person.¹¹⁰⁵

Pursuant to section 49(2)(c), in the case of activities or facilities that are subject to any risk that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements set out in section 49. This means that the consumer must, *inter alia*, sign or initial the provision in question. The wording of this provision indicates that as long as the supplier has fulfilled the formal requirements of section 49, a clause excluding its liability for injury or death is deemed to be fair.¹¹⁰⁶ However, the exclusion of the supplier's liability simply by having initialled or signed the clause in question seems to be too oppressive with regard to the consumer's fundamental right to life. It could therefore be contrary to public policy. Hence, such a clause will be presumed to be unfair under regulation 44(3)(a) unless the supplier is able to convince the court why such a provision is fair in the given circumstances.¹¹⁰⁷

In *Johannesburg Country Club v Stott and Another*,¹¹⁰⁸ the court held that the exclusion of liability for damages arising from negligence causing the death of another might be contrary to public policy because of the high value that the common law and the Constitution place on the sanctity of life. Unfortunately, the court did not answer the question of whether this clause was against public policy. As the consumer may still exercise his or her common-law rights under section 2(10), courts might decide that clauses excluding or limiting liability for bodily injury or death are contrary to public policy or unconstitutional. However, in the past the common law set the bar very high.¹¹⁰⁹ The unfairness standard of the Act is likely to be fulfilled more easily than the one which indicates that a term is against public policy or unconstitutional.¹¹¹⁰ Besides, the greylisting of clauses that exclude injury or death is an indication in that sense because in court rulings that were rendered before the Act came into force, the party alleging

¹¹⁰⁵ Van Eeden and Barnard *Consumer Protection Law* 280. See s 61(5) CPA. Otto correctly asserts that in terms of s 61(5), only the economic consequential loss will be claimable to the extent that it was caused by 'harm' as set out in paras (a)-(c), i.e., damages caused due to the death, injury or illness of any natural person or the loss or damage due to the movable or immovable property. See Otto 2011 *THRHR* 541.

¹¹⁰⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹¹⁰⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹¹⁰⁸ 2004 (5) SA 511 (SCA) 518.

¹¹⁰⁹ See, e.g., *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and *Durban's Water Wonderland v Botha and Another* 1999 (1) SA 982 (SCA).

¹¹¹⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

that such a clause is contrary to public policy carried the risk of non-persuasion. In other words, the Act shifted the onus from the consumer to the supplier.¹¹¹¹ Consumers are often not able to bring evidence which is by nature within the business's knowledge. In *Barkhuizen v Napier*,¹¹¹² for instance, the consumer could not bring sufficient evidence on the business reasons for the term in question which contributed to the court's decision not to declare as invalid the given clause, which now would be presumed to be unfair under regulation 44(3)(a).

In *Swinburne v Newbee Investments (Pty) Ltd*,¹¹¹³ the obiter dictum stated that if the exemption clause in the lease in question did extend to personal injury, it may arguably have been contrary to public policy due to several factors, including the fact that 'the constitutional right to bodily integrity ought to be given weight in consideration of the impact of public policy on this type of clause' and that the term in that agreement of adhesion where the tenant had practically no bargaining power, was in fine print. This obiter is, it is suggested, an indication in the sense that the courts are well aware of the weight of the fundamental right to bodily integrity in consumer contracts and are ready to strike down terms that infringe that right. It is highly unlikely that a decision like *Afrox Healthcare Bpk v Strydom*¹¹¹⁴ would have the same outcome today in the light of the Act and its regulations, notably regulation 44(3)(a).¹¹¹⁵

In *Naidoo v Birchwood Hotel*,¹¹¹⁶ the court decided whether a clause that exempted the hotel from claims for bodily injury of a hotel guest by a hotel employee's negligence was lawful. The court decided that such a clause could not be enforced in the particular circumstances, even if it is not objectively unreasonable and contrary to public policy. According to the court, to deny a guest judicial redress for injuries he sustained while exiting through the hotel gates, which is not supposed to be an inherently dangerous activity, offends against notions of justice and fairness. Exemption clauses that exclude liability for bodily harm in hotels and other public places generally have the effect, according to Heaton-Nicholls J, of denying a claimant judicial redress and thus should be contrary to public policy. Interestingly, the court distinguished between clauses concerning inherent dangerous activities, such as in *Afrox Healthcare Bpk v Strydom*¹¹¹⁷ and *Durban's Water Wonderland v Botha and Another*,¹¹¹⁸ and those which do not

¹¹¹¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

¹¹¹² 2007 (5) SA 323 (CC).

¹¹¹³ 2010 (5) SA 296 (KZN).

¹¹¹⁴ 2002 (6) SA 21 (SCA).

¹¹¹⁵ Hawthorne 2012 *THRHR* 367.

¹¹¹⁶ 2012 (6) SA 170 (GSJ).

¹¹¹⁷ 2002 (6) SA 21 (SCA).

¹¹¹⁸ 1999 (1) SA 982 (SCA).

comprise dangerous activities, such as exiting a hotel gate. The court's arguments can also be applied to regulation 44(3)(a), which means that a clause such as put forward by the hotel would be unfair.

Naudé correctly asserts that despite the unfortunate wording of section 49(2)(c), this provision still makes sense as it could relate to clauses warning the consumer to take adequate precautions against the risk of injury or death that should be specifically pointed out and initialled or signed.¹¹¹⁹ Hence, section 49(2)(c) has a warning function, irrespective of whether the supplier is liable for injury or death of its customer, and questions of liability have to be dealt with separately.

Terms which exclude or limit any liability for death or personal injury should rather be blacklisted than greylisted where the supplier is at fault, and simple negligence should be the threshold. This is the case in many European countries.¹¹²⁰ Disclaimers in which suppliers exclude or limit their liability for any reason would thus be outlawed right away.¹¹²¹ The fact that the limitation or exclusion of the supplier's liability for any loss attributable to gross negligence is blacklisted under section 51(c)(i), and that the limitation or exclusion of its liability for death or personal injury – unless it concerns section 61(1) – is merely presumed to be unfair is a systemic weakness that the legislator should correct. This applies especially in the light of the common law and the Constitution which attributes a very high rank to the sanctity of life. The OFT took the stance that no contractual term can legally exclude liability for death or injury caused by negligence in the course of business and that such terms should be banned in consumer contracts.¹¹²²

Naudé asserts that in a developing country such as South Africa, the outright prohibition of excluding or restricting liability for companies could have an adverse impact on those businesses. Businesses in developing countries often cannot afford insurance. If they sign an insurance policy, they must include their price in the end-price for their customers. A business

¹¹¹⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 19.

¹¹²⁰ See §§ 309 no. 7 lit. a) BGB, 6(1) no. 9 Austrian KSchG, s 2(1) UK Unfair Contract Terms Act, 1977. See Naudé 2009 *SALJ* 524.

¹¹²¹ Disclaimers as those from Durban's Water Wonderland would therefore be unlawful: 'The amenities which we provide at our Waterworld (Amusement Park) have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, **MUST** stipulate that they are absolutely *unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever* which is suffered by any person who enters the premises and/or uses the amenities provided.' Disclaimer taken from Van Eeden and Barnard *Consumer Protection Law* 279 and 280. Emphasis added.

¹¹²² OFT *Unfair Contract Terms Guidance* (2008) para 1.10 at 16.

which is not insured can have far-reaching effects in terms of tourists coming from abroad visiting South Africa because medical costs and loss of income are likely to be higher overseas. Hence, she suggests that suppliers who offer services to overseas tourists should insure against higher claims coming from such tourists and include their higher costs in their quotes. Otherwise, they should insist on adequate travel insurance that covers the given activities, or ask the tourist to agree to the exemption clause.¹¹²³

This could nevertheless imply practical problems in terms of the necessary distinction between South Africans – who, despite lower medical costs in comparison to overseas tourists, often cannot afford certain medical treatments – and overseas tourists. In addition, asking for special insurance well in advance excludes the possibility that tourists book certain activities spontaneously as they might not know about specific touristic offers in advance.

Another problem, especially in developing countries, could arise when permitting the limitation or exclusion of liability because this gives no incentives to businesses to maintain their premises or equipment in safe conditions. This could lead to even higher risks for consumers.

A balance between the supplier's and the consumer's interests is however achieved by using adequate warnings of the risks involved, not only in the terms and conditions but also on the supplier's premises. Such warnings should make clear that consumers need to take sensible precautions but do not have the effect of limiting or excluding the supplier's liability. This requirement is already set out in section 49(2),¹¹²⁴ but can even go further, by warning consumers not only generally about the risks involved (e.g., the warning of the general risks involved when parachuting), but also point out which group of persons are more likely exposed to risks (e.g., elderly persons, individuals suffering from a severe medical condition, or persons under the influence of alcohol or drugs). Disclaimers should however not exclude the supplier's liability for death or personal injury, but should only have the effect of preventing the consumer from suing the supplier for damages to their own property caused by their own carelessness.¹¹²⁵ In order to be efficient, consumers should be informed well in advance, e.g., while booking an adventure trip, or when buying tickets for any other hazardous activity. This solution would not only avoid detrimental effects on businesses who cannot afford insurance but also allow

¹¹²³ Naudé 2007 *SALJ* 156, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 24.

¹¹²⁴ This stance is also taken by the OFT *Unfair Contract Terms Guidance* (2008) para 1.12 at 16.

¹¹²⁵ OFT *Unfair Contract Terms Guidance* (2008) para 1.11 at 16.

consumers to participate in dangerous activities¹¹²⁶ and take adequate insurance. For more spontaneous activities or activities, the tourists did or could not book in advance, suppliers should provide for the possibility for tourists to take insurance at their premises by handing out insurance policies. If this is not possible, they should refer to a nearby insurance broker or online offers where consumers can subscribe to an adequate insurance policy.

Naudé contends that it may be appropriate not to strike down clauses limiting liability for personal injury if the supplier can show that it provides a potentially dangerous activity, that insurance is impossible to provide because of the costs involved, and that the consumer has been warned well beforehand in terms of his or her need for an insurance subscribed by him- or herself.¹¹²⁷ This point of view overlooks though that these factors do not necessarily affect the supplier's liability. Its liability is only triggered in cases where it acted at least negligently. The fact that a supplier could not obtain any insurance should not make someone's life negotiable, however. A supplier offering potentially dangerous activities or facilities and who maintains its equipment properly will not be held liable for a consumer's accident, due to the consumer's negligence or fault (e.g., in case of the consumer's improper conduct during the activity or not sufficient training). Regulation 44(3)(a) is merely applicable in cases where the supplier is liable because of its own act or omission. It is my suggestion that the greylisting of this item sends a wrong signal in that someone's life can be negotiable in some cases. As already mentioned, this should be corrected by blacklisting this item.

Furthermore, as Naudé argues, for non-profit suppliers, such as schools, exemption clauses might be fair in terms of section 48 (regulation 44(3) is not applicable for not-for-profit organisations under regulation 44(1). Otherwise, parents who often take part in school trips in order to oversee students would not be willing to volunteer anymore. As schools cannot afford adequate insurance against certain risks involved in school trips, those trips would not be possible anymore without volunteering parents. Parents sending their children to such school trips should be advised well in advance of the risks and to sign an adequate policy.¹¹²⁸

In this regard, the same arguments as mentioned above apply, i.e., schools should not be able to exclude or limit their liability, but rather take over the parents' liability on school trips.

¹¹²⁶ See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 25.

¹¹²⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 25.

¹¹²⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 25.

It should be noted that competition on the South African insurance market is not sufficiently efficient yet with regard to more affordable insurance premiums. Insurance companies are thus able to charge relatively high premiums in order to have a high-profit margin. The weak economy and the loss of existing clients should however contribute to more competition.¹¹²⁹ This applies at least in functioning and competitive markets. Insuring against certain risks should hence be no longer an obstacle to get cheaper insurance. Another, more effective solution would consist of group policies between the Department of Basic Education (DBE) or the Department of Higher Education and Training (DHET) and insurance companies offering competitive contracts. In this kind of contract, parents who wish to participate in school activities do not have to be named in the original policy. The latter merely provides that a certain number of parents will be insured against certain risks and for a certain number of activities throughout the academic year. Before the beginning of the activity in question (e.g., a school trip), the school would simply have to give to the insurer the personal details of the parents involved. This would certainly be an interesting market for insurance companies in the face of the number of contracts throughout South Africa. Another solution would be that the DBE or the DHET act as self-insurer by renouncing to subscribe to an insurance policy with an insurance company and paying damages caused by parents themselves. Parents supervising students on school trips and other activities act on behalf of the State as usually, these activities would fall to teachers. They should thus not bear any adverse repercussions in terms of liability. Because of economic and other reasons, in the current political climate, the political will does not seem to exist for such solutions, however.

b) Exemption clauses in respect of breach

In terms of regulation 44(3)(b), a provision is presumed to be unfair if it excludes or restricts the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement. This includes the consumer's right to set off a debt owed to the supplier against any claim which the consumer may have against the supplier.

A similar provision can be found in item (b) of the Annex of the EC Unfair Terms Directive.¹¹³⁰

¹¹²⁹ KPMG: Business unusual - The South African Insurance Industry Survey 2016 at 23. See 'Business unusual – 2016 South African Insurance Industry Survey' at <https://home.kpmg.com/za/en/home/campaigns/2016/07/2016-south-african-insurance-survey.html>.

¹¹³⁰ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

The ambit of this regulation might be limited, as Van Eeden points out, by defining the supplier's obligations narrowly because the latter is free to do so.¹¹³¹ This also means *a contrario* that this regulation covers the supplier's obligations which have been stipulated in the contract.

Non-derogable rights which are afforded under other legislation do not fall under the scope of regulation 44(3)(b). This is, for instance, the case for certain tenants' rights under the Rental Housing Act¹¹³² that cannot be excluded by contrary agreement.¹¹³³ Such legislation must be considered *lex specialis* to the Act. The Consumer Protection Act itself also prohibits that the supplier imposes certain terms which restrict the consumer's right to cancel the agreement after a breach. Under section 19(6)(c), the consumer is entitled to cancel the agreement without penalty if the supplier tenders the delivery of goods or the performance of services at a location, on a date or at a time other than as agreed. Section 54(2) sets out that the consumer may require to remedy any defect or to refund the consumer if the supplier fails to perform a service correctly. A provision under which the consumer has to give the supplier the occasion to re-perform its service before cancelling the contract would therefore be void.¹¹³⁴ Pursuant to section 56(2), the consumer may return sub-standard goods within six months after delivery, and the supplier must either repair or replace them, or refund the consumer the price the latter had paid.

On the other hand, in cases where the Act or other legislation does not prohibit a term restricting the consumer's right to cancel, the common law permits a party to immediately cancel a contract in case of a 'material positive malperformance' (defective performance) by the other party. It is nevertheless common to provide for an ultimatum procedure. Such a procedure brings certainty as to whether there should be a right to cancel. It may also serve the policy goal to rather uphold contracts than strike them down.¹¹³⁵ Hence, if the consumer's rights under provisions such as sections 19(6)(c), 54(2) and 56(2) are not affected, the term is reciprocal and does not grant an unduly long period for cure of the supplier's breach, such terms may be considered fair.¹¹³⁶ Broad cancellation clauses should always be qualified, and the supplier

¹¹³¹ Van Eeden and Barnard *Consumer Protection Law* 278.

¹¹³² 50 of 1999.

¹¹³³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 27.

¹¹³⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 33.

¹¹³⁵ A typical ultimatum clause would be: 'Upon breach of contract by either party, the other party must give the breaching party seven days' notice to remedy the breach, otherwise the contract may be cancelled by notice in writing'.

¹¹³⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 34.

should explicitly inform the consumer of his or her rights to cancel in terms of the provisions of the Act. By doing so, the generalised cancellation clause undoubtedly only applies to situations not specifically regulated by the Act. Clauses such as 'this does not affect your statutory rights' are not sufficient because consumers typically cannot understand legal jargon and do not know what their statutory rights are.¹¹³⁷

'Breach' means failing to perform any term of a contract, written or oral, without a legitimate legal excuse.¹¹³⁸

Item (b) includes, *inter alia*, exemption clauses purporting to deprive the consumer of the right to claim damages under section 61 for bodily injury, death or damage caused to property and resultant economic loss caused by defective goods, unless the defences provided for in section 61(4) are available to the supplier, or purporting the supplier's liability in the case of over-booking or over-selling in terms of section 47.

The Consumer Protection Act does however not provide for a comprehensive law of contract. This is why certain exemption clauses do not fall under the ambit of regulation 44(3)(b), e.g., in respect of claims for damages for loss caused by defective services,¹¹³⁹ pure economic loss caused by defective goods,¹¹⁴⁰ and loss caused by defects in the goods of which the retailer could not reasonably have been aware.¹¹⁴¹ The loss must not be attributable to gross negligence of the supplier though because otherwise, section 51(1)(c) is applicable. In terms of section 2(10), no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. Furthermore, section 56(4) provides that the implied warranty regulated by this section, and the right to return goods are each, in addition to any other implied warranty or condition, imposed by the common law, the Act or any other public regulation. These 'savings provisions' ascertain that the common-law rights and

¹¹³⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 35. OFT *Unfair Contract Terms Guidance* (2008) para 2.8.4 at 35 and 36.

¹¹³⁸ See <http://dictionary.law.com/Default.aspx?selected=93>. 'Breach' can also be defined as a civil wrong that may give rise to a duty to pay damages as compensation. See Hutchison *et al Law of Contract* 39.

¹¹³⁹ Section 55 is only applicable to goods, but not to services.

¹¹⁴⁰ Section 61(5) only refers to economic loss resulting from death, personal injury or illness of a natural person, loss or damage to property, but not to pure economic loss. However, the word 'includes' in s 61(5) creates, according to Naudé, some confusion. It is suggested that the wording in s 61(5)(d) is unambiguous as it only refers to 'any economic loss *that results from* harm contemplated in paragraph (a), (b) or (c)'. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 27 note 3. Emphasis added.

¹¹⁴¹ Unlike under the common law 'Pothier rule', according to which a trader who publicly professes to have expert skill and knowledge in relation to the goods sold is liable for all foreseeable loss, including consequential loss, caused by a latent defect which existed in the goods at the time of the agreement of sale, s 61(4)(c) gives the retailer or trader this defence against the liability pursuant to s 61.

warranties are still applicable.¹¹⁴² They must however comply with the formal requirements of section 49 and may be unfair under section 48.¹¹⁴³

The reason for greylisting terms exempting from liability for breach is that the legislator wants to make sure that the parties' rights and obligations be evenly balanced with respect to the contract and the background law, i.e., the terms implied by law. Since in consumer contracts it is usually the supplier who inflicts its terms on the consumer, it is only logical that the supplier has to convince the court that its contractual terms are fair as greylisted terms are presumed to be unfair. The supplier therefore has to bring evidence that it has legitimate reasons for limiting or excluding its liability in terms of breach.¹¹⁴⁴ Possible arguments could include the prohibitive cost for insurance, especially where the consumer can insure itself, the fact that the goods or services are inherently dangerous, that there is a high risk of failure to the knowledge of the consumer,¹¹⁴⁵ or that the goods were manufactured to the special order of the consumer.¹¹⁴⁶ Another factor to be taken into account in the fairness enquiry is the price for which the consumer could have acquired identical or equivalent goods or services from another supplier.¹¹⁴⁷ If other suppliers offer an equivalent product at a comparable price, but without any exclusion of liability for breach, while being profitable, the supplier's exclusion of liability for breach is likely to be unfair. On the other hand, if suppliers offer goods or services at a higher price because the contract does not contain an exemption clause, and the same goods or services at a lower price, but with the exemption clause, this may be an indication that the term is fair. The 'premium' price may not be excessively high though, and the consumer has to be informed in advance of the available options.¹¹⁴⁸

Interestingly, when assessing the fairness of a particular term, the court also has to consider whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision that is alleged to have been unfair, having regard to any custom of trade and any previous dealings between the parties.¹¹⁴⁹ This is peculiar because it means that the consumer's knowledge or supposed knowledge of a particular term which it gained in

¹¹⁴² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 27 note 6.

¹¹⁴³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 28.

¹¹⁴⁴ Section 52(2)(f) which refers to the legitimate interests of the supplier as one factor in the assessment of the fairness of a term.

¹¹⁴⁵ Section 52(2)(c) which refers to the 'circumstances of the transaction (...) that existed or were reasonably foreseeable at the time that the conduct or transaction occurred'.

¹¹⁴⁶ Section 52 52(2)(j).

¹¹⁴⁷ Section 52(2)(i).

¹¹⁴⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 30.

¹¹⁴⁹ Section 52(2)(h).

previous dealings with the supplier is taken into account. It is suggested that this factor can lead to unfair outcomes because knowledge of an allegedly unfair term cannot make it fair, although the consumer agreed to it in previous dealings with the supplier. One could construe this provision in the sense that knowledge of the term in question could serve merely as a ‘warning’ or information to the consumer as regards the existence of the term. This ‘warning’ or information did not necessarily exist in previous dealings with the supplier though.

Other factors which should be taken into consideration in the fairness review are the consumer’s interests. This concerns questions such as the feasibility to insure itself against the risk,¹¹⁵⁰ or procedural factors such as the extent of negotiations between the parties, or codes of conduct¹¹⁵¹ for the particular sector which stipulate, for instance, that the supplier has to take reasonable care in supplying services. Then, a supplier who excludes its liability for breach is unlikely to convince a court that this provision is fair.¹¹⁵²

Sharrock takes the view that the inclusion of far-reaching exemption clauses could be justified if the supplier acquired the product in question from another supplier who excluded its liability for any deficiencies in the product.¹¹⁵³ According to section 5(5), the Act is however applicable to any goods that are supplied within South Africa to any person in terms of a transaction that is exempt from the application of the Act, and the importer or producer, distributor or retailer of those goods, respectively, are nevertheless subject to sections 60 and 61. In terms of section 61, liability for injury or property damage and resultant economic loss caused by defective goods cannot be excluded contractually by any supplier in the supply chain, and the consumer can sue any supplier in the supply chain for damages under section 61.¹¹⁵⁴ The producer, importer, distributor or retailer of any goods is liable, without proof of negligence on the part of the supplier of the goods, for any harm caused by the goods.¹¹⁵⁵ As regards liability which is not covered by section 61 – such as pure economic loss – but by the common law, it might be unfair to pass such risks onto consumers in the terms and conditions without warning them in advance. This applies especially where the supplier could easily insure against the risk without significantly increasing the price, and where he or she did not try to secure a right of

¹¹⁵⁰ See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.1 at 72, Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 39.

¹¹⁵¹ See also s 52(2)(h)(i) which takes into account customs of trade.

¹¹⁵² Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 31.

¹¹⁵³ Sharrock 2010 *SA Merc LJ* 311 note 96, Sharrock 2010 *SA Merc LJ* 132 note 96.

¹¹⁵⁴ See Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 31.

¹¹⁵⁵ Melville *Consumer Protection Act* 98.

recourse against his own supplier.¹¹⁵⁶ What is more, the supplier should only be able to exclude its liability in terms of breach where it is not at fault. Problems with its own suppliers or subcontractors should be treated as its own fault because the consumer had no influence on the supplier's choice of its own suppliers and no recourse against them.¹¹⁵⁷ The same rationale can be found where a company excludes its liability for errors caused by the company's IT. Here again, the consumer has no influence and no choice than accepting the supplier's technology. Thus, terms under which a supplier seeks to shift a risk onto the consumer which the supplier is better able to handle, or risks within the supplier's control, should be considered unfair under section 44(3)(b).¹¹⁵⁸

Item (b) also concerns terms under which a party forfeits a right to recover a performance if it should exercise any remedy and terms which exclude all conditions and warranties. A term stipulating that the consumer has to bear its expenses in connection to the transport of a defective good could be prohibited by section 54(2). This provision does not prohibit terms under which the consumer has to bring the defective good to the supplier's place of business if the consumer exercises this right under section 54. However, a term under which the consumer has to do so at his or her own expense falls under regulation 44(3)(b) because it excludes the consumer's common-law right to claim damages for breach by the supplier in cases where the consumer can show that it acted reasonably by incurring costs in transporting the goods for the repair, which would have been avoided had the service been properly performed.¹¹⁵⁹ In cases though where the supplier is a small business, and the consumer could bring the goods easily to the supplier's shop, the consumer should not be allowed to have them brought back by a transport service supplier.¹¹⁶⁰

It is advisable that suppliers rather draft their exemption clauses narrowly and exclude liability merely for losses where the supplier is not at fault or that were not foreseeable when entering into the contract.¹¹⁶¹

¹¹⁵⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 31.

¹¹⁵⁷ The UK Office of Fair Trading takes this view. See OFT *Unfair Contract Terms Guidance* (2008) para 1.9 at 15.

¹¹⁵⁸ See for the UK 'Terms regarding the responsibilities and liabilities of insurance comparison websites for providing their service' at http://www.fsa.gov.uk/pages/Doing/Regulated/uct/library/comparison_websites.shtml (no longer available).

¹¹⁵⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

¹¹⁶⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

¹¹⁶¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 36.

Regulation 44(3)(b) *in fine* also includes the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier. By operating a set-off (*compensatio*), the parties may extinguish their contractual and other debt. Set-off may be regarded as a form of payment.¹¹⁶² In order to be able to operate a set-off, both debts must be reciprocal, i.e., the parties must each other owe a debt. Furthermore, the debts must be liquidated which is the case when it is evident that it is due and to what amount (*cum certum est an et quantum debeatur*). Furthermore, it must be capable of easy and speedy proof.¹¹⁶³ This is notably the case where the plaintiff admits a debt,¹¹⁶⁴ or a debt is of the amount of a fixed rate for rendering a certain service,¹¹⁶⁵ or in the case of a bank overdraft and bank charges.¹¹⁶⁶ In all these cases, an easy and speedy proof, a concept which leaves the court some discretion of whether a particular debt is capable of *compensatio*, is possible. The debt must also be due. This is not the case before the time for payment has not arrived, or where the debt is contingent or subject to a suspensive condition which has not been fulfilled yet.¹¹⁶⁷ However, certain debts cannot be set-off, such as alimony, debt on a true contract of *depositum*, or taxes due to the *fiscus*, i.e., SARS.¹¹⁶⁸ Besides, statutory prohibitions against set-off exist.¹¹⁶⁹

The rationale behind the greylisting of clauses restricting set-offs is that consumers might believe that they have no choice but to pay in full, even if something is wrong with the purchased product or service. These clauses have the effect that consumers first have to obtain justice in court, which is costly. Moreover, they cause delays, and the outcome is uncertain. As a result, consumers might give up their claim, which is equal to a deprivation of their rights.¹¹⁷⁰

The clause must not necessarily use the word ‘set-off’. It is sufficient that it has the effect to exclude or restrict a set-off. This is namely the case where the consumer is requested to pay promptly and in full and without deduction as soon as the supplier decides that its part of the transaction as finished.¹¹⁷¹ A restriction of the consumer’s right to set-off a claim also exists where a clause subjects set-off to penalty, i.e., when a consumer does not pay the full contract

¹¹⁶² Christie and Bradfield *Law of Contract* 494.

¹¹⁶³ *Treasurer-General v Van Vuren* 1905 TS 582 at 589.

¹¹⁶⁴ *Smith v Morum Bros* (1877) 7 Buch 20.

¹¹⁶⁵ *Whelan v Oosthuizen* 1937 TPD 304.

¹¹⁶⁶ *Bain v Barclays Bank (DC&O) Ltd* 1937 SR 191.

¹¹⁶⁷ Christie and Bradfield *Law of Contract* 496.

¹¹⁶⁸ See Christie and Bradfield *Law of Contract* 497, with further references.

¹¹⁶⁹ *Barret v R* 1926 NPD 96 at 98-99, *Fourie v Swiegers* 1950 1 SA 369 (C).

¹¹⁷⁰ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.2 at 28.

¹¹⁷¹ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.3 at 28.

price when demanded. Such a penalty can take the form of a loss of guarantee rights or of a right to a discount.¹¹⁷²

It is submitted that regulation 44(3)(b) must be interpreted widely so that also clauses by which suppliers may require full payment before they have delivered the agreed service, such as the installation, are unfair. Fully or nearly fully paid suppliers have no incentive to do their work properly, and consumers are deprived of their possibility to set-off with regard to the service in question.¹¹⁷³ What is more, in the presence of such a clause, the consumer bears the risk if the supplier becomes insolvent. This wide interpretation is covered by the wording of item (b) which not only covers set-offs in terms of funds (mutual debts), but the consumer's *debt* owed to the supplier and its *claim* against the supplier. A 'claim' can take any other form and does not only concern monies. A clause by which full payment is required before delivery might be fair though if the monies are held on a deposit account of a specialised and neutral third party and will not be released until the parties have resolved their dispute by an independent adjudication.¹¹⁷⁴

There is nothing to say against so-called 'stage-payment' arrangement by which the consumer pays a certain sum every time a certain stage of the delivery of goods (e.g., a certain number of goods) or of the service has been reached, provided that the consumer may keep a retention allowing it to exercise its right to set-off its claim.¹¹⁷⁵

c) Entire agreement and formality clauses

Under regulation 44(3)(c), a term is presumed to be unfair if it has the purpose or effect of limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier.

In contract law, an entire agreement clause¹¹⁷⁶ is a clause in a written contract that declares the contract to be the complete and final agreement between the parties.¹¹⁷⁷ The reason for greylisting such clauses is that the consumer's rights to redress for misrepresentation and breach of obligation should not be excluded, particularly in contracts where a salesperson will

¹¹⁷² OFT *Unfair Contract Terms Guidance* (2008) para 2.5.6 at 29.

¹¹⁷³ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.8 at 30.

¹¹⁷⁴ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.10 at 30.

¹¹⁷⁵ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.10 at 30.

¹¹⁷⁶ Also referred to as integration clause, merger clause or entrenchment clause.

¹¹⁷⁷ Hutchison *et al Law of Contract* 410.

necessarily make statements about the product. Suppliers and their agents should weigh their words carefully.¹¹⁷⁸ Suppliers shall not be able to disclaim responsibility by using an entire agreement clause, i.e., by stipulating that their liability accepted orally is excluded, as good faith demands that each party to a contract should be bound by its agreement and by any other statements which help secure the other party's agreement.¹¹⁷⁹

It is obvious that such a term is vulnerable to manipulation by the supplier because its performance is subject to discretion.¹¹⁸⁰ Clauses specifying the circumstances in which a contractual obligation may not be observed might be fair, however. This is not the case though where these circumstances are effectively under the supplier's control.¹¹⁸¹

An example for such a clause is a provision by which an employee or agent who negotiated the contract has no authority to make any promise or statement on behalf of the business, or a term providing that an employee or agent may not give undertakings according to which the goods will meet the consumer's particular needs unless such an undertaking is given in a writing authorised by Head Office.¹¹⁸² Such clauses lessen the seller's incentive to weigh its words carefully and to make sure that its employees and agents act in the same manner.¹¹⁸³

The reason often brought forward by the defendants of entire agreement clauses is that they achieve certainty as to what statements are binding on the parties. This is however only done at the price of the unacceptable exclusion of the consumer's right to redress for misrepresentation and breach of obligation.¹¹⁸⁴

Contrary to the blacklisted term under section 51(1)(g), regulation 44(3)(c) has a broader scope of application as its objective is to prevent consumers from relying on representations that were not expressly included in the agreement and signed by the parties.¹¹⁸⁵

According to Naudé, the wording of item (c) should be interpreted broadly, so that 'commitments' include representations and oral undertakings as well as those made by a supplier who is a sole trader. 'Compliance with a particular condition' should also include

¹¹⁷⁸ OFT *Unfair Contract Terms Guidance* (2008) paras 14.1.1-14.1.8 at 61.

¹¹⁷⁹ Van Eeden and Barnard *Consumer Protection Law* 284 and 285. See OFT *Unfair Contract Terms Guidance* (2008) paras 14.1.1 at 61 and 14.1.3 at 62.

¹¹⁸⁰ Van Eeden and Barnard *Consumer Protection Law* 276 and 277.

¹¹⁸¹ See OFT *Unfair Contract Terms Guidance* (2008) para 1.3-3.3 at 37.

¹¹⁸² Examples from Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 43, with further references.

¹¹⁸³ OFT *Unfair Contract Terms Guidance* (2008) para 14.1.3 at 61.

¹¹⁸⁴ OFT *Unfair Contract Terms Guidance* (2008) para 14.1.4 at 61-62.

¹¹⁸⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 43.

compliance with formality requirements for variations. This view is correct as the legislator chose a ‘catch-all’ provision by using words such as ‘commitment’ (instead of ‘transaction’) and ‘condition’ (instead of narrowing down the scope of application by adding words like ‘material’ or ‘formal’). In order to achieve a clearer formulation, the wording should be amended though, as Naudé suggests, in order to include ‘commitments undertaken by *the supplier or his or her agents*’.¹¹⁸⁶

Naudé correctly maintains that the phrase ‘commitments subject to compliance with a particular condition which depends exclusively on the supplier’ is not as clear as the EC Directive’s formulation¹¹⁸⁷ which refers to terms ‘limiting the seller’s or supplier’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality’.¹¹⁸⁸ The Directive’s formulation makes it clear that a requirement that both parties sign a variation is not excluded from the ambit of the provision. Item (c) should therefore be amended accordingly.

Formality and entire agreement clauses often overlap. When referring to subsequent variations of the contract, a formality clause is also called a ‘non-variation clause’.¹¹⁸⁹

The greylisting of formality clauses, including non-variation clauses, is particularly important in consumer and standard form contracts as consumers often do not read the terms and conditions and therefore are not aware of such a clause. Regulation 44(3)(c) corrects the strict application of the *Shifren* principle, according to which parties are bound by their written agreements.¹¹⁹⁰ As discussed in detail further above, the *Shifren* principle often led to unfair outcomes because a party (mostly the supplier) could act contrary to the reliance it had created by its oral agreement to amend the contract by simply denying that it had given such an oral agreement.¹¹⁹¹ In contract law, fair results can be achieved by applying the parol evidence rule, however,¹¹⁹² which assumes a coherent contractual document usually containing all the terms

¹¹⁸⁶ Emphasis added for the suggested amendment.

¹¹⁸⁷ Item (n) of the Annex to the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

¹¹⁸⁸ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 44.

¹¹⁸⁹ A typical formulation for a non-variation clause would be: ‘No variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement’. Formulation from Hutchison *et al Law of Contract* 165.

¹¹⁹⁰ See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A). This decision was later affirmed in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹¹⁹¹ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 47.

¹¹⁹² Hutchison *et al Law of Contract* 257, *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 47, *Johnston v Leal* 1980 (3) SA 927 (A) 938. The parol evidence rule is a substantive common law rule in contract cases that prevents a party to a written contract from presenting extrinsic evidence that discloses an ambiguity and

of the agreement. Since the strict application of the parol evidence rule leads to some difficulties, such as the distinction between background circumstances and surrounding circumstances, the courts have become less reluctant in recent years to consider the broad context in which the contract was concluded and now allow extrinsic evidence.¹¹⁹³

The OFT took the stance that an entire agreement clause might be fair if the consumer is clearly and unmistakably warned that the law favours written terms as long as the clause does not undermine the court's power to consider other (oral) statements where necessary. This has to be appropriately highlighted, clearly drafted, and the consumer must have an adequate opportunity to read the clause before signing the agreement. The effect of such a warning might be stronger even if the consumer is encouraged to ask questions.¹¹⁹⁴

d) Limiting the supplier's vicarious liability for his agents

Greylisted under regulation 44(3)(d) are also terms which limit, or have the effect of limiting, the supplier's vicarious liability for its agents.

Section 25(1)(i) of the Australian Consumer Law¹¹⁹⁵ contains a similar provision.

Vicarious liability is a form of a strict, secondary liability that arises under the common law doctrine of agency – *respondeat superior* –, the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the 'right, ability or duty to control' the activities of a violator.¹¹⁹⁶ There must be a particular relationship between the two individuals involved, e.g., the employer and employee, or the principal and agent.¹¹⁹⁷

clarifies it or adds to the written terms of the contract that appears to be whole. However, there are a number of exceptions to this general rule, including for partially integrated contracts, agreements with separate consideration, to resolve ambiguities, or to establish contract defences.

¹¹⁹³ Some authorities, especially after the case *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA), were taking the view that the court will abandon the aforementioned distinction as soon as it is presented with an adequate opportunity, and at least one author, namely Wallis, is of the opinion that this distinction has no validity anymore. See Wallis 2010 SALJ 674-675. Finally, in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), the SCA held at para [12] that the distinction 'between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

¹¹⁹⁴ OFT *Unfair Contract Terms Guidance* (2008) paras 14.1.6-14.1.8 at 62. See also Van Eeden and Barnard *Consumer Protection Law* 284 and 285.

¹¹⁹⁵ Schedule 2 to the Competition and Consumer Act, 2010.

¹¹⁹⁶ See Law *Oxford Dictionary of Law* s.v. 'Vicarious liability'.

¹¹⁹⁷ Van Eeden and Barnard *Consumer Protection Law* 284 and 285. See § 831 BGB which deals with the responsibility for vicarious agents: '(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to

This is restated in section 113(1) by which the employer is jointly and severally liable with the employee or agent.¹¹⁹⁸ Section 113(1) however applies only to the joint and several liability in terms of the Act, e.g., the liability under section 61. Hence, item (d) applies to terms limiting the supplier's vicarious liability under the residual common-law rules, such as liability for damages caused by pure economic loss that were caused by defective goods which is not covered by section 61.¹¹⁹⁹

Moreover, as opposed to section 113(1) which covers the supplier's (principal, employer) vicarious liability for its employees or agents, regulation 44(3)(d) seems to apply only to agents, and not to employees. According to the definition of 'vicarious liability', also third parties, such as subcontractors and agents, are covered. For this reason, terms limiting the supplier's liability for problems with its subcontractors should be treated in the same way as clauses concerning the supplier's liability for its employees or the supplier itself because the consumer has no choice with respect to the subcontractors and has no recourse against them.¹²⁰⁰

Vicarious liability of the employer is given where the employee fulfils three requirements. First, a particular relationship, e.g., employment, is necessary at the time when the delict is committed. Second, the delict must have been committed by the employee, and third, the latter must act within the scope of its employment when committing the delict or must have been engaged in any activity reasonably incidental to it.¹²⁰¹

For this reason, clauses stating that the supplier only acts on behalf of another person will most likely be unfair in terms of item (d). Furthermore, the Act's definition of 'supply' in relation to services means to sell, to perform or to cause the services to be performed or provided etc.¹²⁰² Therefore, the apparent supplier with whom the consumer concluded a contract will also be

the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised. (2) The same responsibility is borne by a person who assumes the performance of one of the transactions specified in subsection (1) sentence 2 for the principal by contract.'

¹¹⁹⁸ Section 113(1) provides: 'If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.'

¹¹⁹⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 48. Because of the word 'includes' in s 61(5), this is not clear, though.

¹²⁰⁰ See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.1 at 72.

¹²⁰¹ *F v Minister of Safety and Security and Another (Institute for Security Studies and Others as Amici Curiae)* 2012 (3) BCLR 244 (CC).

¹²⁰² See s 1 s.v. 'supply' (b). Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 49.

subject to the remedies granted to consumers in terms of late and defective provision of services (by another supplier on whose behalf the apparent supplier contracted with the consumer).¹²⁰³

The rationale behind item (d) and for shifting the burden of proof from the consumer to the supplier is that rights and obligations especially under a standard contract are generally not evenly balanced unless the parties are bound by their contractual duties and the terms implied by law. Thus, the supplier has to bring forward legitimate reasons for the limitation of its liability so that there is a fair balance between the parties' rights and obligations.¹²⁰⁴

Van Eeden argues that section 51(1)(c)(i) only prohibits the limitation or exemption of the supplier's gross negligence and that a disclaimer relating to liability based on the employee's or agent's negligence may be considered fair.¹²⁰⁵ The wording of section 51(1)(c)(i) seems to contradict this view as it expressly prohibits disclaimers relating to the gross negligence of the supplier *or any person acting for or controlled by the supplier*.¹²⁰⁶ However, a limitation (not an exclusion) of the supplier's vicarious liability for *simple* negligence for its agents might be fair under regulation 44(3)(d).

The OFT maintained that 'no term should shield a business from liability where its employees fail to provide as good a standard of service as they are reasonably able'.¹²⁰⁷ Hence, it is more appropriate that the supplier takes the risks that are within its control, that the consumer cannot be expected to know about, or against which the supplier can insure more cheaply than the consumer.¹²⁰⁸

e) Indemnity clauses

Pursuant to regulation 44(3)(e), a term is presumed to be unfair if it forces the consumer to indemnify the supplier against liability incurred by it to third parties.

This means that the consumer cannot be forced by the supplier to assume liability for obligations that the supplier has under the Act, such as a claim for harm caused by defective goods under section 61.¹²⁰⁹

A typical example of an indemnity clause is the following:

¹²⁰³ See ss 19 and 54. Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 49.

¹²⁰⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* paras 48 and 29.

¹²⁰⁵ Van Eeden and Barnard *Consumer Protection Law* 284 and 285.

¹²⁰⁶ Emphasis added.

¹²⁰⁷ OFT *Unfair Contract Terms Guidance* (2008) para 2.2.9 at 22.

¹²⁰⁸ OFT *Unfair Contract Terms Guidance* (2008) para 18.2.1 at 72.

¹²⁰⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 50.

'The consumer shall indemnify the supplier against all liabilities, costs, expenses, damages and losses suffered or incurred by the supplier arising out of or in connection with [the relevant breaches].'¹²¹⁰

Such a term can be regarded as an inappropriate transfer of risks to the consumer.¹²¹¹ Unless the consumer can insure easily against such risk, the argument often put forward by suppliers that these terms enable them to contain prices is not acceptable. If the consumer cannot find appropriate insurance, he or she pays more overall or goes unprotected against the risk in question.¹²¹² In general, a supplier should not make its consumer its insurer.¹²¹³ The rationale behind item (e) is thus the same as for item (b), i.e., the fair balance between the parties' rights and obligations.¹²¹⁴

Contrary to item (a), item (e) also applies to terms in respect of liability for illness of any natural person, any loss of, or physical damage to movable or immovable property as well as economic loss resulting from the death of, or injury to any natural person.¹²¹⁵

Terms including the words 'indemnify' or 'indemnity' (as in the example above) belong to the legal jargon and infringe sections 50 and 22.¹²¹⁶ Especially not legally trained consumers cannot see that it is simply a 'hold harmless' provision, and could construe those words in a way that implies a threat that legal and other costs that the supplier incurred are transferred.¹²¹⁷

f) Restricting the right to rely on the statutory defence of prescription

Under item (f), a term of a consumer agreement is presumed to be unfair if it has the purpose or effect of excluding or restricting the consumer's right to rely on the statutory defence of prescription.

Prescription in the legal sense is a maximum period of time within which specific claims may be brought in a court of law. After this period, the creditor is no longer able to enforce its debt.¹²¹⁸

¹²¹⁰ Example (slightly modified for the purposes of this section) from 'Legalese: Golden rules for drafting indemnities' at <http://www.trinityllp.com/legalese-golden-rules-for-drafting-indemnities>.

¹²¹¹ See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.7 at 73.

¹²¹² See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.3 at 72.

¹²¹³ See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.3 at 72.

¹²¹⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* paras 50 and 29.

¹²¹⁵ Van Eeden and Barnard *Consumer Protection Law* 281.

¹²¹⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 50.

¹²¹⁷ Van Eeden and Barnard *Consumer Protection Law* 281.

¹²¹⁸ Van Eeden and Barnard *Consumer Protection Law* 286 and 287. For a broader definition in other jurisdictions, see Duhaime's Law Dictionary at <http://www.duhaime.org/LegalDictionary/P/Prescription.aspx>.

§ 309 no. 8 lit. b) ff) contains a somewhat similar, but narrower provision.¹²¹⁹

In South Africa, the Prescription Act¹²²⁰ provides a general framework for prescriptions. Pursuant to section 11(d) of the Prescription Act, the period of prescription of debts shall be three years in respect for any other debt which is not mentioned in section 11(a) to (c) of the Prescription Act, i.e., claims in connection with contracts prescribe after three years.

In common law, there has been an interesting development in the last decades as regards the question of whether it is possible to waive the protection offered by the Prescription Act. In *Nedfin Bank Bpd v Meisenheimer and others*,¹²²¹ the court referred to *Murray & Roberts (Cape) v Upington Municipality*¹²²² and held that the objective of the provisions of the Prescription Act was to establish certainty between individuals, i.e., the creditor and the debtor, and to promote the individual interests of the debtor where the creditor has failed to take timeous steps to enforce debt. Therefore, it would be possible to waive the protection offered by the Prescription Act validly. In *Ryland v Edros*,¹²²³ the court did not follow the obiter of *Nedfin Bank Bpk v Meisenheimer and others* and decided that extinctive prescription serves at least in part for the interest of the public, and not only for the interest of the individuals involved. An agreement to renounce prescription in advance is therefore not valid. In *ABSA Bank Bpk h/a Bankfin v Louw*,¹²²⁴ the court ruled that a debtor may validly agree to extend the prescription period after prescription has started to run as long as the institution of prescription is not completely negated. Four years later, the Supreme Court of Appeal did however not answer the question in *De Jager en andere v ABSA Bank Bpk*¹²²⁵ whether or not a term that renounces in advance the statutory right to rely on prescription was contrary to public policy.

Van Eeden sticks to the wording of regulation 44(3)(f) according to which waivers of the right to rely on prescription are 'only' *presumed* unfair in consumer agreements.¹²²⁶ Naudé, on the other hand, argues that despite the greylisting of these terms, they should never be regarded as fair. As regulation 44(2)(d) provides that '[t]his regulation does not derogate from provisions

¹²¹⁹ Pursuant to **§ 309 no. 8 lit. b) ff)**, even to the extent that a deviation from the statutory provisions is permissible, 'the limitation of claims against the user due to defects in the cases cited in [§] 438 (1) no. 2 and [§] 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained' is ineffective.

¹²²⁰ 68 of 1969.

¹²²¹ 1989 (2) All SA 226 (T) at 230.

¹²²² 1984 (1) SA 571 (A) at 578F-H.

¹²²³ 1996 (4) All SA 557 (C) at 576-577.

¹²²⁴ 1997 (3) SA 1085 (C) at 1089.

¹²²⁵ 2001 (3) SA 537 (SCA).

¹²²⁶ Van Eeden and Barnard *Consumer Protection Law* 286 and 287.

of the Act or other law in terms of (...) which a term of an agreement is prohibited', a court is likely to decide that this kind of terms will always be void and contrary to public policy.¹²²⁷ The Prescription Act does not expressly prohibit terms under which the renouncement of prescription by a party is prohibited.¹²²⁸ It is suggested though that the Prescription Act promotes certainty not only for the parties but also for the general public.¹²²⁹ This objective would be jeopardised if the debt itself continued to exist as a natural obligation as it was the case in the earlier Prescription Act of 1943¹²³⁰ which only provided for weak prescription.¹²³¹ Therefore, Naudé's view is convincing. Although the deletion of item (f) is not necessarily mandatory in order to avoid misunderstandings (because of the interplay between regulations 44(3)(f) and 44(2)), it should nevertheless be deleted and instead inserted in section 51.

g) Modifying the normal rules regarding the distribution of risk

By virtue of regulation 44(3)(g), terms which have the purpose or effect of modifying the normal rules regarding the distribution of risk to the detriment of the consumer are presumed to be unfair.

The rationale behind this item is that the supplier is more likely than the consumer to have an appreciation of the risks linked to particular goods or services.¹²³² The argument that such a provision likely raises the price for products or services is not legitimate because the fair distribution of risks will also re-distribute the costs. Otherwise, the consumer will disproportionately bear the risk and have to re-purchase the item in case of its deterioration or loss.

In order to be able to apply item (g) correctly, it is necessary to establish the meaning of 'normal rules'. A first approach consists in conducting a survey of the rules regarding risk adopted in a particular industry or market segment. This approach would be contrary to the purposes and policy of the Act though because it would entrench the *status quo*.¹²³³ This is because industry-made or supported rules serving as benchmark or reference for consumer protection are mostly an unsatisfactory solution because they may be unfair themselves.

¹²²⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 51.

¹²²⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 51.

¹²²⁹ See also Hutchison *et al Law of Contract* 389.

¹²³⁰ 18 of 1943.

¹²³¹ Hutchison *et al Law of Contract* 387 and 389.

¹²³² Van Eeden and Barnard *Consumer Protection Law* 278, OFT *Unfair Contract Terms Guidance* (2008) para 18.2.1 at 72.

¹²³³ Van Eeden and Barnard *Consumer Protection Law* 278 and 279.

The second approach consists in the application of the reasonableness test in section 48(2) which negates reasonableness of a term if it is excessively one-sided or inequitable, is based on a false, misleading or deceptive representation, or the agreement was subject to a term or condition, or a notice in terms of section 49(1), and the latter is unfair, or the fact, nature and effect of that term, condition or notice was not drawn to the consumer's attention according to section 49.¹²³⁴ This approach has certainly some advantages and would be coherent with the policy of the Act. It seems however that the legislator had a more specific conception of the meaning of 'normal rules' in item (g) in mind as it chose the phrase 'normal rules *regarding the distribution of risk*'.¹²³⁵ The idea behind the reasonableness test in section 49(2) does certainly include the assessment of the distribution of risk, but its general objective is to assure fairness in general, and not only risk distribution.

A third approach is more general in terms of the law of contracts and considers the *naturalia* of an agreement in the absence of express terms.¹²³⁶ *Naturalia* are unexpressed provisions of the contract which the law imports therein, without reference to the actual intention of the parties.¹²³⁷ The intention of the parties is however not totally disregarded as the parties' actual or presumed intention has been implied because any honest party entering into a particular type of contract would want to include such a term.¹²³⁸ Such implied terms¹²³⁹ may derive from the common law, trade usage or custom, or statute.¹²⁴⁰ In the latter case, the legislator may use its overriding power to nullify or control any attempt by the parties to exclude a term implied by statute or common law in their contract.¹²⁴¹ This approach is convincing as regards the determination of the 'normal rules regarding the distribution of risk'.

For instance, one of those implied terms – or *naturalia* – is the common-law rule under which the risk of destruction or damage to sold goods rests on the purchaser when the parties agreed

¹²³⁴ See Van Eeden and Barnard *Consumer Protection Law* 278 and 279.

¹²³⁵ Emphasis added.

¹²³⁶ Van Eeden and Barnard *Consumer Protection Law* 278 and 279.

¹²³⁷ See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531.

¹²³⁸ Christie *Law of Contract* 166 and 167.

¹²³⁹ Some authors prefer the nomination 'residual rules' (Kerr *Principles of the Law of Contract* 370 *et seq*), others use 'implied terms' and 'residual rules' indiscriminately (Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 52). Already Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) qualified the term 'implied terms' in certain contexts as a misnomer. Christie (*Law of Contract* 166) remembers the Latin origin of the word 'implied', which comes from *implicare* (to fold into), and is of the opinion that the traditional usage should therefore be retained as an implied term is 'folded into the contract' by law. It is suggested that the nomination is secondary, and that all proposed terms are well established, so that they all can be used without causing confusion. Section 19(2)(c), for instance, uses the term 'implied (condition)'.

¹²⁴⁰ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531.

¹²⁴¹ Section 51 CPA and s 90(2) NCA contain such statutory provisions. See Christie *Law of Contract* 167.

that the seller has to deliver goods at a place other than the place of sale or manufacture. According to this common-law ‘risk rule’, the risk passes from the supplier to the consumer as soon as the price and the *merx* are established and all suspensive conditions are fulfilled, i.e., the contract is *perfecta*. The physical control over the *merx* is still on the supplier’s side though, which means that disputes between the parties with respect to the cause of a damage are very likely.¹²⁴² It will be difficult for the consumer to prove that the supplier took reasonable steps in order to avoid any damage to the goods, which makes this common-law rule unfair.¹²⁴³ In the absence of any statutory provision, this would be a ‘normal rule regarding the distribution of risk’ in terms of regulation 44(3)(g).

Section 19(2)(c) modifies the aforementioned ‘risk rule’ nonetheless insofar as, unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that goods to be delivered remain at the suppliers risk until the consumer has accepted delivery. This means that the risk is linked to the physical control over the goods.¹²⁴⁴

Terms under which the risk passes onto the consumer before delivery will thus be presumed to be unfair under regulation 44(3)(g). The supplier could bring forward, e.g., that its term according to which the consumer has to bear the risk before delivery is fair when the consumer is in breach, for instance, because he or she did not accept the delivery on the agreed date without any valid reason.¹²⁴⁵

It is unclear whether section 54(1)(d) has to be understood in that the supplier will always carry the risk of any destruction or damage to the goods while they are in its possession. Under this provision, when a supplier undertakes to perform any services for or on behalf of a consumer, the latter has the right to the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services. In other words, the supplier has to return the consumer’s goods in at least as good a condition as it was before, after having performed its service (e.g., repairs). If this provision would have to be applied without any exceptions, a term

¹²⁴² Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 53.

¹²⁴³ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 53.

¹²⁴⁴ The principle that the risk should generally run with physical control can also be found in art 66-69 CISG.

¹²⁴⁵ See s 19(2)(a)(i) CPA. Art 69 of the CISG, art 142(3) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final, as well as the European Draft Common Frame of Reference provide for an earlier transfer of risk than delivery in cases where the consumer breaches its obligation to take delivery.

stating that the risk for such damage on the consumer would be prohibited by section 51(1)(b)(i) because it would waive or deprive a consumer of a right in terms of the Act. In terms of section 65(2), when a supplier has possession of any property belonging to the consumer, the supplier must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property of another person. Thus, the Act provides that the supplier is liable for damage to the goods by negligence, whereas it does not specifically provide that the supplier is also liable for other loss caused by unforeseen, unavoidable events, such as *vis maior* or *casus fortuitus*.

Since section 54 does not provide for a claim for damages and section 65 already deals with liability for loss caused by the supplier's negligence concerning the consumer's goods, the courts will probably not interpret section 54 in that this provision creates peremptory liability for loss caused by supervening impossibility of performance. The maxim *inclusio unius est exclusio alterius*, meaning that the specific inclusion of one implies the exclusion of the other, speaks for this point of view. Hence, a supplier of services who can prove that the consumer's goods were damaged by unforeseeable and unavoidable events will probably escape liability as under the common law.¹²⁴⁶

The following example illustrates that the supplier must be able to exclude the risk of unforeseeable damages to the property of the consumer, or those that are not under its control:

A consumer brings a wooden chair with a loose leg, which is still under warranty, for repair to the company from which he had bought it. Both parties agree that the company's carpenter, an employee of that company, will have to finish his repairs after the consumer has returned from his 3-week holidays abroad. The carpenter puts the chair meanwhile in another room because he wants to start the repairs in two weeks' time so that they will be finished by the third week. When taking the chair to his workshop in order to start working on it, he realises that meanwhile, termites had eaten up part of the chair. It is established afterwards that his client had problems with termites at his home before leaving, and that the company's premises had not been infested with termites.

It is evident that the supplier cannot be held liable for the fact that it is unable to return the item in the same condition as it was before because the damage was unforeseeable (at least for the company) because of an inherent defect of the item.

¹²⁴⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 57.

In addition, section 54 does not provide for a claim of damages, and section 65 already deals with liability for loss caused by the negligent handling of the consumer's goods.¹²⁴⁷ In these cases, the supplier should be able to escape liability, and a term providing that unforeseen or unavoidable events do not fall under the supplier's liability should be fair under item (g).

Section 18(1) escapes the assessment of regulation 44(3)(g). Since it provides that *despite any statement or notice to the contrary*¹²⁴⁸ a consumer is not responsible for any loss or damage to any goods displayed by a supplier, unless the consumer acted in gross negligence or recklessness, malicious behaviour or criminal conduct, it is an underogable provision. The rationale behind this provision is that it would be unfair to transfer this risk of damage onto consumers as they have no control over how such goods have been displayed. The display itself could be not stable and secure, or already damaged. Displayed goods often serve as 'samples' to be presented to potential clients. It is not rare that displayed goods already have some wear and tear because clients often try out the products they wish to buy. This is coherent with section 19(5) according to which consumers must be granted the opportunity to examine the goods to ascertain whether the goods correspond with the sample or description on the basis of which they were bought.¹²⁴⁹ It would be unfair to hold the consumer liable by merely putting a notice by which the supplier passes the risk onto its customers.

3.4.2 Terms granting the supplier unilateral powers and rights

a) Price increase clauses

Terms allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement are presumed to be unfair by virtue of regulation 44(3)(h).

¹²⁴⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 57.

¹²⁴⁸ Emphasis added.

¹²⁴⁹ De Stadler 'Section 18' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

The grey- or blacklisting of price increase clauses is ubiquitous in other legislation, such as the EC Directive on unfair contract terms,¹²⁵⁰ the German BGB,¹²⁵¹ the Austrian KSchG¹²⁵² or the Dutch BW.¹²⁵³

The reason for greylisting price increases is that the initially stipulated price between the parties – a core term – is usually all consumers reasonably expect to pay. They are also unlikely to focus on terms that allow for price increases.¹²⁵⁴ The OFT notes that ‘if a contract is to be considered balanced, each party should be sure of getting what they were promised in exchange for providing the ‘consideration’ they agreed to provide.¹²⁵⁵ Therefore, clauses under which suppliers can unilaterally increase their prices without giving their consumers the possibility to cancel the agreement are usually unfair. This especially applies when the clause does not contain clear indications as regards the *modus operandi* for the calculation of the new price and the events triggering the price increase. Clauses which refer to precise events might be unfair too, especially if the consumer is less able to anticipate and control the relevant factors than the suppliers. Clauses allowing for price increases because of ‘increased labour or material costs’, or indicating ‘costs as a result of industrial dispute’, ‘external factors beyond the supplier’s control’ or ‘price increases by the supplier’s subcontractors’ should be qualified as unfair. This applies particularly if they do not allow the consumer to cancel the agreement. In addition, the consumer is less able in these cases to control and anticipate such changes than the supplier.¹²⁵⁶ On the other hand, increases in VAT are entirely beyond the supplier’s control and not unfair under regulation 44(3)(h) as they apply to everyone, are publicly known and verifiable.¹²⁵⁷

¹²⁵⁰ According to **item (l) of the Annex of the Directive**, terms that ‘provide[...] for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded’ may be unfair.

¹²⁵¹ **§ 309 no. 1 BGB**: ‘[A] provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract [is ineffective]; this does not apply to goods or services delivered or rendered in connection with continuing obligations.’

¹²⁵² **§ 6(2) no. 4 KSchG**: Provisions by which ‘the entrepreneur is entitled, on demand, to payment of a consideration higher than that originally specified for a performance which has to be rendered by him within two months of entering into the contract’ are not mandatory. Official translation of the Austrian Federal Chancellery available at https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1979_140.

¹²⁵³ **Article 6:236(i) BW**: ‘[A] stipulation which gives the user the right to increase the agreed price within three months after the conclusion of the contract, unless the counterparty is contractually entitled to rescind the contract in the event that the user exercises this right’ is unreasonably burdensome for the consumer.

¹²⁵⁴ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 61.

¹²⁵⁵ OFT *Unfair Contract Terms Guidance* (2008) para 12.1 at 57.

¹²⁵⁶ OFT *Unfair Contract Terms Guidance* (2008) para 12.3 at 67, Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 61.

¹²⁵⁷ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 62.

It is suggested that the consumer should be able to cancel the agreement without any penalty or inconveniences. Otherwise, any obstacle would make the consumer reconsider his or her position and eventually convince him or her not to cancel (e.g., because this would be too complicated in terms of ‘red ink’ or formalities, or the penalty would come close to the price to be paid if the contract would have been pursued). In this case, the supplier could circumvent item (h) and *de facto* increase its prices at will.

It is furthermore submitted that a clause giving the consumer the right to cancel the agreement in terms of item (h) should be drafted as unambiguously as possible and that the possibility to cancel the agreement should be ‘physically’ linked to the price increase clause and not hidden elsewhere. At least there must be an apparent reference in the price increase clause to the applicable cancellation clause. Therefore, clauses permitting a cancellation without expressly referring to a price increase after the conclusion of the agreement should be considered unfair because the consumer cannot be expected to assess the agreement like a lawyer. This is also a question of plain language in terms of section 22.

This does however not mean that suppliers are totally bound to their previously agreed prices and have no flexibility. The OFT argued that where the supplier specified the level and timing of any price increases (within narrow limits), or where increases were linked to a relevant published price index, such price increase clauses might be fair.¹²⁵⁸

According to the OFT, a price variation clause is not necessarily fair because it is not discretionary. This is the case, for instance, where the supplier reserves a right to increase its prices in order to cover increased costs it experienced.¹²⁵⁹ In such a case, the rise in costs is beyond the supplier’s control.

Regulation 44(4)(b) provides for some exceptions in which item (h) does not apply. This is the case for transactions in transferable securities, financial instruments or other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, or to an agreement for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency, or a price fluctuation clause, where lawful, but the method by which prices vary must be explicitly described.

¹²⁵⁸ OFT *Unfair Contract Terms Guidance* (2008) para 12.4 at 58.

¹²⁵⁹ OFT *Unfair Contract Terms Guidance* (2008) para 12.3 at 67.

These exceptions are legitimate because they are beyond the supplier's control when operating in uncertain markets which contain variable pricing elements. This is certainly the case of 'fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control' but also of 'money orders denominated in foreign currency' and 'price index clauses'.¹²⁶⁰ It should be emphasised that clauses mentioned in subregulation (4)(b) are likely to be fair, such terms remain subject to sections 48 to 52 according to regulation 44(2)(c).

Naudé correctly asserts that price increase clauses *without* the possibility to cancel the agreement may be valid if the factors for price increases are brought to the consumer's attention, such clause is prominent, and there is actual and informed consent to it. This is the case when the price increase is calculated in a way the consumer reasonably can expect.¹²⁶¹ The exception contained in regulation 44(4)(b)(iii) speaks for this point of view.

Other countries outrule price increases before a certain period has elapsed. § 309 no. 1 BGB prohibits price increases within four months after the conclusion of the contract, for instance.¹²⁶² Naudé contends that such a definite time scale seems unwise, and prefers the approach of greylisting.¹²⁶³ On the other hand, such a fixed time scale gives certainty to the consumer, and is not too long for the supplier so that it can adjust its prices when necessary.

Since section 5(2)(d) excludes the application of the Act for credits which are governed by the National Credit Act, price increase clauses in such credit agreements, e.g., for interest and fees, are not covered by regulation 44(3).¹²⁶⁴

b) Unilateral variation clauses

Under regulation 44(3)(i), clauses enabling the supplier to unilaterally alter the terms of the agreement, including the characteristics of the product or service are presumed to be unfair.

¹²⁶⁰ See reg 44(4)(b)(i)-(iii).

¹²⁶¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 62.

¹²⁶² Other countries chose different time scales: 2 months (§ 6(2)(4) Austrian KSchG), or 3 months (art 6:236(i) Dutch BW).

¹²⁶³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 60 note 3.

¹²⁶⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 63.

The EC Directive on unfair contract terms contains two similar items,¹²⁶⁵ as well as §§ 308 no. 4 BGB and 6(2) no. 3 KSchG.¹²⁶⁶ In the two latter cases, however, an alteration clause is fair if the consumer can reasonably expect such an alteration.¹²⁶⁷

The reason for greylisting such terms is that a contract can be considered balanced only if both parties are bound by their obligations as agreed. If one party can alter the terms unilaterally, this balance is disturbed in favour of the party which alters the terms.¹²⁶⁸ Otherwise, a consumer could be forced to accept increased costs, reduced benefits or other commercial reasons.¹²⁶⁹ A simple corrective for this disturbed balance could be the right to cancel the agreement¹²⁷⁰ and to claim compensation.¹²⁷¹ It is my suggestion though that the legislator did not insert the phrase 'without giving the consumer the right to terminate the agreement' as it did in item (h) because it wanted to put the bar higher for the supplier. Contrary to item (h), it is thus not necessarily sufficient to give the consumer the right of cancellation in order to make a variation clause fair.

It is further submitted that even if the consumer agrees to certain variations, this does not necessarily make them fair because often he or she cannot ascertain if the changes are made because of mandatory requirements or purely for commercial reasons.

As the price is also a term, even a core term, of any agreement, it is submitted that subregulation 44(3)(h) is *lex specialis* to subregulation 44(3)(i).

Pursuant to regulation 44(4)(c), paragraph (i) of regulation 44(3) does not apply to a term under which a supplier of financial services reserves the right to alter the interest rate payable by the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier informs the consumer immediately thereof, and the

¹²⁶⁵ Pursuant to **item (j) of the EC Directive**, terms may be ineffective that 'enabl[e] the (...) supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract', and according to **item (k)**, terms may be ineffective that 'enabl[e] the (...) supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided'.

¹²⁶⁶ KSchG = Konsumentenschutzgesetz (Austrian Consumer Protection Code).

¹²⁶⁷ **§ 308 no. 4 BGB**: '[T]he agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account' [is ineffective]. **§ 6(2) no. 3 KSchG**: The consumer shall not be bound by a stipulation whereby 'the entrepreneur may unilaterally alter or vary the performance to be rendered by him, unless the consumer may be reasonably expected to accept the alteration or variation, particularly because it is negligible and factually justified'.

¹²⁶⁸ See OFT *Unfair Contract Terms Guidance* (2008) para 10.1 at 52.

¹²⁶⁹ OFT *Unfair Contract Terms Guidance* (2008) para 10.2 at 52.

¹²⁷⁰ Van Eeden and Barnard *Consumer Protection Law* 271.

¹²⁷¹ Naudé 2007 *SALJ* 151.

consumer can dissolve the agreement at the earliest opportunity. Furthermore, this provision does not apply to a transaction in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, as well as to an agreement for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency, and a term under which the supplier reserves the right to unilaterally alter the conditions of an open-ended agreement, provided that he forthwith informs the consumer thereof and the latter can dissolve the agreement immediately.

The reasons for these exemptions of the application of item (i) are similar to those discussed under item (h), i.e., they concern factors beyond the supplier's control. However, the wording of regulations 44(4)(b) and (c) is not identical. Firstly, regulation 44(4)(c)(i) applies to terms concerning financial services offered by a supplier and interest payable by a consumer. Item (b) does not contain such a provision. It is suggested that the legislator wanted to distinguish between the price payable for specific products or services for which the price is the consideration for this product or service, and the 'price' payable for financial services in the form of interest.

Secondly, regulation 44(4)(c)(iv) applies to open-ended agreements, i.e., contracts of indeterminate duration,¹²⁷² a provision which is not found in regulation 44(4)(b). As a consequence, a clause by which the supplier reserves the right to alter the conditions of an open-ended agreement unilaterally is not greylisted, whereas a clause by which he or she may increase the price agreed upon in an open-ended contract when the agreement was made, without giving the consumer the possibility to cancel the agreement, is greylisted. Therefore, suppliers seem to be able to alter the conditions of an open-ended agreement more easily than the price payable for such an agreement. However, the fact that the supplier must inform the consumer of the alteration in advance and that the consumer has the right to cancel the agreement immediately puts both items on the same level of the 'obstacles' the supplier has to overcome to make such a clause fair.¹²⁷³ It is furthermore suggested that 'conditions' in regulation 44(4)(c)(iv) is equivalent to 'terms of the agreement' in regulation 44(3)(i) and does not include price alterations, which are already covered by item (h). It should also cover the 'characteristics of the product or service' mentioned in item (i). The formulation 'including the

¹²⁷² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 64.

¹²⁷³ Regulation 44(4)(c)(iv)(aa) and (bb).

characteristics' in item (i) speaks for this broad interpretation. What is more, the legislator would probably have chosen only one of the expressions of regulation 44(3)(i) if he had wished a more restrictive application of regulation 44(4)(c)(iv).

Several types of long-term agreements are excluded from the application of the Act. These are, e.g., employment contracts¹²⁷⁴ and long-term insurance contracts.¹²⁷⁵

Thirdly, regulation 44(4)(b)(iii) refers to price-indexation clauses, a provision that cannot be found in item (c) of regulation 44(4). The reason for this provision is evident because regulation 44(4)(b) refers to price increases set out in regulation 44(3)(h), whereas there is no need for such a price-index clause in item (i) of subregulation (3) as the latter refers to the terms of an agreement, including the characteristics of a product or service. When interpreted widely, the price payable is also part of the terms of an agreement, but here item (h) of subregulation (3) is *lex specialis* to item (i) of the same subregulation.

The discussion above is of theoretical nature though because since 28 February 2014, transactions, functions or acts subject to Financial Services Board Legislation have been excluded from the scope of application of the Act.¹²⁷⁶

An example for regulation 44(3)(i) is a term by which the supplier, for commercial reasons, reserves the right to deliver a flat-screen TV with different technical characteristics (e.g., a plasma instead of an LED screen) or with different loudspeakers, rather than a term granting the supplier that right in cases where the ordered television set is no longer available on the market and giving the consumer the possibility to terminate the contract without penalty or charge if he chooses not to accept the variation of the terms in question.

The second alternative in the example mentioned above is likely to be fair in terms of regulation 44(3)(i) because it has a restricted effect. It can thus not be used to change the balance of advantage under the contract. Such a term is narrow enough if it allows a modification in the wording of the terms to reflect changes in the legal requirements, or new industry standards and codes of practice. In addition, the reason for the exercise of such a variation must be clearly

¹²⁷⁴ See s 5(2)(e).

¹²⁷⁵ Schedule 2 item 10 read with s 1 s.v. 'service' (c)(ii).

¹²⁷⁶ Section 28 of the Financial Services Board Act 97 of 1990 as amended by s 66 of the Financial Services Laws General Amendment Act 45 of 2013, read with GN 120 in GG 37357 of 28 February 2014.

spelled out and specifically ensure that the supplier cannot take advantage of them. The supplier must also give notice of any variation and grant a right of cancellation without penalty.¹²⁷⁷

The OFT takes the view that a 'reasonableness qualification', i.e., terms which allow amendments only 'when reasonable', are generally too extensive to save a variation clause. This applies unless it will be apparent to a consumer what amendments under what circumstances the wording allow. This is the case, according to the OFT, 'where fair-minded persons in the position of the consumer and supplier would be likely to share a common view as to what would be "reasonable" – for example, where a "reasonable charge" clearly means a charge sufficient to meet specific open-market costs.'¹²⁷⁸ Where on the contrary, the criteria for the determination of reasonableness are imprecise or aim to protect the supplier's commercial interests, it will be able to change the bargain to the detriment of the consumer solely on the basis that it wants to protect its profit margins.¹²⁷⁹ Interestingly, the OFT referred to a common view of the consumer *and* the supplier, and not only to the consumer's view. It is suggested that this position narrows down the application of 'reasonableness qualifications' and ensures a fair balance between the parties' interests.

For instance, at the OFT's initiative, the clause

'The University may change any of these regulations from time to time as it sees fit.'

was redrafted as follows:

'The University may change any of these academic and other Regulations in order to assist the proper delivery of education, and these changes will normally come into effect at the beginning of the next academic year. The University reserves the right to introduce changes during the academic year when it is in the interests of students.'

The redrafted clause has narrowed down the scope of alteration, which can only be effected when reasonable motifs exist.

Naudé is of the opinion that the wording of the provisions of the greylist of the EC Proposal for a Consumer Rights Directive that are equivalent to regulation 44(4)(c)(i)(aa) and (bb) is

¹²⁷⁷ See OFT *Unfair Contract Terms Guidance* (2008) para 10.3 at 52.

¹²⁷⁸ OFT *Unfair Contract Terms Guidance* (2008) para 10.5 at 53. Open-market costs are those which originate in the absence of tariffs, taxes, licensing requirements, subsidies, unionisation and any other regulations or practices that interfere with the natural functioning of the free market. See 'Investopedia' s.v. 'open market' at <http://www.investopedia.com/terms/o/open-market.asp>.

¹²⁷⁹ OFT *Unfair Contract Terms Guidance* (2008) para 10.4 at 53.

preferable to the current South African provision. The main difference between these two provisions is that the words ‘immediately’ and ‘at the earliest’ opportunity’ have been interchanged by the South African legislator. Unfortunately, Naudé does not give any reason for her view, but correctly points out that the current wording only has a limited practical impact because of the exclusion of transactions or acts subject to the Financial Services Board Legislation from the ambit of the Act since 28 February 2014.¹²⁸⁰

In terms of regulation 44(3)(i), also unilateral alterations of the characteristics of the product or service fall under this provision as the consumer should receive what he has bought, and not merely something similar.¹²⁸¹ Variation clauses allowing minor technical amendments which do not affect the performance of the product, or amendments required by law should not be considered unfair.¹²⁸² As long as the consumer understands that other terms allow for other amendments than the ones above and entirely agrees to them, those should be fair. This applies under the condition that the contract clearly spells out what kind of variations might be made in what circumstances and to which extent. It is submitted that in spite of terms respecting those considerations, terms should be considered unfair if the products or services are substantially different from what the consumer has ordered.¹²⁸³ This is most likely the case where the supplier’s terms allow the delivery of another car model than ordered or even the same car model but with another motor (e.g., diesel instead of petrol). It is proposed that a product or a service is substantially different if the difference is so significant that a bystander would consider the concerned product or service so different from the one which the consumer had contracted so that one reasonably cannot speak of the same product. This has to be assessed on a case-to-case basis because for more personal objects, changes that could be qualified by outsiders as minor could be substantial for the consumer in question. A client who wants to add a specific train model to her model railway where all trains are made of metal will perceive a plastic train as substantially different, even if it has the same size and colour, the same technical specifications and is the exact replica of the original train. The OFT stated that ‘[c]onsumers are legally entitled to expect satisfactory quality in goods and services, but this does not mean that it is fair to reserve the right to supply something that is not what was agreed but is of equivalent standard or value.’¹²⁸⁴ A statement of reasons can in no circumstances justify

¹²⁸⁰ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 66.

¹²⁸¹ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 70.

¹²⁸² See OFT *Unfair Contract Terms Guidance* (2008) para 11.3 at 54.

¹²⁸³ See OFT *Unfair Contract Terms Guidance* paras 11.5 and 11.6 at 55.

¹²⁸⁴ OFT *Unfair Contract Terms Guidance* (2008) para 11.2 at 54.

making the consumer pay for a product or service materially different from what he or she agreed to purchase.¹²⁸⁵ What is more, the possibility for the consumer to cancel an agreement with substantially altered terms does not make it fair. The consumer should not be in the situation where he or she has to choose between accepting the given product or service which he or she had not agreed to initially, or refusing it and suffering the inconvenience of not getting what he immediately needed, just because it is more convenient for the other party not to supply what was initially agreed.¹²⁸⁶

The formulation in the Austrian KSchG covers this sort of situations because variation clauses are not binding on the consumer 'unless the consumer may be reasonably expected to accept the alteration or variation, particularly because it is negligible and factually justified'. This is a much better formulation than the one in the BGB where a variation is of no effect 'unless the agreement of the modification (...) can reasonably be expected of the [consumer] when the interests of the [supplier] are taken into account'. Item (i) of regulation 44(3) should be amended accordingly.

It is arguable if also improvements of a product or service are a unilateral alteration of characteristics of a product or service under regulation 44(3)(i). After all, improvements cannot be unfair at first sight. The wording of this provision covers all kinds of alterations, however, and does not provide for any distinction between alterations which simply make the product or service different from what was ordered and those which improve or worsen the product or service in question. In most cases though, terms allowing for a change for the worse will most likely be unfair. This is the case, for example, where a supplier changes the material of its toasters from metal to plastic in order to protect its margin.

It is suggested that one solution could consist in taking a more subjective stance, for instance, by distinguishing between visible and non-visible improvements which could affect what the consumer had in mind when ordering the product.

Example: A consumer has ordered a new flat-screen TV. In a first scenario, the supplier's terms allow the delivery of another TV set of which the exterior is made of another material, e.g., aluminium instead of PVC. Aluminium is certainly a better product than PVC in terms of robustness and value. However, it changes

¹²⁸⁵ OFT *Unfair Contract Terms Guidance* (2008) para 11.6 at 55.

¹²⁸⁶ OFT *Unfair Contract Terms Guidance* (2008) para 11.7 at 55.

the exterior of the TV to an extent that the consumer might be disturbed, because it would not fit with his other multi-media devices which are all made of PVC, or for other reasons related to his or her taste (the same applies to the example above, only that a metal train is delivered instead of a plastic one, and all other miniature trains of the consumer are of plastic). In a second scenario, the supplier's terms allow the delivery of the same TV model but it is equipped with more technical options and more USB ports.

In this case, terms allowing for visible improvements were considered unfair if the contract does not set out clearly what kind of variations might be made in what circumstances and to which extent. On the other hand, improvements that are not or barely visible would be fair as it would not be reasonable to reject an improved product where the alterations are (almost) invisible.

This solution is quite unsatisfactory though as it does not take into account the supplier's interests. Therefore, it is recommended that the stance of the BGB and the KSchG is taken. Hence, the alteration (improvement) of the characteristics of the product or service is considered fair if the consumer should reasonably expect it. The EC Directive's formulation achieves the same purpose by requiring a 'valid reason' for the alteration. This corresponds with the 'reasonableness' requirement in § 308 no. 4 because where a modification of the performance is reasonable, there is a 'valid reason' for it.¹²⁸⁷ Contrary to item (j) in the EC Directive, this 'valid reason' needs not to be specified in the contract if the alteration concerns the characteristics of the product or service. A balancing test between the supplier's and the consumer's interests ensures a fair consideration of the parties' interests though and should therefore apply.¹²⁸⁸ If the supplier does not produce plastic trains anymore, for instance, or the kind of plastic has been outlawed, the consumer can be expected to accept the alteration.

c) Determination of conformity and right of interpretation

According to regulation 44(3)(j), a term is presumed to be unfair if it gives the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or gives the supplier the exclusive right to interpret any term of the agreement.¹²⁸⁹

Item (m) of the EC Directive on unfair contract terms contains a similar item.

¹²⁸⁷ Stöffels *AGB-Recht* 329. The BGH also sometimes refers to a 'valid reason', e.g., in BGH *NJW* 2005, 3420 (3421).

¹²⁸⁸ WLP/Dammann § 308 no. 4 para 22 *et seq.*

¹²⁸⁹ Item (m) of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993 has the same wording as reg 44(3).

The rationale of the greylisting of such a term is that if a supplier reserves the right to decide whether it has fulfilled his or her obligations set out in the agreement, it can unfairly refuse to acknowledge that it has not fulfilled them.¹²⁹⁰ The effect of such clauses is comparable to provisions that unfairly exclude liability for unsatisfactory goods and services.¹²⁹¹

The wording of this item could be misunderstood as by the determination whether or not there is conformity with the agreement, a broad interpretation must be applied. ‘Conformity’ not only applies to the quality of the goods or services and their description in the agreement or according to section 18(3) but also to the question of whether the supplier has fulfilled all its other obligations under the contract, which is a question of breach.¹²⁹² The corresponding provision in the Australian Consumer Law providing that ‘a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning’ is unfair is therefore preferable.¹²⁹³ For lawyers, the term ‘conformity’ in this context is unlikely to pose any problems. As stated further above, the Consumer Protection Act should nonetheless be written in plain and understandable language in order to be accessible for non-lawyers.

In any event, a term which provides that the supplier has the final decision whether the goods or services supplied are in conformity with the agreement would be contrary to sections 18(3), or section 55 or section 56, read with section 51(1). These provisions grant non-derogable rights pursuant to section 51. When a consumer purchases goods solely on the basis of a description or sample, or both, these goods must conform to their description or sample, and the goods delivered must in all material respects correspond to that which an ordinarily alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample.¹²⁹⁴ According to sections 55 and 56, the consumer has the non-derogable right to demand quality service and safe, good quality goods.

An example of such a greylisted term would be a clause which gives the supplier the right to carry out its own tests or inspections in order to determine whether the client’s complaint is well-founded. Such terms would be a restriction of the consumer’s right to declare a dispute as

¹²⁹⁰ Van Eeden and Barnard *Consumer Protection Law* 294. See also OFT *Unfair Contract Terms Guidance* (2008) para 13.1 at 59.

¹²⁹¹ OFT *Unfair Contract Terms Guidance* (2008) para 13.2 at 59.

¹²⁹² Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 71.

¹²⁹³ Section 25(1)(h) of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act, 2010). Such a term is not greylisted in terms of the Australian legislation but unfair *per se*.

¹²⁹⁴ Section 18(3).

to whether the supplier has performed its part of the agreement. In this case, the supplier would be the judge in its own affair and confer a judicial authority which normally is performed by the courts.¹²⁹⁵ On the other hand, a term providing for independent inspection or testing for the final decision whether or not the supplier was in breach of contract would most probably be considered fair. This applies under the condition that the consumer has not to bear the costs for such inspection if it was well-founded.¹²⁹⁶ Compulsory arbitration clauses may be unfair under regulation 44(3)(x) though unless such arbitration is provided for by the Act or other legislation. This means that a clause by which the supplier has the right to construe the contract unilaterally may be fair if disputes must be referred to an accredited industry ombud.¹²⁹⁷

A term which does not give the supplier the *exclusive* right to determine whether it is non-compliant with the terms of the agreement may be considered fair, e.g., if it refers the dispute to an accredited industry ombud. It is however suggested that such a term should be formulated in a fashion that does not give the supplier the *final* decision. Otherwise, it would be able to circumvent paragraph (j) of regulation 44(3) by simply agreeing on an intermediary step, i.e., the ombud's intervention, without being obliged to follow its decision. Unlike section 25(1)(b) of the Australian Consumer Law¹²⁹⁸ mentioned above which declares terms unfair that permit one party *unilaterally*¹²⁹⁹ to determine whether the contract has been breached or to interpret its meaning, regulation 44(3)(j) does not contain any adjective or adverb, such as 'unilateral(ly)', 'exclusive(ly)' or 'final(ly)', in terms of the determination of whether the supplier was in breach. Only in terms of the interpretation of the agreement, terms that give the supplier the *exclusive*¹³⁰⁰ right of interpretation are greylisted. Item (j) should thus be amended as follows:

‘(j) giving the supplier the *final or exclusive*¹³⁰¹ right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the *final or exclusive* right to interpret any term of the agreement’¹³⁰²

A term giving the supplier the exclusive right to construe any term of the agreement is presumed to be unfair because it deprives the consumer of the possibility of recourse of an

¹²⁹⁵ Van Eeden and Barnard *Consumer Protection Law* 293 and 294.

¹²⁹⁶ Example from OFT *Unfair Contract Terms Guidance* (2008) para 13.3 at 59.

¹²⁹⁷ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 74.

¹²⁹⁸ Schedule 2 to the Competition and Consumer Act, 2010.

¹²⁹⁹ Emphasis added.

¹³⁰⁰ Emphasis added.

¹³⁰¹ Emphasis added for a better understanding of the proposed amendment.

¹³⁰² Suggested changes emphasised.

impartial adjudicator.¹³⁰³ Otherwise, the supplier could interpret the term in a way that is advantageous for it. It is submitted that the same arguments as presented above apply to the interpretation of the terms, which is why the aforementioned suggested change of paragraph (j) should also include the interpretation. One should note that terms referring the matter to an independent arbitrator or expert, or compulsory arbitration clauses which involve sums below or above a certain threshold may be unfair. This is the case in the United Kingdom where the threshold is currently at GBP 5,000.¹³⁰⁴ The South African Arbitration Act¹³⁰⁵ does not contain such a provision. However, it should be considered to assess unfairness under section 48 (2)(b), especially when relatively small sums trigger high arbitration costs.¹³⁰⁶

d) Unequal termination rights

A term allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer is potentially unfair in terms of regulation 44(3)(k).¹³⁰⁷

The EC Directive on unfair contract terms contains a similar item.¹³⁰⁸

The reason for greylisting such terms is their excessive one-sidedness, which is a criterion for unfairness in section 48.¹³⁰⁹ In the view of the OFT, '[f]airness and balance requires that suppliers and consumers are on an equal footing as regards rights to end and withdraw from a contract.'¹³¹⁰ This does not mean that merely the absence of reciprocity is the only factor that makes such terms potentially unfair.¹³¹¹ In most cases, the consumer, although having an equal right to cancel the contract, might suffer adverse consequences in the case of a termination by the supplier. This is the case, for instance, where he or she is unable to purchase easily similar goods or services after a cancellation by the supplier. A high-quality catering service preparing exotic food and a special wedding cake for a very exclusive wedding which cancels its agreement with its clients a couple of days before the event is very unlikely easily replaceable.

¹³⁰³ Van Eeden and Barnard *Consumer Protection Law* 294.

¹³⁰⁴ Section 1991 of the UK Arbitration Act, 1996.

¹³⁰⁵ 42 of 1965.

¹³⁰⁶ See discussion on item (x) *infra*.

¹³⁰⁷ This item is based on the wider **item (f) of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC** of 5 April 1993 which also encompasses clauses allowing the supplier to cancel the contract for any breach. This item greylists clauses 'authorising the (...) supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the (...) supplier to retain the sums paid for services not yet supplied by him where it is the (...) supplier himself who dissolves the contract'.

¹³⁰⁸ According to **item (f) of the EC Directive**, terms 'authorising the (...) supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer (...)' may be unfair.

¹³⁰⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 75.

¹³¹⁰ OFT *Unfair Contract Terms Guidance* (2008) para 6.1.1 at 43.

¹³¹¹ Naudé 2007 *SALJ* 150 and 153.

The clients will most probably have problems to find a similarly specialised catering service offering the same quality in a short period of time. A clause which allows the cancelling of such an agreement at will is thus unfair, despite the fact that the consumer is granted the same right.

Regulation 44(3)(k) does not apply to clauses which allow a termination of the contract for stated reasons, like breach. A cancellation clause – or *lex commissoria*¹³¹² – allowing termination for even minor breach, or a provision allowing a termination based on imprecisely worded general grounds, have to be assessed under section 48. Then the consumer will carry the risk of non-persuasion however as such clauses are not contained in the greylist. Some pieces of legislation set out criteria which have to be met before a contract may be cancelled, such as the Hire-Purchase Act,¹³¹³ the Alienation of Land Act¹³¹⁴ and the National Credit Act.¹³¹⁵ Then a cancellation by the supplier merely reflects the ordinary law and should be qualified as a cancellation *ex lege* and not as one *ex contractu*.¹³¹⁶

In the view of the OFT, a clause which does not merely allow the supplier to cancel at will (i.e., a non-discretionary clause) may be fair if it would be impractical or impossible to complete the contract. Such a clause must clearly and specifically describe the circumstances in which the supplier may cancel, and require that the supplier find out and inform the consumer as soon as possible if such circumstances do apply. It must also explain the reasons for the cancellation if they are not obvious. The circumstances must be beyond the supplier's control. In these cases, it may also be fair only to return prepayments without any further liability.¹³¹⁷

It is suggested however that the termination of a contract based on a term containing the aforementioned circumstances can never be 'at will' in terms of regulation 44(3)(k). The phrase 'at will' implies that no reasons whatsoever need to be given and that the supplier is completely free in terms of its decision to cancel.¹³¹⁸ On the other hand, where the conditions mentioned

¹³¹² A forfeiture clause entitles the creditor to cancel the contract if the debtor fails to perform by the time fixed for performance. Such a clause is enforceable. See Christie and Bradfield *Law of Contract* 534, Vessio *LLD thesis* 425. Vessio points out that the meaning of the term *lex commissaria* has been widened through trade usage and nowadays encompasses all kinds of cancellation clauses, whereby the use of 'forfeiture clause' is reserved for certain kinds of clauses in relation to specific forfeiture of payments for breach. See Vessio *LLD thesis* 425 and 426 note 2537.

¹³¹³ 36 of 1942, s 12(b).

¹³¹⁴ 68 of 1981, s 19.

¹³¹⁵ 34 of 2005, s 123.

¹³¹⁶ Vessio *LLD thesis* 429.

¹³¹⁷ OFT *Unfair Contract Terms Guidance* (2008) para 6.1.5 at 44.

¹³¹⁸ 'At will' is defined in dictionaries as follows: 'at one's own desire, inclination, or choice'. See 'at will' at <http://www.collinsdictionary.com/dictionary/english/at-will>.

above must be fulfilled in order to cancel, the contract is not terminated 'at will' but under certain conditions. This is admittedly more of a linguistic point without any practical impact.

Clauses permitting the supplier to cancel for vaguely defined reasons or following a breach of contract committed by the consumer often aim to protect the supplier from problems beyond its control or serious misconduct by the consumer.¹³¹⁹ Suppliers should however avoid a drafting that is too vague and indicate the circumstances in which the agreement may be terminated.

According to regulation 44(4)(a), paragraph (k) of subregulation 44(3) does not apply to a term by which a supplier of financial services reserves the right to terminate an open-ended agreement without notice unilaterally, but the supplier is required to inform the consumer thereof immediately.

Van Eeden uncritically mentions that regulation 44(4)(a) applies to item (k),¹³²⁰ whereas Naudé correctly points out that this qualification was actually meant to qualify item (l) in regulation 44(3).¹³²¹ Item (l) which applies to open-ended agreements is, it is suggested, *lex specialis* to item (k) which applies to other agreements. For this reason, and because of the wording of regulation 44(4)(a) ('unilaterally terminate an open-ended agreement'), this exception can only apply to item (l), and the reference in paragraph (a) of subregulation 44(4) to regulation 44(3)(k) is an editorial error which should be corrected.

Note should be taken that regulation 44(3)(k) applies to agreements other than open-ended agreements (*cf.* regulation 44(3)(l)) and fixed-term agreements. For the latter, section 14(2)(b) applies in terms of cancellation. In other words, item (k) is only applicable to 'once-off' transactions, such as the purchase of a product or service which is not continual. As section 14 does not apply to juristic persons, regardless of their annual turnover or asset value, juristic persons do not seem to have the protection of section 14.¹³²²

¹³¹⁹ Van Eeden and Barnard *Consumer Protection Law* 273.

¹³²⁰ Van Eeden and Barnard *Consumer Protection Law* 273.

¹³²¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 79.

¹³²² Section 14(1).

e) Cancellation of open-ended agreements without notice by the supplier

Regulation 44(3)(l) refers to terms enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract.

An open-ended agreement is a contract of indefinite duration, i.e., without stipulating the expected duration.¹³²³ The reasons for the conclusion of such contracts are various: the parties intend, for instance, that the contract will be in force until it is terminated by notice, or that it will be in force for a reasonable period of time, and then terminate, or that it will last forever.¹³²⁴

The wording of item (l) indicates that terms which allow the supplier to terminate an open-ended agreement without reasonable notice other than for a material breach will be presumed to be unfair.¹³²⁵ The OFT took the view that if the term refers to certain ‘serious grounds’ it may be fair if the nature of such serious grounds is clearly indicated in the provision.¹³²⁶ This is the case for ‘circumstances in which there is a real risk of loss or harm to the supplier or others if the contract continues even for a short period. This is, for instance, the case if there is a reasonable suspicion of fraud or other abuse.’¹³²⁷ The formulations of Schedule 2 paragraph 1 of the UK Unfair Contract Regulation and regulation 44(3)(l) are not identical, which begs the question of whether a ‘serious ground’ can be equated with ‘breach’. Breach of contract is a civil wrong that may give rise to a duty to pay damages as compensation.¹³²⁸ Breach of contract arises if the terms of the contract are not performed at all, or performed late or performed in a wrong manner by the debtor.¹³²⁹ It is suggested that breach is therefore, in any event, a ‘serious ground’ to cancel an agreement under regulation 44(3)(l). The term ‘serious grounds’ is however somewhat more extensive than the concept of breach because the OFT also considered circumstances in which there is a real risk of loss or harm to the supplier or others if the contract continues for even a short period, e.g., where there is a reasonable suspicion of fraud or other abuse.¹³³⁰ This means that in these situations, the consumer has not yet committed a breach,

¹³²³ Hutchison *et al* *Law of Contract* 213, Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 81.

¹³²⁴ Hutchison *et al* *Law of Contract* 213. Certain contracts are legally incapable of enduring forever, e.g., the contract of lease which has the essential feature that the lessor only temporarily parts with the use and enjoyment of the thing. See *Davids v Van Straaten* 2005 (4) SA 468 (C) at 481.

¹³²⁵ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 80, Van Eeden and Barnard *Consumer Protection Law* 290.

¹³²⁶ OFT *Unfair Contract Terms Guidance* (2008) para 7.4 at 47.

¹³²⁷ OFT *Unfair Contract Terms Guidance* (2008) para 7.3 at 47.

¹³²⁸ Hutchison *et al* *Law of Contract* 39.

¹³²⁹ Christie and Bradfield *Law of Contract* 515.

¹³³⁰ OFT *Unfair Contract Terms Guidance* (2008) para 7.3 at 47.

but there is some serious indication that he or she will do so. If the supplier waited until the breach has been committed, it would risk being the victim of a fraud or another harm. It is therefore my submission that the term 'breach' in paragraph (l) should be extended to 'risk of breach'. This must however be clearly indicated in the supplier's standard terms, and the risk must be sufficiently serious and probable.

The common law also permits the supplier to cancel without giving notice if the consumer commits a material breach. To be material, a breach must be sufficiently serious. To establish if a breach is material, several tests have been developed. For example, the breach must go 'to the root of the contract',¹³³¹ or be so serious that the creditor would probably not have entered into the contract had he foreseen the breach, or the debtor failed to perform a 'vital part'¹³³² of his obligations or an 'essential'¹³³³ or 'material' term of the contract.¹³³⁴ In these cases too, the breach must already have been committed.

The exception regulated in regulation 44(4)(a) has already been discussed earlier. Despite this exception, the consumer can still bring forward that such term is unfair under section 48 as pursuant to regulation 44(2)(c), a term which falls within the ambit of subregulation (4) remains subject to sections 48 to 52 of the Act.

The EC Unfair Terms Directive¹³³⁵ and the UK Unfair Terms in Consumer Contracts Regulations¹³³⁶ require 'a valid reason' for cancelling before the term falls within the exception. It is therefore suggested that the exception of regulation 44(4)(a) is less strict for the supplier than the EC Unfair Terms Directive and the UK Regulations because it does not require a 'valid reason' to cancel the banking or credit contract without notice. On the other hand, according to the UK regulation, there might be no need for a notice to the consumer, especially in circumstances in which a risk of significant detriment to the consumer is unlikely.¹³³⁷

In the OFT's view, such a term should not be drafted in a manner that could in practice be used arbitrarily to suit the supplier's interests.¹³³⁸ There is no valid reason if the consumer is

¹³³¹ *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) 784.

¹³³² *Aucamp v Morton* 1949 (3) SA 611 (A).

¹³³³ As to a material breach of an essential term see Christie *Law of Contract* 535-538, with further references.

¹³³⁴ *Hutchison et al Law of Contract* 295.

¹³³⁵ EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993, Annex under no. 2 item (a) read with no. 1 item (g).

¹³³⁶ SI 1999/2083.

¹³³⁷ Schedule 2 para 2. See OFT *Unfair Contract Terms Guidance* (2008) para 7.5 at 48.

¹³³⁸ OFT *Unfair Contract Terms Guidance* (2008) para 7.5 at 48.

confronted with 'an unexpected and unacceptable change in his or her position'.¹³³⁹ Regulation 44(4)(a) does not require a valid reason and is hence less consumer-friendly. It is suggested that the fact that the supplier must inform the consumer of its cancellation immediately cannot balance the fact that the cancellation can be done without a valid reason.

Moreover, it would have been less harsh if at least regulation 44(4)(a) required a 'reasonable' notice, or a notice expressed in days as it is the case in section 14(2)(b)(ii).¹³⁴⁰ It is difficult to comprehend why the supplier has to give notice in the case of section 14, where the consumer commits a 'material failure' to comply with the agreement, whereas the supplier may unilaterally terminate the agreement under regulation 44(4)(a) at will, without a valid reason. This is clearly a systemic imbalance which should be corrected. At least, the supplier should only be able to cancel the agreement without notice where there are serious grounds for doing so, for instance, reasonable suspicion of fraud or other abuse.

As discussed further above, transactions or acts subject to Financial Services Board Legislation are excluded from the scope of the Act since 28 February 2014.¹³⁴¹ The exception of regulation 44(4)(a) is thus of limited practical application.

f) Obliging the consumer to perform although the supplier is in default

In terms of regulation 44(3)(m) a term is presumed to be unfair if it has the purpose or effect of obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations.

Item (m) belongs to the category of terms which exclude or limit the consumer's legal rights against the supplier in the event of breach.¹³⁴² Such terms are greylisted because otherwise, the essence of the contract would be destroyed if one party were allowed to fail to perform while the other is held to its bargain.¹³⁴³ Such an imbalance exists, for instance, where the supplier does not deliver the sold goods or services, and the consumer has to pay nonetheless.

Item (m) reflects several items of the EC Unfair Terms Directive, such as items (b), (n) and (o). Regulation 44(3)(b) already covers provisions which apply to breach of contract. If the

¹³³⁹ OFT *Unfair Contract Terms Guidance* (2008) para 11.5 at 55.

¹³⁴⁰ The supplier may cancel the agreement 20 business days after giving written notice to the consumer. Note that in terms of s 14(1), s 14 does not apply to transactions between juristic persons regardless of their annual turnover or asset value.

¹³⁴¹ Section 28 of the Financial Services Law Board Act 97 of 1990, as amended by s 66 of the Financial Services General Amendment Act 45 of 2013.

¹³⁴² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 86.

¹³⁴³ Van Eeden and Barnard *Consumer Protection Law* 273 and 274.

supplier fails to perform its obligations and therefore is in breach – and the breach is not due to supervening impossibility of performance, i.e., impossibility that arises after the conclusion of the contract¹³⁴⁴ – the consumer is normally entitled to suspend his or her own reciprocal performance by raising the *exceptio non adimpleti contractus*.¹³⁴⁵ Terms excluding this right thus limit the consumer's legal rights in the event of breach of contract. This would be the case, for instance, if a term requiring a consumer to pay a monthly sum for the rent of a phone although there have been long periods during which the service was unavailable.¹³⁴⁶

Item (m) covers types of clauses which affect the residual common-law principle of reciprocity which applies to contracts for the sale of goods or the supply of services. This concerns clauses by virtue of which a consumer has to continue paying even though the goods or services he or she had contracted for are not provided as agreed due to an unavoidable, unforeseen event which is not due to the supplier's fault. For the application of paragraph (m), the supplier's breach is therefore not necessary.

On the basis of the common-law rule of reciprocity of obligations that were promised in return for each other, the following scenarios are possible: If the total supervening impossibility is permanent, both obligations (e.g., delivery and payment) extinguish.¹³⁴⁷ In the case of partial impossibility to perform, the creditor generally has a choice either to accept partial performance in return for a proportionally reduced counter-performance or to terminate the contract. Then, the counter-obligation will also extinguish. Where there is a temporary impossibility, the obligation and the counter-obligation are suspended until the impossibility has disappeared. If the creditor cannot be reasonably expected to continue with the contract because the impossibility continues for a period too long, the creditor may nevertheless choose to terminate the contract, in which case the counter-obligation will be extinguished.¹³⁴⁸ A lessor, for

¹³⁴⁴ Hutchison *et al Law of Contract* 383.

¹³⁴⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 86. The underlying principle of the *exceptio non adimpleti contractus* is that the parties have the expressed or unexpressed common intention of reciprocity (*do ut des*), i.e., an exchange of performances (e.g., goods in exchange of money). The *exceptio* serves as a defence for the defendant who is sued by a plaintiff who has not yet performed or tendered to perform. See Christie and Bradfield *Law of Contract* 437.

¹³⁴⁶ Example from Law Commission of England and Wales and Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scon Law Com No 199) (2005) at 191.

¹³⁴⁷ Two requirements must be met so that in the case of supervening impossibility of performance the contract can be terminated: Firstly, the performance must be objectively impossible (i.e., nobody can tender the agreed performance, by applying a 'standard of society' where, e.g., it would be too expensive to retrieve the given object of the contract, or performance has become illegal), and secondly, the impossibility must be unavoidable by a reasonable person (i.e., the impossibility must be due to an event which was objectively beyond the debtor's control). See Hutchison *et al Law of Contract* 383 and 384.

¹³⁴⁸ Hutchison *et al Law of Contract* 385 and 386.

example, cannot be expected to continue paying the full amount of rent without deduction until the end of the lease period if the rented house becomes uninhabitable after being damaged or destroyed by an unavoidable, unforeseen event, or *vis maior*.¹³⁴⁹ Such a term would fall under item (m), and not under item (b) since there is no need for a breach of contract.

According to the OFT, a term which gives the supplier the right to suspend its services may be fair where the consumer is exempted from paying during periods of suspension¹³⁵⁰ or is entitled to a refund after a certain number of days for the time in which services were suspended.¹³⁵¹ This also applies to terms allowing the contract period to be extended without additional costs to ensure that the consumer receives all services for which it had concluded the contract.¹³⁵²

Furthermore, clauses which allow the supplier to suspend its service while obliging the client to continue paying may be fair if, for instance, they enable the supplier to deal with technical problems or other circumstances outside its control. They may also be fair if they protect the interests of innocent third parties, or aim to enhance the service. Such clauses are fair if they have a restricted effect, so that they cannot be used to destroy the contractual balance, and are sufficiently qualified. This is the case where consumers are informed of exactly when and how they are likely to be affected. The supplier must give notice of any proposal to rely on the term, and the consumer is entitled to cancel before being affected by it, without a penalty or otherwise being worse off for having entered into the contract.¹³⁵³

It is imaginable that a supplier uses such terms in the guise of a penalty in order to deny the consumer a benefit under the contract because it is non-compliant with its obligations. Then it is crucial that the supplier is not given undue discretion in making the decision, and that there is no scope to inflict a disproportionate sanction.¹³⁵⁴ In any event, the potential effect and the intention behind such provisions have to be considered. If the supplier's clause goes further than is strictly necessary to achieve a legitimate purpose, it probably unbalances the contract and is unfair.¹³⁵⁵

¹³⁴⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 90.

¹³⁵⁰ OFT *Unfair Contract Terms Guidance* (2008) para 15.4 at 65.

¹³⁵¹ OFT *Unfair Contract Terms Guidance – Annexes* (2008) 102-103.

¹³⁵² OFT *Unfair Contract Terms Guidance* (2008) para 15.4 at 65.

¹³⁵³ OFT *Unfair Contract Terms Guidance* (2008) paras 2.7.2-2.7.3 at 33-34.

¹³⁵⁴ OFT *Unfair Contract Terms Guidance* (2008) para 2.7.4 at 34.

¹³⁵⁵ OFT *Unfair Contract Terms Guidance* (2008) para 2.7.2 at 33.

The OFT's view is to be also welcomed in South Africa because it ensures that the consumer does not have to pay for services he or she did not receive. Besides, it strengthens the consumers' trust in suppliers.

g) Unilateral avoidance or limitation or performance

Greylisted in terms of regulation 44(3)(n) are also provisions permitting the supplier, but not the consumer, to avoid or limit performance of the agreement.

This subregulation refers to clauses which, for example, entitle the supplier to deliver only partially, whereas the consumer would have to pay in full.

The practical relevance of this subregulation is however limited as item (b) already greylists clauses excluding or limiting the consumer's right in the event of breach of contract by the supplier. Other terms will already be prohibited outright by mandatory provisions in the Act with regard to the quality of the goods or services, e.g., sections 54, 55 56 and 61, read with section 51.¹³⁵⁶ In practice, terms permitting the supplier to limit or avoid its performance may often have the same effect as terms obliging the consumer (and not the supplier) to fulfil all its obligations.¹³⁵⁷

h) One-sided renewal terms

Regulation 44(3)(o) greylists terms permitting the supplier, but not the consumer, to renew or not renew the agreement.

This item is based on a nearly similar item in the Australian Consumer Law.¹³⁵⁸

For fixed-term agreements between natural persons,¹³⁵⁹ the maximum duration is set out in section 14(4)(a), read with regulation 5(1). In terms of regulation 5(1), the maximum period of a fixed-term consumer agreement is 24 months from the date of signature by the consumer unless another agreement has been expressly reached, or a regulation or an industry code provides for a different period for a specific type of agreement. As regards the renewal of fixed-term agreements, section 14(2)(bb) provides that the consumer may cancel the agreement at

¹³⁵⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 92.

¹³⁵⁷ Van Eeden and Barnard *Consumer Protection Law* 276.

¹³⁵⁸ Section 25(1)(e) of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act, 2010).

¹³⁵⁹ Section 14(1).

any other time than the expiry of its fixed term, by giving the supplier 20 business days' notice in writing or other recorded manner and form.¹³⁶⁰

Under section 14(2)(c) and 14(2)(d), the supplier must, not more than 80, nor less than 40 business days before the expiry date of the fixed term of the consumer agreement notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date, and the options available to the consumer, that is on the expiry of the fixed term, the agreement will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated above, unless the consumer expressly directs the supplier to terminate the agreement on the expiry date, or agrees to a renewal of the agreement for a further fixed term.

For other consumer agreements than fixed-term agreements, one has to take into account regulation 44(3)(o). When the consumer and the supplier are entitled to renew or not to renew the agreement, the term will not be deemed unfair in terms of this regulation.¹³⁶¹ On the other hand, the supplier may not insert a clause into the agreement by which the contract will be automatically renewed for another fixed term if the consumer does not give notice before a certain time of his or her intention to allow the contract to expire.¹³⁶² Such a term would distort the contractual *equilibrium* between the parties because consumers and suppliers should be on an equal footing as regards their right to end or withdraw from the contract. The same rationale can be found in item (h) of the EC Unfair Terms Directive.¹³⁶³ What is more, the supplier's rights should not be excessive, or the consumer's rights excessively restricted. It is not sufficient that there is a formal equivalence in rights to terminate an agreement. Instead, both parties should enjoy rights of equal extent and value.¹³⁶⁴

i) Unreasonable long time to perform

Item (p) of regulation 44(3) greylists a term allowing the supplier an unreasonably long time to perform.¹³⁶⁵

¹³⁶⁰ See Van Eeden and Barnard *Consumer Protection Law* 273.

¹³⁶¹ Van Eeden and Barnard *Consumer Protection Law* 273.

¹³⁶² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 93.

¹³⁶³ According to **item (h) of the EC Unfair Terms Directive**, terms 'automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early' may be regarded as unfair.

¹³⁶⁴ OFT *Unfair Contract Terms Guidance* (2008) para 6.1.1 at 44.

¹³⁶⁵ A similar item can be found in **§ 308 no. 1 BGB**, according to which in standard business terms is in particular ineffective 'a provision by which the user reserves to himself the right to unreasonably long or insufficiently

The BGB and the Dutch Civil Code contain similar items.

In terms of section 19(2), the supplier, ‘*unless otherwise expressly provided or anticipated in an agreement*’,¹³⁶⁶ is obliged to deliver the goods or perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement. Therefore, section 19(2) does not *per se* prohibit terms which allow the supplier an unreasonably long time to perform. The wording in item (p) indicates however that an evaluative ‘reasonableness’ standard has to be applied, and once this standard is determined, a term failing this standard will be deemed to be unfair.¹³⁶⁷

Regulation 44(3)(p) has a warning function for suppliers in that they should carefully evaluate the reasonableness of terms regulating the time allowed for performance. Terms excluding liability for delays caused by situations beyond the supplier’s control may thus be fair, as opposed to terms serving to protect the supplier against delays for which he or she is responsible. In order to be fair, such terms must include factors outside the supplier’s control, and not factors which might be attributable to the supplier’s fault, like shortage of stock, labour problems, strike or labour shortage.¹³⁶⁸ Furthermore, in order to achieve fairness, terms should not make it possible for suppliers to refuse redress where they are at fault, e.g., where they did not take reasonable steps to prevent or minimise any delay. Where there is a risk of substantial delay, the supplier might grant the consumer a right to cancel without penalty, in order to help achieve fairness with regard to an exclusion of liability for delay caused by circumstances beyond the supplier’s control.¹³⁶⁹

Finally, terms such as ‘force majeure’ or ‘Act of God’, which refer to a subsequent impossibility of performance through forces of nature, the conduct of third parties for whom the parties to the contract are not responsible, or unforeseen circumstances¹³⁷⁰ should be avoided as they are legal jargon. Otherwise, they always should be clearly explained.¹³⁷¹

specific periods of time for acceptance or rejection of an offer or for rendering performance (...). Also **art 6:237(e) BW** contains a similar provision.

¹³⁶⁶ Emphasis added.

¹³⁶⁷ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 94.

¹³⁶⁸ OFT *Unfair Contract Terms Guidance* (2008) paras 2.6.1-2.6.7 at 31-32.

¹³⁶⁹ OFT *Unfair Contract Terms Guidance* (2008) paras 2.6.5-2.6.6 at 32.

¹³⁷⁰ Hutchison *et al Law of Contract* 412.

¹³⁷¹ OFT *Unfair Contract Terms Guidance* (2008) para 2.6.7 at 32.

3.4.3 Penalty clauses and similar clauses

a) One-sided forfeiture clauses

In term of regulation 44(3)(q), a clause allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative) is presumed to be unfair.¹³⁷²

The EC Unfair Terms Directive¹³⁷³ and the Australian Consumer Law¹³⁷⁴ contain similar provisions.

The rationale behind paragraph (q) is that a term by which a substantial prepayment or deposit is entirely non-refundable, whatever the circumstances, conflicts with the principle that a party has normally the right to cancel the contract and receive a refund of any prepayments.¹³⁷⁵

Section 51(1)(h) blacklists standard terms that require the consumer to forfeit any money to the supplier if the consumer exercises any right in terms of the Act, or to which the supplier is not entitled in terms of the Act or any other law. Naudé correctly brings forward that this provision means that a supplier is not entitled to require a consumer to forfeit any money in terms of an agreement where this is forbidden by the Act or any other law. It does not mean that the supplier needs to be specifically entitled to do so in terms of the Act or other law.¹³⁷⁶ As discussed further above under section 51, otherwise, too many clauses would be invalidated. This would not be consistent with the presumption of statutory interpretation that legislation does not alter the existing law more than necessary.¹³⁷⁷ What is more, the negative formulation of

¹³⁷² This item is similar to **item (d) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts** 93/13/ECC of 5 April 1993 according to which terms 'permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract' may be regarded as unfair.

¹³⁷³ Terms 'permitting the (...) supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the (...) supplier where the latter is the party cancelling the contract' may be regarded as unfair in terms of **item (d) of the Annex to the EC Unfair Terms Directive**.

¹³⁷⁴ **Section 25(1)(c) of the Australian Consumer Law** (Schedule 2 to the Competition and Consumer Act, 2010) lists 'a term that penalises (...) one party (but not another party) for a breach or termination of the contract'.

¹³⁷⁵ OFT *Unfair Contract Terms Guidance* (2008) para 4.2 at 38.

¹³⁷⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 97.

¹³⁷⁷ Du Plessis *Re-interpretation* 252, Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 6 and Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 97. See also Naudé 2009 *SALJ* 524.

subparagraph (ii) ('is not entitled') speaks for this point of view, meaning that a prohibitive provision in the Act or any other law is required in order to invalid the term in question.

As the supplier is allowed to impose a reasonable charge for cancellation of the order or reservation made by the consumer in terms of section 17(3), this kind of forfeiture clauses neither fall under the prohibition of section 51 nor in the scope of regulation 44(3)(q). This means that clauses which satisfy the requirements of section 17 are deemed to be fair, even if they are not reciprocal and do not grant the same right to the consumer in the case where the supplier fails to perform. The cancellation fee must however be 'reasonable' since otherwise it can be challenged in terms of item (q).¹³⁷⁸

Section 17 does not apply to franchise agreements or special-order goods.¹³⁷⁹ The exclusion of franchise agreements only applies to the relationship between the franchisee and the franchisor though but not in terms of third parties. Thus, section 17 applies when the goods are not ordered in terms of the franchise agreement because all franchisees are considered consumers regardless of their annual turnover or asset value.¹³⁸⁰

Special-order goods are defined in section 1 as 'goods that a supplier expressly or implicitly was required or expected to *procure, create or alter* specifically to satisfy the consumer's requirements'.¹³⁸¹ Where a supplier must order specific goods which are usually not in stock, this can be qualified as the *procurement* of a product to satisfy the consumer's requirements. A consumer requiring from the supplier that a specific product be delivered in a colour other than normally available, e.g., wooden furniture that has to be repainted in a colour that is not offered by the supplier, qualifies as *alteration* in terms of special-order goods. Finally, a supplier who is required to build a wooden and metal garden pavilion for which the consumer provides her plans and ideas can be considered to be a *creation* of a product in terms of the definition of 'special-order goods'. Industries that will be affected the most by section 17 are the airline and travel industry.¹³⁸²

The consumer's cancellation must be made before the supplier procures its goods or services. A 'cancellation' is an express notice by the consumer to withdraw from his or her agreement with the supplier before the latter takes steps in terms of the delivery of his products or services.

¹³⁷⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 96.

¹³⁷⁹ Section 17(1).

¹³⁸⁰ Section 5(7). De Stadler 'Section 17' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹³⁸¹ Emphasis added.

¹³⁸² De Stadler 'Section 17' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

Therefore, a consumer who does not show, or simply refuses the acceptance of goods or services does not cancel but is simply in breach, except where such a conduct is justified.¹³⁸³

The reasonableness of the cancellation charge under section 17(3)(b) is subject to regulation 44(3)(q). Section 17(4) provides guidelines for the determination of a reasonable cancellation charge. When determining the amount of such a fee, the supplier has to take into consideration the nature of the goods or services that were reserved or booked.¹³⁸⁴ It is therefore suggested that a supplier of exclusive safaris where a small number of guests stay in luxurious accommodations, the food is prepared by a renowned chef, and they are accompanied by well-trained guides, will be able to retain a higher cancellation charge than one who supplies mass holiday packages in over-crowded resorts. Another factor is the length of notice of cancellation provided by the consumer.¹³⁸⁵ It is further suggested that this factor is closely linked to section 17(4)(c) concerning the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation. The longer in advance the consumer cancels, the more likely the supplier will find another consumer for his or her goods or services. It is further my submission that a supplier can charge a cancellation fee up to 100% if a client cancels the agreement, for instance, a booking in a hotel during the low season, in the last minute. The fact that the consumer did not use the room and that it had not to be cleaned afterwards is not an argument in favour of the consumer as those costs are fixed costs for a hotel which pay their staff the same amount regardless of the number of rooms to be cleaned on a particular day. Moreover, it is irrelevant if the hotel manager finds another guest instead. Paragraph (c) of section 17 only requires a 'reasonable potential' to find an alternative consumer, and not if an alternative consumer has *actually* been found. The fourth factor to be taken into account for the reasonableness of the cancellation fee is the general practice of the relevant industry. This factor is astonishing however as it would cement the *status quo* of the relevant industry and perpetuate unfair practices.¹³⁸⁶ This factor could assist the consumer in cases though where the supplier charges cancellation fees that are higher than the standard of the relevant industry.¹³⁸⁷ It should be regarded with suspicion for the reason mentioned above though.

¹³⁸³ De Stadler 'Section 17' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹³⁸⁴ Section 17(4)(a).

¹³⁸⁵ Section 17(4)(b).

¹³⁸⁶ See the discussion on reg 44(3)(g) *supra*.

¹³⁸⁷ De Stadler 'Section 17' in Naudé and Eiselen (eds) *CPA Commentary* para 9 note 2.

The word ‘and’ at the end of section 17(4)(c) indicates that the four factors have to be cumulatively taken into consideration. The assessment of the reasonableness of the cancellation fee will therefore depend on many factors against the backdrop of the actual situation. A well-located hotel in a big city with good standards will thus be able to charge higher amounts than a family-run B&B in a remote area.

It has to be kept in mind though that in many contracts, suppliers do not have any interest in being able to cancel as this would mean that the respective deal is lost. If the supplier agrees to accept a hefty penalty for cancelling the agreement, this does therefore not necessarily ‘balance’ a term imposing a severe penalty on the consumer for cancelling. The consumer does not enjoy a real benefit in this case, although the clause seems to be ‘balanced’ for both parties. A real *equilibrium* exists where both parties roughly bear the same risk of losing because of the other party’s cancellation.¹³⁸⁸

Although the Act does not require that the method of calculation be included in the contract, it is recommended that the supplier include a specific clause in terms of which the consumer can calculate the fee him- or herself, instead of relying solely on the Act or including a general clause such as ‘a reasonable cancellation charge may apply’.¹³⁸⁹ This could be done by providing a sliding scale in which factors such as the length of the notice in advance and the season (high or low season) are set out.

Section 17(5) provides that no cancellation fee may be imposed if the consumer is unable to honour the booking because of the death or hospitalisation of the person for whom or for whose benefit the booking was made. The supplier is entitled to require proof of the death or hospitalisation, in order to prevent abuse of this subsection.¹³⁹⁰ The legislator clearly wants to protect consumers in cases which are beyond his or her control. It is however surprising that it did include ‘hospitalisation’ as a reason as cases are conceivable where a consumer falls sick and is not obliged to stay in hospital, but unable to honour his or her agreement. What is more, the length of hospitalisation does often depend on factors which are not always medical. Health insurances and hospitals aim to cut costs and tend to limit the length of hospitalisation. Besides, medical advancement allows patients to be treated at home. It is furthermore suggested that the term ‘hospitalisation’ must be interpreted widely and includes the stay in a psychiatric

¹³⁸⁸ OFT *Unfair Contract Terms Guidance* (2008) para 4.4 at 39.

¹³⁸⁹ De Stadler ‘Section 17’ in Naudé and Eiselen (eds) *CPA Commentary* para 10.

¹³⁹⁰ De Stadler ‘Section 17’ in Naudé and Eiselen (eds) *CPA Commentary* para 11.

establishment as well as quarantines. Furthermore, cases of force majeure should be included in subsection (5) of section 17.

Better consumer protection would thus be achieved if the legislator had chosen a more extensive and better-defined range of reasons, such as:

*'... because of the death of the person for whom, or for whose benefit the booking, reservation or order was made, or for any other medical, psychological or psychiatric reason or treatment which was not known by the consumer at the time of his or her booking, reservation or order as well as any case of force majeure which makes it objectively impossible for the consumer to honour his or her agreement'.*¹³⁹¹

The phrase 'objectively impossible' in the aforementioned suggestion means that not the consumer's personal view is to be taken into account, but the opinion of a medical professional.

In a situation where the supplier breaches the contract, and the consumer cancels it, the consumer is normally entitled to get a refund under the common law. Conversely, if the consumer is in breach, and the supplier cancels the contract for this reason, the consumer will also be entitled to restitution under the rules of the common law.¹³⁹² The consumer will be liable to compensate the supplier for his or her actual loss in the form of damages, however. Therefore, a clause under which a supplier is entitled to retain a deposit or prepayment by the consumer, without granting the latter the right to be compensated in an equivalent amount in cases where the supplier is in breach, would be presumed to be unfair.¹³⁹³

Another solution would consist of a financial penalty¹³⁹⁴ in case of breach. However, if the amount is out of proportion of the actual harm suffered by the supplier, the court may reduce it under section 3 of the Conventional Penalties Act.¹³⁹⁵

¹³⁹¹ Suggested modification of s 17(5) emphasised.

¹³⁹² According to *Walkers Fruit Farms v Sumner* 1930 TPD 30, this does not apply if the payment was made in respect of an obligation which accrued as a separate cause of action independent from the executory part of the agreement, i.e., divisible from the remainder of the contract. This is the case, for instance, for the payment of rent regarding a period for which the consumer had already been given beneficial occupation by the lessor.

¹³⁹³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 98.

¹³⁹⁴ A penalty, is defined, by virtue of **s 1(2) of the Conventional Penalties Act 15 of 1962** as '[a]ny sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable (...).'

¹³⁹⁵ **15 of 1962. Section 1(1) of the Conventional Penalties Act:** 'A stipulation, hereafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.' **Section 3 of the Conventional Penalties Act:** 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances:

According to section 1 of the Conventional Penalties Act, terms incorporated in a contract shall be deemed penalty stipulations, when the clause provides that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or deliver or perform anything for the benefit of any other person, either by way of penalty or as liquidated damages.¹³⁹⁶ In terms of this provision, all penalty stipulations are *prima facie* enforceable once the existence of a valid and enforceable contract is established, a penalty stipulation is contained therein and there is a breach of the given contract.¹³⁹⁷

In practice, item (q) of regulation 44(3) should be of minor relevance. First, as Naudé correctly points out, item (q) only operates in circumstances which are not covered by section 17 and only apply in situations where the forfeiture clause was intended to operate when the contract is cancelled after breach of one of the parties.¹³⁹⁸ Second, suppliers will tend to insert penalty clauses rather than a clause which is presumed to be unfair in terms of this item. By doing so, the consumer is not necessarily more vulnerable because in situations where the penalty is out of proportion to the damage suffered by the supplier, the court must take into consideration equity, by not only the creditor's (supplier's) proprietary interest but every other rightful interest which may be affected by the act or omission in question.¹³⁹⁹ It is my submission that 'every other rightful interest' also includes the debtor's (consumer's) interests. Otherwise the phrase 'may reduce the penalty to such extent as it may consider equitable in the circumstances' would make no sense because in order to determine equity, all aspects concerning the parties involved have to be taken into account. A drawback of penalty clauses as opposed to forfeiture clauses is however that the proactive and extra-judicial effect of the items of the greylist is somehow circumvented as suppliers probably will tend to put an unreasonably high penalty into their contracts hoping that the consumer will not go to court. Consumers do most likely not know about the Conventional Penalties Act, contrary to the Consumer Protection Act.

Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

¹³⁹⁶ See Vessio *LLD thesis* 463.

¹³⁹⁷ Belcher 1964 *SALJ* 84.

¹³⁹⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 98.

¹³⁹⁹ Section 3 of the Conventional Penalties Act 15 of 1962.

b) Penalty clauses

A clause is presumed to be unfair in terms of regulation 44(3)(r) if it requires any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier.

The EC Unfair Terms Directive¹⁴⁰⁰ contains a similar item, although it speaks of a 'disproportionally high sum in compensation' instead of 'significantly exceed the harm'.

The rationale behind this provision is that it is unfair if the consumer has to pay higher compensation for a breach than a reasonable pre-estimate of the actual loss caused to the supplier.¹⁴⁰¹ Conversely, if a clause merely stipulates that the amount payable just has to cover the ordinary expenses or other loss incurred by the supplier it may be fair.¹⁴⁰²

Like item (q), item (r) also operates in cases where the contract is cancelled after breach, with the exception that item (r) only applies in case of breach by the consumer. In contrast, item (q) operates in case of breach by either party.¹⁴⁰³

For the aggrieved party (the supplier), a penalty clause has the advantage that he or she may claim the penalty without the need to prove any loss and their extent.¹⁴⁰⁴ Examples for item (r) are clauses stipulating that the consumer has to pay excessive storage fees where he or she failed to take delivery as agreed, or saying that the supplier is entitled to claim all its costs and expenses and not just its net costs, or – more excessively – to claim both the supplier's costs as well as its loss of profit where this would lead to a double compensation of the same loss.¹⁴⁰⁵

Penalty clauses which give the supplier excessive discretion to decide the level of a penalty, or a clause which is formulated in a vague, misunderstanding way are most likely to be unfair in the OFT's view. Hence, legal terminology and terms such as 'mitigation' should be avoided.¹⁴⁰⁶

On the other hand, terms which require the consumer to pay a sum which represents a real and fair pre-estimate of the costs or loss of profit the supplier will probably suffer, or merely stating that the consumer can be liable to pay reasonable compensation, are most likely to be fair.¹⁴⁰⁷

¹⁴⁰⁰ Item (e) of the Annex to the EC Unfair Terms Directive.

¹⁴⁰¹ OFT *Unfair Contract Terms Guidance* (2008) para 5.1 at 40.

¹⁴⁰² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 99.

¹⁴⁰³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 98.

¹⁴⁰⁴ Van der Merwe *et al Contract General Principles* 379.

¹⁴⁰⁵ See OFT *Unfair Contract Terms Guidance* (2008) paras 5.2 and 5.3 at 40.

¹⁴⁰⁶ This is already set out in s 22. See OFT *Unfair Contract Terms Guidance* (2008) para 5.5 at 41.

¹⁴⁰⁷ OFT *Unfair Contract Terms Guidance* (2008) para 5.7 at 41.

In terms of regulation 44(4)(d), item (r) of subregulation (3) does not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of the Act or any other law. Item (r) thus does not apply to cancellation fees in terms of section 17 and sums payable for fixed-term agreements in terms of section 14.

Item (r) of the greylist seems superfluous because the Conventional Penalties Act already provides for a similar provision. It is however disputable if the phrase ‘(...) significantly exceed the harm suffered by the supplier’ in item (r) has the same meaning as ‘out of proportion to the prejudice suffered by the creditor’ in section 3 of the Conventional Penalties Act.¹⁴⁰⁸ Even though both expressions contain an evaluative element, it is suggested that an amount payable may *significantly* exceed the harm suffered without being *out of proportion*. In practice, these differences should not cause any problems, however, as in both cases the courts will consider the circumstances of the given case.

It is noteworthy that the legislator chose a formulation according to which the payable damage must *significantly* exceed the actual damage. At first sight, this does not seem to be very consumer-friendly. The wording begs the question why the consumer should pay a higher damage than the supplier has actually suffered, especially in cases where the Act applies. One should keep in mind though that the consumer is in breach after all. As the word ‘penalty clause’ indicates, there is a penalising element contained in such a clause.

Even though the Conventional Penalties Act already provides for a legal framework in these cases, paragraph (r) could have an extra-judicial and proactive effect because the Consumer Protection Act is more likely to be known by laypersons than the Conventional Penalties Act. Besides, the fact that the provision is contained in the ‘checklist’ of regulation 44(3) helps non-lawyers and suppliers when assessing whether a term is suspicious.¹⁴⁰⁹

c) Unreasonable high remuneration upon termination by either party

Greylisted in terms of regulation 44(3)(s) are also clauses permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure.¹⁴¹⁰

¹⁴⁰⁸ Also item (e) of the EC Unfair Terms Directive contains the word 'disproportionally'.

¹⁴⁰⁹ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 99.

¹⁴¹⁰ This item is based on § 308 no. 7 BGB which declares clauses ineffective by which 'the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract, may

Under regulation 44(4)(d), item (s) of subregulation (3) does not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of the Act or any other law. This item is therefore not applicable to compensation for use according to section 20(6)(c). Section 20(6) determines in which cases the supplier may impose a charge upon the consumer if the latter returns any goods.¹⁴¹¹

This item applies to provisions which operate where the contract is terminated for reasons other than breach. It therefore has a wider scope of application than item (r).¹⁴¹² Such clauses are often used to deter consumers from terminating an agreement.¹⁴¹³

The legislator chose the word ‘unreasonable’/‘unreasonably’ in item (l) (‘without reasonable notice’) and item (p) (‘unreasonably long time to perform’) to describe a period of time, whereas it uses ‘unreasonably’ in item (s) in connection with an amount of money (‘unreasonably high remuneration’/‘unreasonably high reimbursement’). In item (r) it chose the word ‘significantly’ instead. It is doubtful that the legislature chose this expression merely for stylistic reasons. It is submitted that it aimed to stress the evaluative element because it also uses the term ‘unreasonable’ in section 48(1)(a)(i) in connection with the price to be paid by the consumer. In practice, this distinction should have no impact, however, since for the enquiry of whether the amount is reasonable, the courts might have to rely on a standard that includes whether the amount significantly exceeds the objective value of the received performance or use, like in Germany.¹⁴¹⁴

demand a) unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered, or b) unreasonably high reimbursement of expenses’.

¹⁴¹¹ The supplier may not charge the consumer if the goods are returned in the original unopened packaging (s 20(6)(a)). If the goods are in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for use of the goods during the time they were in its possession, or any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer (s 20(6)(b)). In any other case, the consumer may charge a reasonable amount for the use of the goods or any consumption or depletion, and for necessary restoration costs to render the goods fit for re-stocking, unless the consumer had to destroy the packaging in order to determine whether the goods conformed to the description or sample provided, or were fit for the intended purpose (s 20(6)(c)).

¹⁴¹² Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 100.

¹⁴¹³ De Stadler *Consumer Law Unlocked* 125.

¹⁴¹⁴ Locher *Recht der AGB* 137. See discussion on § 308 no. 7 in Part II ch 5 para 2.3.7.

3.4.4 Transfer of obligations and rights

a) Transfer of obligations without the consumer's agreement

Regulation 44(3)(t) refers to terms giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement.

This item in the greylist only refers to the transfer of obligations, and not to the transfer of rights, unlike EU¹⁴¹⁵ or German¹⁴¹⁶ law. The issue of free assignability of claims, i.e., rights, which is an essential factor in the credit economy, is therefore not concerned by item (t).¹⁴¹⁷ On the other hand, the Directive does not contain the phrase 'to the detriment of the consumer'. Naudé asserts that the South African formulation 'to the detriment of the consumer' could be misleading as it could be argued to place the burden of proof on the consumer to show first that the transfer of obligations would be detrimental for him or her, before the term in question will be presumed to be unfair.¹⁴¹⁸ As all items in the greylist are *presumed* to be unfair, it is the supplier though who has to prove that the term in question is fair. On the other hand, the consumer does not have to prove that it is unfair. This presumption concerns, it is submitted, all elements contained in the items of the greylist, and therefore includes the phrase 'to the detriment of the consumer'.

Furthermore, when determining whether a transfer of obligations has been detrimental to the consumer, one has to bear in mind that a consumer who had purchased a good or a service often did so because he or she relied on the supplier's market reputation which the latter had built up by advertising, and its position in the market (goodwill etc.). When such obligations are transferred without the consumer's consent, the consumer is faced with another supplier who might not have the same reputation. This is the case, for instance, if a term in a transportation contract stipulates that the supplier has the right to engage other companies to transport the

¹⁴¹⁵ Under **item (p) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts** 93/13/ECC of 5 April 1993 clauses 'giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement' may be regarded as unfair. See also art II-9:410(o) of the Draft Common Frame of Reference.

¹⁴¹⁶ In terms of **§ 309 no. 10 BGB**, 'a provision according to which in the case of purchase, loan or service agreements or agreements to produce a result a third party enters into, or may enter into, the rights and duties under the contract in place of the user, unless, in that provision, a) the third party is identified by name, or b) the other party to the contract is granted the right to free himself from the contract' is ineffective.

¹⁴¹⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 104.

¹⁴¹⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 101.

goods and will not be liable if such third-party companies damaged the goods.¹⁴¹⁹ Then, such a transfer of obligations is likely to be to the detriment of the consumer. There is also a significant possibility of consumer abuse as the consumer had trusted the first supplier, and that trust is put at stake.¹⁴²⁰ This is even true in cases where the consumer still has the same rights under the agreement against the third party.¹⁴²¹ Naudé thus concludes that *any* terms allowing the supplier to transfer its obligations should be presumed to be to the detriment of the consumer and unfair.¹⁴²² It is suggested though that this point of view is too stringent because one should distinguish between different scenarios.

It is, therefore, my suggestion that terms allowing a supplier, without the agreement of the consumer, to transfer the supplier's obligations to a third party are always to the detriment of the consumer where the latter not only relied on the market reputation and goodwill of the supplier, but also where the supplier offers products or services that imply a more or less personal relationship between the parties, where trust is an important element, or where the parties have had an ongoing and increasingly important relationship. This is the case, for instance, for architects' contracts, or contracts between a lawyer and his or her client. In these cases, the consumer might chose the supplier also for personal reasons, such as a good relationship with the supplier, a personalised service, or a long-term business relationship with the consumer. If the supplier can easily transfer its obligations to a third party, the consumer's trust is simply abused. A personal choice when concluding the transaction becomes a more or less risky transaction for the consumer. There may even exist an element of bad faith on the supplier's side as he or she knew or should have known that the consumer especially chose the supplier for personal reasons, especially in the contract types mentioned above.

There may be exceptions where such a transfer of obligations can be considered fair, namely where the consumer is entitled to cancel the agreement, the supplier remains liable for performance of the third party, or the transfer occurs in connection of the transfer of the supplier's business by which all obligations and rights are transferred.¹⁴²³ It is recommended, however, that in the fairness review under consideration of these exceptions, the fact that the consumer may cancel the agreement but has to find another supplier whom he or she trusts, or

¹⁴¹⁹ Law Commission of England and Wales and Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005) 191.

¹⁴²⁰ Van Eeden and Barnard *Consumer Protection Law* 292.

¹⁴²¹ Naudé 2007 *SALJ* 162-163, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 101.

¹⁴²² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 101.

¹⁴²³ These 'exceptions' are listed, for instance, in article 6:236(e) BW.

that the former supplier is still liable for the performance of the third party but therefore might suffer delays, is taken into consideration. Those exceptions eventually might be detrimental to the consumer. As regards the transfer of a business with all its obligations and rights the case may be different where the transfer occurs to a subsidiary controlled by the original supplier, or as a result of a merger or a similar lawful company transaction *if such transaction is not likely to negatively affect any right of the consumer*.¹⁴²⁴ It is suggested though that this is also a question that has to be answered on a case-to-case basis, by considering the nature of the agreement between the parties, the value of the transaction and other factors such as the consumer's right to cancel the agreement.

b) Limitation of the transferability of commercial guarantees

Paragraph (u) of regulation 44(3) greylists terms restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the consumer.

The discussion of this item is closely linked to the previous paragraph.

The OFT pointed out that '[g]uarantees, while they remain current, can add substantial value to the main subject matter of the contract. If consumers cannot sell something still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they have paid for'.¹⁴²⁵

If the transferability of a guarantee is not allowed, the saleability of the product in question will necessarily be affected. This applies especially to long-term service obligations under a consumer agreement. It would not be fair if the subsequent purchaser should be deprived of the balance of the unexpired rights against the original supplier. What is more, there is no legitimate reason why a purchaser should deprive a subsequent purchaser of a still valid guarantee since the price paid to the supplier incorporated the guarantee until its stipulated expiration date.¹⁴²⁶

The OFT allowed a supplier to request proof that the guarantee was properly assigned, provided that the procedural requirements involved are reasonable.¹⁴²⁷ It is suggested that where the subsequent purchaser (assignee) cannot present a formal contract between him or her and the

¹⁴²⁴ See article 85(m) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final of 11 October 2011.

¹⁴²⁵ OFT Unfair Contract Terms Guidance (2008) para 18.4.2 at 76.

¹⁴²⁶ Van Eeden and Barnard *Consumer Protection Law* 292.

¹⁴²⁷ OFT *Unfair Contract Terms Guidance* (2008) para 18.4.3 at 76.

former purchaser (assignor) because no such contract had been set up, a simple statement by which the former purchaser certifies that he or she sold the item in question to the subsequent purchaser suffices.

It should be noted that paragraph (u) of regulation 44(3) only applies to the *resale* of goods. Hence, a term under which the transferability of a commercial guarantee is limited in cases where the consumer gives the goods to the subsequent purchaser gratuitously, i.e., as a gift, would therefore not be presumed to be unfair under regulation 44(3)(u) when considering this provision in an isolated manner.¹⁴²⁸ This limitation is of a somewhat limited practical importance though as 'consumer' is defined in section 1 as 'a user of those particular goods (...), irrespective of whether that user (...) was a party to a transaction concerning the supply of those particular goods (...)'.¹⁴²⁹ In other words, the person who received the goods as a gift is considered the (original) consumer in terms of regulation 44(3)(u). This applies only though 'if the context so requires or permits'.¹⁴³⁰ This could be the case where the original purchaser buys the goods in view of giving them to another person as a gift, this is done within a reasonable period of time, and the original purchaser has not used the goods meanwhile. Consequently, a person who subsequently receives the goods free of charge by the original purchaser after the latter had used them, or where he or she had initially bought them without the intention of giving them away gratuitously, could not be considered a consumer in terms of section 1. For this reason, a term limiting the transferability of a guarantee for transactions by which the original purchaser gives the goods to another person at a later stage, or after having used them, would not be presumed to be unfair in terms of regulation 44(3)(u). This case could be regarded as one in which 'goods' become 'used goods' in terms of the definition in section 1. Note should be taken that 'used goods', although defined in section 1, does not appear anywhere else in the Act.¹⁴³¹

With regard to the arguments mentioned above, this limitation has in my opinion no legitimate ground, however. The original purchaser bought the goods in question including a guarantee, and for the supplier, and it should not matter who makes a claim under this guarantee as long as it is justified. From a supplier's perspective, it is thus irrelevant if the initial purchaser re-sold the goods or gave them to a third party gratuitously. The objection that a person who receives

¹⁴²⁸ They could be unfair in terms of s 48 though. See reg 44(2)(b).

¹⁴²⁹ Section 1 s.v. 'consumer' (c).

¹⁴³⁰ Section 1 s.v. 'consumer' (c).

¹⁴³¹ De Stadler assumes that the definition of 'used goods' in s 1 is a remnant of an earlier Bill where the term was actually used. See De Stadler 'Section 1' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

something gratuitously should not be able to benefit from a guarantee as he or she did not pay for it, is not valid and is rather based on moral considerations. As mentioned earlier, the supplier had sold the item including a (still valid) guarantee, i.e., the selling price reflected the inclusion of a guarantee, and there is no reason why a donee should not benefit from it. Otherwise, the supplier would have an economic benefit in the form of the paid price for the guarantee without entirely granting the equivalent benefit, that is the remaining time of the guarantee.

Paragraph (u) should hence be amended either by replacing the verb 're-sell' by 'alienate', or, as the latter term is legal jargon, by reformulating the phrase in question as follows: 'by restricting the consumer's right to re-sell the goods *or dispose of them in any other way*.'¹⁴³²

3.4.5 Terms relating to statements

a) Deemed statements and acknowledgements

Under regulation 44(3)(v), a term is presumed to be unfair if it provides that the consumer must be deemed to have made or not made a statement or acknowledgement to his or her detriment, unless (i) a suitable period of time is granted to him or her for the making of an express declaration in respect thereof, and (ii) at the commencement of the period the supplier draws the attention of the consumer to the meaning that will be attached to his or her conduct.

The rationale of this item is that according to certain terms, the consumer has to make a certain statement as otherwise he or she will be deemed to have consented to a particular state of affairs. The consumer bears the burden to interpret and react to such a statement required by the supplier, which may have onerous consequences for the consumer.¹⁴³³

For this item, §§ 308 no. 5 BGB¹⁴³⁴ and 6(1) no. 2 KSchG¹⁴³⁵ served as a model. According to regulation 44(3)(v)(ii), the supplier has to draw the consumer's attention to the meaning that will be attached to his or her conduct. Naudé argues that this wording is not explicit enough and should be revised according to the German legislation because the latter would be clearer

¹⁴³² Suggested amendment emphasised.

¹⁴³³ Van Eeden and Barnard *Consumer Protection Law* 294.

¹⁴³⁴ § 308 no. 5 BGB: '[A] provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless a) the other party to the contract is granted a reasonable period of time to make an express declaration, and b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time' is without effect.

¹⁴³⁵ In terms of § 6(1) no. 2 KSchG, the consumer should not be bound by a provision whereby 'a specific conduct by the consumer is deemed to constitute a declaration or failure to make a declaration, except when the consumer is expressly informed of the significance of his conduct at the beginning of the time limit provided and is allowed a reasonable period in which to make an express declaration'.

in that the supplier itself must draw the consumer's attention to the meaning that will be attached to his or her conduct.¹⁴³⁶ However, § 308 no. 5 lit. b) BGB merely reads: '(unless) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time.' Apart from the use of synonyms in the official translation ('commencement of the period'/'beginning of the period of time', 'draws the intention of the consumer'/'agrees to especially draw the attention of the other party to the contract', 'to the meaning that will be attached to his or her conduct'/significance of his behaviour'), the German phrase 'to especially draw the attention' seems to be a bit stronger than the South African 'draws the attention'. The German phrase '*der Verwender sich verpflichtet*' (literally 'the user obligates himself') has been translated in the official translation¹⁴³⁷ by 'the user agrees'; the German text is thus a bit stronger here again. Since the South African text is written in the active voice ('the supplier draws the attention'), it is however clear enough in my view that it is the supplier who is addressed by this obligation and not someone else.

Regulation 44(3)(v) only applies to terms relating to acknowledgements which are not already prohibited elsewhere in the Act.¹⁴³⁸ The Consumer Protection Act contains several of such prohibitions. Section 51(1)(g) blacklists a term if 'it falsely expresses an acknowledgement by the consumer that (i) *before*¹⁴³⁹ the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier, or (ii) the consumer has received goods or services, or a document that is required by th[e] Act to be delivered to the consumer.' More implicitly, section 31(1)(b) provides that a supplier must not 'offer to enter into or modify an agreement for the supply of any goods or services (...) on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer (...).' Any agreement or modification made in conflict with this provision is void.¹⁴⁴⁰ Furthermore, section 49(1)(d) provides that any notice to consumers or provision of a consumer agreement that purports to be an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer in plain language and in a conspicuous manner and form likely to attract the consumer's attention and that the consumer must be given an adequate opportunity to receive

¹⁴³⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 105.

¹⁴³⁷ Available at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

¹⁴³⁸ See reg 44(2)(d).

¹⁴³⁹ Emphasis added.

¹⁴⁴⁰ Section 31(2) and (3).

and comprehend such provision. Lastly, section 49(2) *in fine* states that if a provision or notice concerns any activity or facility that is subject to any risk the consumer must have assented to the provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

When excluding the above-mentioned provisions, the scope of application of item (v) is limited to terms that apply to acknowledgements which are deemed to have been made *after* the conclusion of the agreement and which do not relate to amendments of the agreement itself.¹⁴⁴¹ This item has therefore a rather narrow ambit.

b) Deemed receipt of statements made by the supplier

According to paragraph (w) of regulation 44(3), a term providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer is presumed to be unfair, unless such statement has been sent by prepaid registered post to the chosen address of the consumer.

The South African Law Commission's Bill¹⁴⁴² contained a similar item. §§ 308 no. 6 BGB¹⁴⁴³ and 6(1) no. 3 KSchG¹⁴⁴⁴ contain similar items. The Austrian provision comes closer to the South African item than the German provision though.

Such a term deprives the consumer of its defence that it has actually not received the communication unless the statement has been sent by prepaid registered post which reduces the risk of the dispute of whether it has been received. In addition, the item ensures that the burden of proof is born by the supplier.¹⁴⁴⁵

Naudé takes the view that with regard to the prevalence of more modern forms of communication, such as e-mail, the following words should be added at the end of paragraph (w): '(...) or by another means of communication chosen by the consumer for such statements'.

¹⁴⁴¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 106.

¹⁴⁴² Section 2(r) of the Law Commission's Bill published in their *Report on Unreasonable Stipulations in Contracts and the Rectifications of Contracts* (Project 47) (1998).

¹⁴⁴³ § 308 no. 6 BGB: '[A] provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract' is ineffective.

¹⁴⁴⁴ § 6(1) no. 3 KSchG: The consumer shall not be bound by a provision whereby 'a declaration of legal significance for the consumer sent by the entrepreneur, which is not received by the former, is deemed to have been received by him, unless it is a matter of the validity of a declaration sent to the consumer's last known address in the event of the consumer not having notified the entrepreneur of a change of address.'

¹⁴⁴⁵ Van Eeden and Barnard *Consumer Protection Law* 295.

She points out that this would narrow down the scope of application of this item to terms providing that a statement will be deemed to have reached the consumer where it was not sent by such a means of communication.¹⁴⁴⁶

Naudé's opinion is reasonable also from a practical point of view since the South African Post Office is rather unreliable due to various factors.¹⁴⁴⁷ Thus, the inclusion of other means of communication would be an advantage in order to avoid unnecessary frustration and disputes. In this regard, it is suggested that the reference to 'registered prepaid post' cannot be extrapolated to include other forms of communication, which is the case for article 13 of the CISG, for instance, where it is generally recognised that 'telex' and 'telegram' also include more modern means of communication.¹⁴⁴⁸

Unlike registered mail, the recipient of an e-mail does not have to confirm reception by his or her signature, and the supplier does not have to worry that its message went into his or her spam folder, or is simply not delivered or delivered without attachments, although the supplier has done everything it could. Pursuant to section 23 ECTA,¹⁴⁴⁹ '[a] data message (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system when it is capable of being retrieved by the addressee, (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.' As the ECTA is applicable in terms of section 4(1) because it applies in respect of any electronic transaction or data message, its application is not excluded by Schedule 1 ECTA. Furthermore, in terms of

¹⁴⁴⁶ Naudé points out that the current wording of item (w) has been inserted *per incuriam*, since the DTI had promised to amend it in the final version of the regulation by taking into consideration more modern forms of communication, such as e-mail. Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 107.

¹⁴⁴⁷ These are, amongst others, many strikes in recent years, poor service delivery and poor communication and unsatisfactory handling of complaints by consumers. See e.g., *Mail & Guardian* of 5 October 2016: 'Post Office closes 221 outlets amid R1.1bn loss' at <https://mg.co.za/article/2016-10-05-post-office-closes-221-outlets-amid-r11bn-loss>, *Mail & Guardian* of 28 October 2015: 'Post office wins court order against strike' at <https://mg.co.za/article/2015-10-28-post-office-wins-court-order-against-worker-strike>.

¹⁴⁴⁸ This is assured by the principle of technological neutrality, according to which the rules of the CISG are 'neutral', i.e., they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information. See Eiselen *FS Kritzer* 124 and 125, with further references.

¹⁴⁴⁹ Electronic Communications and Transactions Act 25 of 2002.

section 26(1) ECTA, an acknowledgement of receipt of a data message is not necessary to give legal effect to that message. It is not required that the consumer confirms reception of the supplier's e-mail. This does not mean however that the supplier should not invite the recipient to confirm reception to prevent misunderstandings, although this is legally not necessary.

Van Eeden points out that item (w) does not provide for situations where a supplier knows or has reason to know that the consumer's given address is no longer his address of choice.¹⁴⁵⁰ It is my submission that one has to distinguish here between different scenarios: First, the scenario is imaginable where the consumer informs the supplier of its new address. Then this address becomes the 'chosen address of the consumer' in terms of item (w) *in fine* as this item does not provide that the chosen address is necessarily the address chosen at the time when the contract has been concluded. In order to avoid unnecessary complications, consumer agreements, especially those which provide for further statements or communications between the parties, should always include a provision according to which the consumer has to update the supplier of any change of address. Second, there may be cases where the consumer does not explicitly but implicitly inform the supplier of its new address, for instance, in a letter to the supplier containing the consumer's new address in the letterhead. Although there is no explicit information concerning an address change, the supplier has in my opinion always an obligation in terms of its commercial diligence to check not only information such as the order number, the customer's name and the ordered goods or services but also the address. This applies especially where the supplier sends communications to the consumer. In those cases, the supplier should reasonably have known the consumer's new address. If the supplier sends its communication to the former address, it should therefore be deemed not to have reached the consumer. This is also the case in the third scenario, where the supplier sends its communication knowingly to the consumer's former address. Naudé correctly argues that this would amount to unconscionable behaviour or unfair tactics in the enforcement of the agreement, and therefore unconscionable conduct under section 40.¹⁴⁵¹

It is suggested that in (the admittedly rare) fourth scenario where the supplier has knowledge of the fact that the consumer changed his or her address but does not know the address, the supplier should take *reasonable* steps in order to find out this new address. An e-mail to the consumer or a phone call should be sufficient in this regard. Although item (w) does not provide

¹⁴⁵⁰ Van Eeden and Barnard *Consumer Protection Law* 295.

¹⁴⁵¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 107.

for any other obligations for the supplier than sending the statement to the *address chosen* by the consumer, the fact that the supplier sends any communication knowingly to the consumer's former address (although he or she does not know the new address), without taking reasonable steps to find out the new address should also be treated as unconscionable behaviour in terms of section 40. If the supplier could not find out the new address, it should not be penalised, however. The same applies if the consumer did not collect his or her mail or provided a wrong address.¹⁴⁵² It is suggested that this not only applies to cases where the supplier has inserted a clause by which the consumer must inform the supplier of any change of address since the supplier should not bear the consequences of the consumer's neglect.

There are also cases imaginable where the consumer did not communicate its new address to the supplier. In these cases, the supplier has no obligation to find out the new address, and the statement should be deemed to have reached the consumer. Interestingly, this scenario is explicitly spelt out in § 6(1) no. 3 KSchG.

3.4.6 Enforcement on the agreement by consumers

a) Terms excluding or hindering the consumer's right to take legal action or exercise any other legal remedy

Pursuant to regulation 44(3)(x), a term is presumed to be unfair if it excludes or hinders the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation.

This item is based on item (q) in the EC Unfair Contract Term Directive.¹⁴⁵³

From the wording of this item, it is clear that arbitration covered by the Act, for instance, the involvement of an applicable industry ombud accredited for the particular sector,¹⁴⁵⁴ is not

¹⁴⁵² Otto takes this stance as regards the (now abolished) Credit Agreements Act 75 of 1980. See Otto *Credit Law Service* 29.

¹⁴⁵³ Under **item (q) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts** 93/13/ECC of 5 April 1993 clauses 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' may be regarded as unfair. **Article 84(d) of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law** COM(2011) 635 final of 11 October 2011 blacklists such terms outright: A contract term is always unfair for the purposes of this Section if its object or effect is to 'exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer'.

¹⁴⁵⁴ See s 69.

regarded as unfair. What is more, there is nothing to say against clauses by which a consumer actually agrees to have settled a dispute that has already arisen to arbitration instead of submitting it to a court, if he or she has been informed in advance of the potential costs involved.¹⁴⁵⁵

In this context, it is interesting to note that certain unfair enforcement clauses are prohibited, i.e., blacklisted outright. Section 51((1)(ii) provides that 'an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed' is not allowed, and subparagraph (iii) of the same provision prohibits 'a consent to a predetermined value of costs relating to enforcement of the agreement, except to the extent that is consistent with th[e] Act'. Under the common law, clauses superseding the courts' jurisdiction by prohibiting the consumer from seeking redress, or preventing him or her from defending him- or herself, are also prohibited.¹⁴⁵⁶ Finally, terms by which the consumer agrees in advance that a certain magistrates' court which would normally have no jurisdiction under section 28 of the Magistrates' Courts Act,¹⁴⁵⁷ which provides the jurisdiction in respect of persons, are also void. Section 45 of the Magistrates' Courts Act provides that such consent may only be validly given if it 'is given specifically with reference to particular proceedings already instituted or about to be instituted in such court'.¹⁴⁵⁸

The problem with compulsory arbitration clauses under which the consumer agrees in advance to submit any future disputes not to the courts but to 'private arbitration' is that the consumer is unlikely to have read them, especially when they are non-negotiated or standard terms, which means that there is no informed consent. Moreover, the consumer is unlikely to understand the cost-implications in terms of arbitration which is generally much higher than court proceedings.¹⁴⁵⁹ What is more, with regard to the costs involved, a consumer is unlikely to proceed to arbitration, especially when the goods or services subject to the dispute are of comparatively low value. This will dissuade consumers, who are more than often in a worse financial position than their suppliers, from taking any legal action against the supplier.¹⁴⁶⁰ A cooling-off period, as suggested by the South African Law Commission in 2001 and

¹⁴⁵⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 109.

¹⁴⁵⁶ *Schierhout v Minister of Justice* 1925 AD 417 at 424, *Standard Bank of South Africa Ltd v Essop* 1997 (4) SA 569 (D) 575-577.

¹⁴⁵⁷ 32 of 1944.

¹⁴⁵⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 114.

¹⁴⁵⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 109.

¹⁴⁶⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 111.

implemented in the Dutch Civil Code,¹⁴⁶¹ would not protect consumers, particularly if they are unaware of the high costs involved, and because of the fact that the cooling-off period will most probably have lapsed before the dispute arises.¹⁴⁶²

Suppliers sometimes have standard clauses by which the consumer agrees that the High Court will have jurisdiction over disputes arising from the contract, even if the Magistrates' Court would normally have jurisdiction over the matter. Even if successful suppliers would be limited in terms of the costs to the scale applicable to the Magistrates' Court, they might use this kind of clauses to dissuade consumers from initiating or defending legal proceedings because of the higher costs involved. Such clauses are likely to be unfair in terms of item (x), unless the supplier can convince the court that it has a legitimate interest in upholding such a clause, and on its fairness.¹⁴⁶³ It is suggested that this is hardly imaginable though in a consumer context because of the higher costs involved and the often relatively small sums for the purchased goods or services. Involvement of the High Court would thus be out of proportion.

On the other hand, terms providing for compulsory arbitration covered by the Act or other legislation are not greylisted. The same applies to provisions requiring the consumer to first take a dispute to the applicable industry ombud under section 69.

As the Arbitration Act¹⁴⁶⁴ applies to all arbitration agreements,¹⁴⁶⁵ it could be argued that all arbitration is 'covered by legislation'.¹⁴⁶⁶ Such a broad interpretation would however make item (x) superfluous. In the UK, where arbitration is also governed by legislation,¹⁴⁶⁷ the courts have interpreted this 'exception' to refer only to arbitration required by legislation. Compulsory arbitration clauses governed by the general arbitration legislation alone are still presumed to be unfair. Naudé correctly asserts that item (x) should be reworded in order to make it clear that

¹⁴⁶¹ **Article 6:236(n) BW** blacklists 'a stipulation which provides for the settlement of a dispute other than by a court with jurisdiction pursuant to law or by one or more arbitrators, unless it still allows the counterparty to choose for a settlement of the dispute by the court with jurisdiction pursuant to law and this choice can be made within a period of at least one month after the user has invoked the stipulation in writing.'

¹⁴⁶² Section 58 of the Bill published in SALRC *Report on Domestic Arbitration* (Project 94) (2001) at 161-162. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 112.

¹⁴⁶³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 115.

¹⁴⁶⁴ 42 of 1965.

¹⁴⁶⁵ **Section 2 of the Arbitration Act** only excludes '[a] reference to arbitration (...) in respect of (a) any matrimonial cause or any matter incidental to any such cause; or (b) any matter relating to status.'

¹⁴⁶⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 110.

¹⁴⁶⁷ Arbitration Act, 1996.

any arbitration clause which does not refer a dispute to arbitration in terms of a dispute resolution system set up by the Act or other legislation will be regarded as unfair.¹⁴⁶⁸

In any event, if the legislator does not want to outlaw compulsory arbitration clauses outright, they should be free from the element of compulsion, and both parties should have a free choice as to whether to go to arbitration or not.¹⁴⁶⁹ They also should be blacklisted for relatively small amounts. The current threshold in the UK is GBP 5,000. This amount seems to be very high at first sight but ensures that no expensive arbitration is possible under this threshold.¹⁴⁷⁰

In general, one has to ask when ascertaining the fairness of such a clause whether it serves the supplier or the consumer. In most cases, it will most probably serve the supplier who has an interest to dissuade consumers from legal action. The suppliers' argument that those arbitration clauses serve cost-effectiveness and expedience is not convincing. Suppliers who are concerned about delays can be expected to make use of the statutory system of alternative dispute resolution for their sector. If such a system does not yet exist, they can take steps to have one implemented under the industry codes of conduct in terms of section 82(6).¹⁴⁷¹ Van Eeden puts it this way: 'The Act appears to be striving to strike a balance between judicial remedies and alternative dispute resolution mechanisms and appears to place undue emphasis on the latter.'¹⁴⁷²

Hence, it is suggested that arbitration clauses should only be considered fair in consumer agreements if they are not compulsory, concern amounts above a considerable threshold which takes into account the relatively high arbitration costs, the consumer has been informed in advance about the cost implications, and the terms are fully, clearly and prominently set out in the consumer agreement.¹⁴⁷³

¹⁴⁶⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 110.

¹⁴⁶⁹ OFT *Unfair Contract Terms Guidance* (2008) para 17.3 at 67.

¹⁴⁷⁰ Section 1991 of the UK Arbitration Act, 1996.

¹⁴⁷¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 111. **Section 82(6):** 'If (a) a proposed industry code provides for a scheme of alternative dispute resolution; and (b) the Commission considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation, the Commission, when recommending that code to the Minister, may also recommend that the scheme be accredited as an "accredited industry ombud".'

¹⁴⁷² Van Eeden and Barnard *Consumer Protection Law* 293 and 294.

¹⁴⁷³ See *Mylcryst Builders Ltd v Buck* [2008] EWHC 2172 (TCC) at 56.

b) Restricting evidence or reversing burden of proof

Also greylisted in terms of regulation 44(3)(y) are clauses restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier.

Item (q) of the EC Directive on Unfair Terms in Consumer Contracts served as a model for this item, although according to the Directive, the clause must be 'unduly' restrict the evidence.¹⁴⁷⁴ Such terms are also listed in other countries, such as Germany.¹⁴⁷⁵

This item in the greylist deals with two different scenarios: First, where a party to the contract unilaterally restricts evidence available to the other party, and second, where a party creates a burden of proof for the other.¹⁴⁷⁶ In both cases, they are a hindrance to the consumer's right to take legal action and typically cause the contract to be 'excessively one-sided in favour of the supplier' by disturbing a fair balance between the parties.¹⁴⁷⁷ They have an effect similar to that of exclusion and limitation clauses.¹⁴⁷⁸

A typical clause restricting the evidence available to the consumer provides that the consumer has to provide the original invoice in order to have corrected a defect on the good he or she had purchased.¹⁴⁷⁹

The Act itself already contains a prohibition of certain false acknowledgements in section 51(1)(g), i.e., terms purporting to limit the evidence on which a consumer may rely are invalid. A similar provision can be found in section 90(2)(g)(i) of the National Credit Act. Pursuant to regulation 44(3)(v), certain acknowledgements are presumed to be unfair.

So-called 'conclusive proof certificates' under the common law which are nothing more than certificates established by the creditor and purporting to be conclusive proof of a certain

¹⁴⁷⁴ Under **item (q) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts** 93/13/ECC of 5 April 1993 clauses '(...) unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' may be regarded as unfair.

¹⁴⁷⁵ Pursuant to **§ 309 no. 12 BGB**, 'a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or b) having the other party to the contract confirm certain facts [is ineffective]; letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature'.

¹⁴⁷⁶ Van Eeden and Barnard *Consumer Protection Law* 295.

¹⁴⁷⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 116, *OFT Unfair Contract Terms Guidance* (2008) para 17.1 at 67.

¹⁴⁷⁸ *OFT Unfair Contract Terms Guidance* (2008) para 17.1 at 67.

¹⁴⁷⁹ See Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005)191.

balance due by the debtor are also invalid as they are against public policy, *contra bonos mores* and unenforceable.¹⁴⁸⁰ According to Van Zyl, the legality of such certificates should be reconsidered because 'account should be taken of business and commercial efficacy in considering a "conclusive proof" provision'.¹⁴⁸¹ With regard to the fact that in terms of such certificates the consumer is precluded from proving the contrary, and the creditor (and not an independent person) is the author of such certificate of balance, it is suggested, that in respect of the upsetting of the balance between the creditor and the debtor in favour of the creditor, conclusive proof certificates can never be fair.

Under section 2(10), no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. Hence, the courts should examine the residual rules on the normal incidence of the burden of proof which vary from contract to contract.¹⁴⁸² Section 65 provides that when a supplier has possession of any property belonging to or ordinarily under the control of a consumer, the supplier is liable to the owner of the property for any loss resulting from a failure to comply with the supplier's obligation to treat that property as being its own and to handle, safeguard and utilise that property with the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person. This provision seems to place the burden of proof on the consumer of whether the loss or damage of the goods in the supplier's possession was caused by the supplier's failure to take reasonable care. Section 65 thus deviates from the common-law rule according to which the supplier who takes the goods of the consumer into its safekeeping in the context of a depositum or bailment for reward¹⁴⁸³ will be presumed to be at fault if the goods are damaged. Under section 2(10), a consumer can however rely on the residual rules, and a term which excludes such common-law rules and places the onus on the consumer will be presumed to be unfair under regulation 44(3)(y).

Naudé argues that terms changing the onus of proof in contracts for safekeeping may sometimes be fair because the Act itself seems to allow such a shift.¹⁴⁸⁴ On the one hand, the party giving the good under the control of another will have difficulties to prove how the good

¹⁴⁸⁰ *Sasfin v Beukes* 1989 (1) SA 1 (A) 15A; *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A).

¹⁴⁸¹ Van Zyl J in *Society of Lloyd's v Romahn* 2006 (4) SA 23 (C) at para [125].

¹⁴⁸² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 119.

¹⁴⁸³ Bailment describes the transfer of the possession of goods from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It arises when a person gives property to someone else for safekeeping, hiring of goods, the loan of goods, the pledge of goods, and the delivery of goods for carriage or repair. It is a cause of action independent of contract or tort. See *Law Oxford Dictionary of Law* s.v. 'Bailment'.

¹⁴⁸⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 119.

was dealt with. For the party who has the control of the good it will be easy to prove the measures it took for keeping the good safe, and the circumstances which lead to the damage or destruction of the given good. The praetor's edict on seamen, innkeepers and stablekeepers provides that when goods are lost or damaged by such suppliers, the latter will be liable, except if they can prove one of a limited number of defences, such as *vis maior*.¹⁴⁸⁵ There is no reason why innkeepers, for instance, should bear the onus of proof for goods '*occasionally*' placed in their sphere of influence, whereas a party who agreed in safekeeping a good in terms of a depositum or bailment, which *expressly* has the object of keeping goods safe, should have the possibility to shift the onus onto the consumer. A term placing the burden of proof on the consumer will thus be presumed to be unfair under regulation 44(3)(y) in any event.

c) Limitation periods / Time-bar clauses

Regulation 44(3)(z) greylists clauses imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings).

The EC Directive's list does not contain a similar item, although the wider formulated items (q) and (b) cover this issue ('excluding or hindering the consumer's right to take legal action', 'inappropriately excluding or restricting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance').

Section 11(d) of the Prescription Act¹⁴⁸⁶ provides that the general prescription period, save where an Act of Parliament provides otherwise, is three years 'in respect of any other debt' than debts mentioned in paragraphs (a) to (d) of this provision. Section 11(d) of the Prescription Act includes consumer contracts.

The Consumer Protection Act is such an Act of Parliament and lays down specific prescription periods. The parties cannot deviate from these by agreement.¹⁴⁸⁷ One of those provisions is section 56(2) according to which a consumer may return the goods to the supplier within six months after their delivery if they fail to satisfy the quality requirements and standards contemplated in section 55. Section 61(4)(d) also contains provisions concerning the exclusion of liability if the claim for damages is brought more than three years after certain events, such

¹⁴⁸⁵ See *Davis v Lockstone* 1921 AD 153, *Essa v Divaris* 1947 (1) SA 753 (A).

¹⁴⁸⁶ 68 of 1969.

¹⁴⁸⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 122.

as death or injury, the earliest time at which a person had knowledge of the material facts about illness and so forth. Since section 61 does not apply to services, time-limitation clauses with regard to the provision of services fall under item (z) of regulation 44(3).¹⁴⁸⁸ In terms of section 116(1), a complaint in terms of the Act may not be referred or made to the Tribunal or to a consumer court more than three years after the act or omission that is the cause of the complaint, or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

The OFT maintained that it is particularly misleading if contract terms seek to exclude or limit the consumer's right to redress for faulty goods during the limitation period set out by law and considered this as an unfair commercial practice.¹⁴⁸⁹ This also applies to statements according to which statutory rights are unaffected, without any further explanation,¹⁴⁹⁰ because the consumer is unlikely to know its statutory rights and therefore cannot claim them.

When assessing whether a time-bar clause¹⁴⁹¹ is fair, the arguments put forward in *Barkhuizen v Napier*¹⁴⁹² can still be applied, although this case was decided before the Act came into force. The first question to be asked regarding the fairness of a time-bar clause is whether the clause affords the person bound by it 'an adequate and fair opportunity to seek judicial redress'.¹⁴⁹³ This is the case if the applicant knows the identity of the defendant and the amount of its claim, for instance.¹⁴⁹⁴ This is of course not the case, it is submitted, where the facts are so complicated, or information which is not easily at hand has to be gathered, or where the defendant holds back such information. This view is supported by the minority judgment of *Barkhuizen v Napier* which held that a period of 90 days of repudiation of the claim was unreasonable and unconscionable because the claimant was required to find litigation funds, appoint an attorney, cause counsel to be briefed and issue and serve a summons.¹⁴⁹⁵ Furthermore, one has to ask if the contract was freely concluded, if there was unequal

¹⁴⁸⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 122.

¹⁴⁸⁹ OFT *Unfair Contract Terms Guidance* (2008) para 2.4.4 at 26.

¹⁴⁹⁰ OFT *Unfair Contract Terms Guidance* (2008) para 2.4.5 at 26.

¹⁴⁹¹ A time-bar clause is a provision in a contract which sets a strict deadline within which either party may bring a dispute to either a court or to arbitration. See Duhaime's Law Dictionary s.v. 'Time-bar clause' at <http://www.duhaime.org/LegalDictionary/T/TimeBarClause.aspx>. On the other hand, limitation refers to statutory rules limiting the time within which civil actions can be brought. See Law *Oxford Dictionary of Law* s.v. 'limitation'.

¹⁴⁹² *Barkhuizen v Napier* (2007) (5) SA 323 (CC).

¹⁴⁹³ *Barkhuizen v Napier* para [67].

¹⁴⁹⁴ *Barkhuizen v Napier* para [63].

¹⁴⁹⁵ *Barkhuizen v Napier* para [112].

bargaining power¹⁴⁹⁶ and whether the relevant clause was drawn to the claimant's attention.¹⁴⁹⁷ Even if the clause itself were not unfair, it would nonetheless be contrary to public policy to enforce it if this would be unfair and unreasonable.¹⁴⁹⁸ One argument of the minority in the ruling mentioned above seems to be important when assessing the fairness of time-bar clauses, i.e., the legitimate interest of a certain time period. As a matter of course, a time-limitation has the objective to create certainty of a given legal status. However, there seems to be no reason to limit this period too much once the claimant has given timely notice of his or her intention to claim because the defendant is now able to investigate and to preserve evidence for trial. As Moseneke DCJ and Sachs J put it in the aforementioned case, '[t]he likely harm to the insured that the provisions wreaks seems disproportionate to the interest the insurance company seeks to protect'.¹⁴⁹⁹ Thus, the supplier must be able to explain why it and suppliers in a similar position or industry have a legitimate interest to differ from the normal prescription period.¹⁵⁰⁰

Other arguments put forward in *Barkhuizen v Napier* were that the clause lied buried obscurely in the insurer's exceptional long standard terms that were entirely to the benefit of the insurer without any apparent reciprocal benefit for the insured. In addition, the time period was less than 10 % of the normal prescription period of three years and significantly limited the constitutional right to have a dispute settled by a court. Furthermore, it was not subject to express qualifications in the case of impossibility of compliance etc., impacted the relationship between insured and insurer in an unbalanced fashion in respect of an activity of considerable public interest (insurance), and erased the claim altogether, instead of simply limit or qualify it.¹⁵⁰¹

For the OFT, a term which makes a claim dependent on the consumer having to notify the supplier of its complaint within an unreasonably short time is unfair. This applies particularly where '(a) a time limit is so short that ordinary persons could easily miss it through mere inadvertence, or because of circumstances outside their control, and (b) faults for which the supplier is responsible (...) could only become apparent after a time limit has expired.'¹⁵⁰²

¹⁴⁹⁶ As noted above, in standard contracts the parties almost never have equal bargaining power as those contracts are concluded on a 'take-it-or-leave-it' basis.

¹⁴⁹⁷ *Barkhuizen v Napier* para [66].

¹⁴⁹⁸ *Barkhuizen v Napier* para [69].

¹⁴⁹⁹ *Barkhuizen v Napier* para [113].

¹⁵⁰⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 126.

¹⁵⁰¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 125.

¹⁵⁰² OFT *Unfair Contract Terms Guidance* (2008) para 2.4.2 at 26.

The OFT did not object to terms that warn consumers ‘of the need to check to the best of their ability for any defects or discrepancies at the earliest opportunity, and take prompt action as soon as they become aware of any problem’.¹⁵⁰³ Although it considered that the supplier should have required prompt notification as this was helpful for the resolution of the dispute, the OFT maintained that it would be too severe to completely take away the consumer’s right to claim on the basis of this rationale.¹⁵⁰⁴ As long as the supplier does not suggest that he or she disclaims liability for problems that consumer fail to notice, there is no reason for concern.¹⁵⁰⁵

Under § 309 no. 8 BGB, a supplier must not set a limitation period of less than one year after the start of the statutory limitation period.¹⁵⁰⁶ This limitation for suppliers creates more balanced clauses in the context of standard terms in which the consumer only has limited bargaining power. Curiously, the South African legislature did not opt for such a minimum period.

Time-bar clauses are common in insurance contracts.¹⁵⁰⁷ However, the Act does generally not apply to insurance policies.¹⁵⁰⁸ Nonetheless, the Policyholder Protection Rules issued by the Minister of Finance under the Long-term and Short-term Insurance Acts¹⁵⁰⁹ provide for minimum prescription periods in insurance contracts. Besides notification periods and a period of not less than six months after the expiry of the period for representations to institute legal action, the insured may request the court to condone non-compliance with the clause if the court is satisfied that good cause exists for the failure to institute legal proceedings and that the clause is unfair to the policy-holder.¹⁵¹⁰

¹⁵⁰³ OFT *Unfair Contract Terms Guidance* (2008) para 2.4.6 at 27.

¹⁵⁰⁴ OFT *Unfair Contract Terms Guidance* (2008) para 2.4.3 at 26.

¹⁵⁰⁵ OFT *Unfair Contract Terms Guidance* (2008) para 2.4.6 at 27.

¹⁵⁰⁶ **§ 309 no. 8 BGB:** ‘(...) (b) [A] provision by which in contracts relating to the supply of newly produced things and relating to the performance of work (...) (ff) the limitation of claims against the user due to defects in the cases cited in [§] 438 (1) no. 2 and [§] 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained’ is ineffective.

¹⁵⁰⁷ De Stadler *Consumer Law Unlocked* 126.

¹⁵⁰⁸ Item 10 of Schedule 2 read with the definition of ‘services’ in s 1.

¹⁵⁰⁹ 52 of 1998 and 53 of 1998, respectively.

¹⁵¹⁰ Rule 16.2(c) of the Policyholder Protection Rules (Long-term Insurance), 2004, and rule 4(i) of the Policyholder Protection Rules (Short-term Insurance), 2004 (as amended).

d) Legal costs clauses

Regulation 44(3)(aa) provides that a term is presumed to be unfair if it entitles the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale.¹⁵¹¹

Such clauses, which were very common in South African standard terms,¹⁵¹² are excessively one-sided and therefore greylisted. Interestingly, legislation in other countries, such as Germany,¹⁵¹³ Austria or the Netherlands does not provide for similar legal provisions in the respective black- or greylists. This is probably because they are limited by other legal provisions providing for a tariff. The losing party normally has to pay its own and the other party's costs (party-and-party costs) on the basis of a tariff prescribed by legislation. Terms providing that the consumer is liable for the costs on the basis of the so-called 'attorney-and-client scale' entail that the consumer will be liable for the actual legal costs, which are much higher as they are not based on a tariff prescribed by legislation. A term under which the supplier is entitled to claim legal costs on an attorney-and-own-client scale would be presumed to be unfair if the contract does not provide the same rights for the consumer.¹⁵¹⁴

Section 51(1)((i)(iii) provides that an agreement that expresses, on behalf of the consumer a consent to a predetermined value of costs relating to enforcement of the agreement, is void, except to the extent that is consistent with the Act.

¹⁵¹¹ As to the different formulations for these clauses and further explanations see 'The difference between party-and-party costs and attorney-and-client costs are becoming a problem.' at <http://billsandcosts.co.za/component/content/article.html?catid=1:latest&id=19:problem-p-a-p-a-a-c&Itemid=2>.

¹⁵¹² Naudé 2007 *SALJ* 154.

¹⁵¹³ In Germany, the 'principle of the unity of costs' (*Einheit der Kostenentscheidung*) prevails, i.e., the court costs and fees (*Gerichtskosten/Gebühren*) as well as the so-called extra-judicial fees, such as lawyers' fees (*außergerichtliche Kosten*) are determined by the court *ex officio* in a so-called 'basic decision on the costs' (order on the costs) (*Kostengrundentscheidung*) in terms of §§ 308(2), 91 *et seq* ZPO. This decision only concerns the question who has to bear the costs and in which proportion, but not the actual amount, however. In terms of § 11(1) and (2) *Gerichtskostengesetz* — GKG, read with Annex 1 and 2 to the GKG, the court costs (*Gerichtskosten*) and fees (*Gebühren*), as well as the lawyer's costs (*Anwaltskosten*) are calculated on the basis of the amount in dispute (*Streitwert* or *Gegenstandswert*). The calculation itself is done by applying the so-called Baumbach formula (*Baumbach'sche Formel*). The actual amount of the court's costs and fees as well of the lawyers' fees is decided by a registrar/officer of justice (*Rechtspfleger*) in a taxation of costs procedure (*Kostenfestsetzungsverfahren*) pursuant to §§ 103 and 104 ZPO, read with §§ 19 GKG, 21 no. 1 and 3 *Rechtspflegergesetz* — RPflG. The amount a lawyer can require is set out in the Lawyers' Compensation Act (*Rechtsanwaltsvergütungsgesetz* — RVG, formerly the *Bundesrechtsanwaltsgebührenordnung* — BRAGO). Since 1 July 2006, lawyers can negotiate their fees for extra-judicial services. For all other services, i.e., before the courts, their fees are set out in the GKG. See Creifelds *Rechtswörterbuch* s.v. 'Kostenentscheidung', 'Kostenfestsetzung' and 'Rechtsanwaltsgebühr'. See also 'Kostenquotelung' at www.juratexte.de.

¹⁵¹⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 130.

According to the OFT, terms by which the supplier claims its legal costs on an 'indemnity' basis, i.e., all costs, and not just costs reasonably incurred, raise concern in terms of fairness because they might operate as penalty clauses.¹⁵¹⁵

3.4.7 Choice of law clauses

According to regulation 44(3)(bb), a term providing that a law other than that of South Africa applies to a consumer agreement concluded and implemented in South Africa, where the consumer was residing in South Africa at the time when the agreement was concluded, is presumed to be unfair.

The reason for the greylisting of such provisions is that consumers should not be prevented from taking legal action in their local courts. It would not be fair if they were forced to travel long distances and use procedures that are unfamiliar to them.¹⁵¹⁶

Hence, it is prohibited to choose another applicable law and to contract out of the Act. In any case, the application of the Act to transactions occurring within the Republic is mandatory under section 5(1)(a), unless it is exempted in terms of sections (5)(2), (3) or (4).¹⁵¹⁷ What is more, under section 5(2) the Act applies to every transaction occurring within the Republic. In addition, if a contract or provision is illegal under the *lex fori* it will be so, even if it is legal under the proper law of the contract as determined by the choice of law clause.¹⁵¹⁸ According to section 51(1)(a), a person must not make a transaction or agreement subject to any term or condition if its general purpose or effect is to defeat the purposes and policy of the Act. Therefore, a clause which circumvents the application of the Act by providing that another law is applicable will be presumed to be unfair in terms of item (bb).

Suppliers are entitled to exclude residual rules of the common law which are not mandatory in terms of the Act, however. Otherwise, the consumer is entitled to rely on its common-law-rights. This is because the Act is not supposed to be an overall consumer protection statute. Nonetheless, these clauses must be fair under section 48.¹⁵¹⁹ The residual common-law rules on the supplier's liability for consequential loss caused by defective goods, for example, offer greater protection to consumers than section 61 which governs damages for loss caused by goods. The supplier may exclude this residual common-law rule, but the terms governing this

¹⁵¹⁵ OFT *Unfair Contract Terms Guidance* (2008) para 5.3 at 40.

¹⁵¹⁶ OFT *Unfair Contract Terms Guidance* (2008) para 17.4 at 68.

¹⁵¹⁷ Van Eeden and Barnard *Consumer Protection Law* 293.

¹⁵¹⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 131.

¹⁵¹⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 131.

exclusion must be fair in terms of section 48. Since section 48 declares excessively one-sided terms as unfair,¹⁵²⁰ choice of law clauses at the consumer's disadvantage will be unfair.

3.5 Conclusion

The insertion of a greylist by means of regulations has the advantage that no act of Parliament is necessary in order to add or delete individual items in the future, if necessary. A more or less regular update of the list contained in regulation 44(3) would give guidance and certainty, even though it is made clear in regulation 44(2)(b) that the list is not exhaustive. Since South Africa has hardly any experience in an overarching consumer protection legislation, this approach is more appropriate and allows for more flexibility. Although the greylist has not been inserted directly into the Act, the threefold interplay of the blacklist in section 51, the greylist in regulation 44(3) as well as the general fairness enquiry in terms of section 48 offers a contractual regime able to strike a balance between the consumer's and the supplier's interests.

Like blacklists, greylists have undoubted advantages because they enable consumer protection bodies and businesses to take preventive action *ex ante*, i.e., already during the negotiations with businesses, and therefore promote self-imposed fairness control. One of the greatest advantages is the shift of the onus of proof from the consumer to the supplier since only businesses are in the position to furnish proof as to why they inserted certain clauses into their standard terms. A regime in which contractual fairness is assessed only by a blacklist and a general clause does not offer sufficient guidance to judges and economic actors so that greylists also simplify the courts' task to reach a decision.

The greylist's ambit is narrower than the one of section 51 because it only applies to consumer agreements (i.e., not to franchise agreements) between 'real' suppliers and 'real' consumers. B2B agreements which fall under section 51 are thus excluded. The artificial distinction between consumers purchasing goods or services which are intended for future business, and those who purchase goods or services for private purposes, which are later used for business purposes, should be abolished. In both cases, the consumer affords the protection of regulation 44. The same applies to franchisees that are often as vulnerable *vis-à-vis* big firms as individual consumers.

¹⁵²⁰ Section 48((2)(a).

The list contained in regulation 44 is only indicative and non-exhaustive. Thus, the listed terms may be fair in the particular circumstances of the case, and also terms not listed could be unfair under section 48.

The items listed in regulation 44(3) are mostly inspired by foreign legislation, such as the EU Directive on unfair terms in consumer contracts, §§ 308 and 309 of the German BGB, § 6 of the Austrian KSchG, articles 6:236 and 6:237 of the Dutch BW, the UK Unfair Terms in Consumer Contracts Regulations 1999 and the Australian Competition and Consumer Act 2010. The reasoning for greylisting specific clauses is to ensure that the parties' rights and obligations are evenly balanced in terms of the contract law and the provisions implied by law and that the risks between the parties are fairly distributed.

Terms excluding or restricting the supplier's liability for death or personal injury (**item (a)** of regulation 44(3)) should rather be blacklisted than greylisted. This would also be in keeping with the high value that the Constitution and the common law attribute to the sanctity of human life. Those who argue that the outright prohibition of such clauses could have adverse effects on South African businesses should not overlook that commercial reasons should not be put on the scales with questions of death or personal injury. This also applies to non-profit organisations, such as schools, where not the supervising parents but the schools, or better their subordinate governmental departments, should be held liable for death or personal injuries of students, which occur on school trips, for instance. Besides, the South African insurance industry could offer better and more cost-efficient policies in this regard, like in other countries.

Non-derogable rights, such as provided in sections 19(6)(c), 54(2) or 56(2) are not covered by **item (b)**, which deals with the exemption of breach. In addition, the common-law principle of material positive malperformance permits a party to immediately cancel the contract (mostly after a certain time has elapsed). Since the Act does not provide for a comprehensive law of contract, certain exemption clauses do not fall under item (b). Hence, certain 'saving provisions' make sure that common-law rights and warranties are still applicable. There might be legitimate reasons for the supplier to exclude the consumer's legal rights or remedies. In any event, the price should reflect the existence or non-existence of certain legal rights stipulated in a clause. If the consumer can find the same product elsewhere at a lower price but without the restrictive clause, the clause is likely to be unfair.

In their fairness review, the courts have to take also into consideration whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision

that is alleged to be unfair, having regard to any custom of trade. This can lead to unfair results though since knowledge of an unfair term cannot make it fair. When a supplier has problems with its own subcontractors, it should not be allowed to exclude its liability for breach because the consumer did not influence the supplier's choice of its own suppliers and has no recourse against them. A term under which the consumer has to bring a defective good to the supplier's place of business at its own costs falls under item (b). Small businesses should be allowed to require the consumer to bring and fetch the given goods if this does not pose any problems to the consumer. This should be dealt with on a case-to-case basis though. In terms of item (b), the exclusion or restriction of the consumer's right to set off a debt is also greylisted. This provision should be interpreted widely so that also clauses by which a supplier may require full payment before the service delivery are presumed to be unfair. Otherwise, the supplier would have no incentive to do its work properly, and the consumer would bear the risk of the supplier's insolvency.

Item (c) deals with entire agreement clauses and prevents that suppliers disclaim their responsibility by the use of such clauses, which have the effect that oral commitments by the supplier or its agents would not be valid. This item also prevents unfair outcomes which were often achieved by the strict application of the *Shifren* principle and the parol evidence rule, which is particularly important because consumers often do not read terms and conditions. Compared to section 51(1)(g), regulation 44(3)(c) has a broader scope of application because it aims to prevent consumers from relying on representations that were not expressly included in the contract. This item should be interpreted widely so that also compliance with formality requirements for variations are included. The EC Directive's formulation is clearer in the sense that it undoubtedly comprises cases where both parties sign a variation. The wording of the South African item should therefore be amended.

Item (d) deals with vicarious liability. Even though this item does not mention the supplier's employees, it derives from section 113(1) that those are also included. In contrast to section 113(1), which is only applicable to the joint and several liability in terms of the Act, item (d) applies to terms limiting the supplier's vicarious liability under the residual common-law rules.

Indemnity clauses are dealt with in **item (e)** which aims to prevent the inappropriate transfer of risks onto the consumer. This provision also applies, contrary to item (a), to provisions in respect of liability for illness, loss of, or physical damage to property as well as economic loss resulting from the death, or injury to a natural person.

The restriction of the statutory defence of prescription is greylisted in **item (f)**. The general framework for prescription is laid down in the Prescription Act, according to which contracts prescribe after three years. The institution of prescription not only provides for certainty for the benefit of the parties involved but also for the general public. Clauses which restrict or exclude the consumer's statutory defence of prescription should therefore always be void and rather be blacklisted.

The term 'normal rules' regarding the distribution of risk in **item (g)** does not mean the rules of a particular industry or market. Otherwise, the *status quo* would be entrenched. It does neither mean the application of the reasonableness test of section 48(2) as the legislator had a more specific conception in mind. It rather means the consideration of the *naturalia* of a contract. Section 54(1)(d) must not be understood in the sense that the supplier also is responsible for losses caused by unforeseen events, such as *vis maior* or *casus fortuitus*. Because of its underogable character, section 18(1) escapes the assessment of item (g).

Clauses by which the supplier may increase the agreed price because of costs which are beyond its control are most likely to be unfair in terms of **item (h)**. This especially applies if the consumer cannot cancel the agreement. Price increase clauses may be fair though if the supplier specifies the level and timing of the price increases, e.g., by using an index. Without the possibility for the consumer to cancel the agreement due to a price increase, such clauses may be fair though if he or she was informed of the factors for the price increase and there was actual and informed consent. Other countries prohibit price increases before a certain period after the conclusion of the contract has elapsed.

Item (i), which greylists unilateral variation clauses, does — contrary to item (h) — not contain the qualification 'without giving the consumer the right to terminate the agreement'. This means that the legislator set the fairness bar higher for the supplier. Only for open-ended agreements this qualification exists in terms of regulation 44(4)(a)(iv)(bb). The exceptions contained in subregulation (4)(c) are justified because the circumstances contained therein are beyond the supplier's control. So-called 'reasonableness qualifications' are generally too extensive since the consumer is unable to know in which circumstances variations are allowed. Variation clauses must hence be clearly set out and not merely protect the supplier's margin. Item (i) should be amended according to the wording of § 6(2) no. 3 of the Austrian KSchG, so that variation clauses are fair unless the consumer can reasonably expect them, mainly because they are negligible and factually justified. Also for improvements, the wording of the Austrian

provision (which is almost identical with § 308 no. 4 BGB) would be helpful. In any event, the balancing test between the supplier's and the consumer's interests should be applied in case of improvements, which are not always wanted by the consumer.

The determination of conformity and right of interpretation is contained in **item (j)**. The use of the word 'conformity' in this item is misleading since 'breach' would be more appropriate. The rationale for greylisting this term is that suppliers should not be the judges of their own affairs, but that rather independent testing is necessary for which the consumer does not have to bear the costs if its complaint is well-founded. The wording of the item should also be amended insofar as also terms should be presumed to be unfair where the supplier has the exclusive and final right to determine if it has breached the contract and the exclusive and final right of interpretation of the agreement. The referral to experts or arbitrators of matters which involve only small sums should be unfair, which is why the legislator should determine a threshold like in the United Kingdom.

Unequal termination rights: Not only the absence of reciprocity makes terms falling under **item (k)** unfair as the consumer might suffer disproportionate consequences if the supplier terminates the contract, even if the consumer has the same right. This item does not apply to terms which allow a termination of the contract for breach. In those cases, section 48 is applicable, and the consumer bears the risk of non-persuasion. Item (k) only applies to once-off transactions, and not to open-ended agreements. Because of an editorial error, regulation 44(4)(a) does not apply to item (k).

In terms of the termination of open-ended agreements without reasonable notice, **item (l)** requires a breach by the consumer. The UK regulations, on the other hand, require a broader concept of 'serious grounds' which include a reasonable suspicion of fraud or abuse. Item (l) should ideally be redrafted and include a 'risk of breach'. A supplier's terms must however be clearly drafted in this regard, and the risk must be sufficiently serious and probable. The EC Unfair Terms Directive requires a 'valid reason' for suppliers of financial services and is therefore somewhat stricter than item (l). With regard to section 14, regulation 44(4)(a) should be amended in that the supplier has to give reasonable notice.

Item (m) concerns terms by which the consumer, unlike the supplier, is obliged to fulfil all its obligations. For the application of this item, and contrary to item (b), for instance, a breach of contract is not necessary. This item covers a wide range of scenarios, such as clauses by which the supplier may suspend its services and the consumer has to pay nonetheless. Such clauses

may be fair though if the suspension of its services enables the supplier to deal with technical problems or to enhance its services. They have to be narrow in effect and sufficiently qualified though, the supplier has to inform the consumer well in advance, and the consumer must be able to cancel the contract before being affected. As this type of clauses might be disguised as penalty clauses, their potential effect as well as the intention behind them have to be considered.

The practical relevance of **item (n)**, which concerns the unilateral avoidance or limitation of performance by the supplier, is limited because breach is already covered by item (b), and the Act already prohibits other terms with respect to the quality of goods and services. Clauses by which only the supplier may avoid or limit its performance often have the same effect as terms obliging the consumer, but not the supplier, to fulfil all its obligations.

Item (o) dealing with one-sided renewal clauses does not apply to fixed-term agreements because section 14, read with section 5(1), already provides for an applicable legal framework. In this context, a formal equivalence in the parties' rights to cancel their agreement is not sufficient because both should enjoy rights of equal extent and value.

Section 19(2) does not *per se* prohibit provisions allowing the supplier an unreasonable long time to perform, but according to **item (p)**, an evaluative reasonableness standard must be applied. This item has a warning function for suppliers. In order to be fair, such terms must include factors which are beyond the supplier's control and include cases where he or she is not at fault.

Item (q) concerns one-sided forfeiture clauses and is of rather limited application because it only operates in circumstances which are not covered by section 17 (cancellation fees) and in situations where the forfeiture clause was intended to operate when the contract is cancelled after a party has breached it. Another factor for the limited application of this item is that suppliers will tend to rather insert penalty clauses. Although consumers are not less vulnerable in terms of penalty clauses since the courts have to consider equity, suppliers could circumvent the rationale of item (q) by inserting unreasonably high penalty fees hoping that consumers, who often do not know about the Conventional Penalties Act, will not sue them. The reasonableness of cancellation charges under section 17 is subject to item (q) though. Section 17 provides for guidelines for the determination of the amount of cancellation charges, which have to be taken into account cumulatively. Suppliers should provide for a method of calculation of cancellation fees (e.g., a sliding scale) in order to make their calculation comprehensible. Section 17(5) should be amended as not only death or hospitalisation should

be taken into consideration, but also other medical or psychological reasons as well as *force majeure*. The medical and psychological reasons should be assessed objectively by a medical professional.

Like item (q), **item (r)**, which concerns penalty clauses, operates in cases where the contract is cancelled after breach, except that the breach in item (r) comes from the consumer. This item does not apply to cancellation fees for fixed-term agreements under section 14 or to those in terms of advance bookings, orders or reservations according to section 17. Although item (r) seems superfluous with respect to the Conventional Penalties Act, this item has an extra-judicial and proactive effect.

Item (s) applies to terms which stipulate an unreasonable high remuneration upon the termination of the contract. This item has a wider application than item (r) because it applies to cases other than breach of contract. The use of the adverb 'unreasonably' in this context indicates an evaluative element which allows the consideration extrinsic factors, which gives the courts more leeway, as opposed to 'significantly' or 'disproportionally'.

Unlike EU law, **item (t)** does not apply to a transfer of rights, but only to a transfer of the supplier's obligations without the consumer's consent. The presumption of the greylist covers the phrase 'to the detriment of the consumer', which means that the supplier has the onus of proof. In cases where the consumer relied on the supplier's reputation and goodwill, there is a possibility of abuse and bad faith on the supplier's side, even if the consumer has the same rights after the transfer of the supplier's obligations. This is also the case for contracts which rely on a trustful relationship, e.g., between lawyers or architects and their clients. A transfer of obligations should always be regarded as detrimental to the consumer in these cases. A transfer of obligations might be fair if the consumer may cancel the agreement, or the supplier remains liable for the third party's performance. The consumer has to find another supplier in these cases whom he or she trusts though, and there might be delays. Hence, detrimental effects cannot be excluded in these situations either. If the supplier's business is transferred to a subsidiary controlled by it, or within a similar lawful company transaction, the transfer of the supplier's obligations may be fair.

The limitation of the transferability of commercial guarantees is greylisted in **item (u)**. Those guarantees add substantial value to the purchased good. If the consumer cannot sell the item with the guarantee, he or she is deprived of part of what was paid for, and the supplier has an economic benefit. Item (u) should not only apply to the re-sale, but also to other types of

transactions, irrespective of whether the initial purchaser had used the good in question. There is no reason why a re-sale should be greylisted, and a donation not. The wording of this item should therefore be amended accordingly.

Item (v) of the greylist deals with deemed statements and acknowledgements of the consumer and only applies to those which are not already prohibited by the Act. Hence, this paragraph is limited to terms purporting to apply to acknowledgements deemed to have been made after the conclusion of the agreement, and which do not relate to amendments of the agreement itself.

Consumers should not be deprived of their legal defence that they have actually not received the supplier's communications. Therefore, **item (w)** presumes such deeming clauses as being unfair. Other means of communication, such as e-mail, should also be included. In cases where the consumer only implicitly informed the supplier of its new address, e.g., on its letterhead, the supplier's communications should not be deemed to have reached the consumer if it was negligently sent to the former address. Sending a communication knowingly to the consumer's former address amounts to unconscionable conduct in terms of section 40. If the consumer did not communicate its new address and the supplier does not know about it, the communication should neither be deemed to have reached the consumer.

Clauses which exclude or hinder the consumer's right to take legal action or exercise any other legal remedy are greylisted in **item (x)**. Such clauses often aim to dissuade consumers from taking legal action. Arbitration covered by the Act is not greylisted, however. Certain enforcement clauses are already blacklisted (section 51(1)(i) and (iii)). In common law, clauses prohibiting the consumer from seeking redress are forbidden too. Clauses giving jurisdiction to the High Court instead of the Magistrates' Court are likely to be unfair because of the higher costs and the relatively small sums involved. The phrase 'covered by legislation' should not include the Arbitration Act as otherwise, item (x) would be superfluous. Arbitration clauses should only be considered fair if they are not compulsory, concern only amounts above a considerable threshold taking into account the relatively high arbitration costs, the consumer has been informed in advance about the cost implications, and are fully, clearly and prominently set out in the consumer agreement.

Item (y) covers cases where the supplier restricts available evidence to the consumer or creates a burden of proof so that the consumer is hindered from taking legal action. The courts should assess the residual rules on the normal incidence of the burden of proof which vary from contract to contract. Clauses which exclude residual rules have to be considered with regard to

section 2(10). A change of the onus of proof in contracts for safekeeping to the detriment of the consumer should be considered unfair because there is no reason why for innkeepers, for instance, in whose sphere a good is placed occasionally, should another standard be applied as opposed to a contract for safekeeping which expressly has the object of keeping goods safe. Commercial efficiency is not sufficient to make conclusive proof certificates fair because consumers would otherwise be precluded from proving the contrary.

Item (z) greylists time-bar clauses and limitation periods that are shorter than the common-law rules or legislation for legal steps. The prescription periods set out in the Act take precedence over those provided for in the Prescription Act so that the parties cannot deviate from them. The fairness of time-bar clauses can be assessed by putting forward the arguments of *Barkhuizen v Napier*, although this case was decided before the Act came into force. Clauses by which the consumer has to check for any defects at the earliest opportunity are not unfair *per se* as they may ascertain a smooth resolution of the dispute. However, they cannot wholly take away the consumer's right to dispose of a prescription period long enough to seek judicial redress. It is regrettable though that item (z) does not contain a minimum period like § 309 no. 8 BGB.

Item (aa) especially concerns attorney-and-client fees which are much higher than party-and-party costs based on a tariff prescribed by legislation. Consumers should not be prevented from taking legal action in their local courts. This is why **item (bb)** greylists choice of law clauses. Suppliers can exclude residual common-law rules which are not mandatory in terms of the Act though. The applicable rules must be fair in terms of section 48.

4. The general clause of section 48

Terms that are not listed in the blacklist contained in section 51 or in regulation 44 may still be unfair under section 48.

Section 48 contains a general clause of unfair contract terms. General clauses are generally open-ended, and the courts' task is to decide on their concrete contents.¹⁵²¹ This open-endedness does not mean however that a general clause does not improve legal certainty,¹⁵²² especially in combination with black- and greylists. The existence of a general clause alongside black- and greylists and the interplay between them is essential and certainly a factor why unfair terms control in Germany has been more effective than in the United States, for instance, where judges merely has to deal with a single general clause. In contrast, German law 'provide[s] additional authoritative points for application of unfair terms control [such as lists of prohibited terms with or without the possibility of evaluation],¹⁵²³ while maintaining a general clause to respond to the need for flexibility'.¹⁵²⁴ A general clause is therefore a catch-all clause that concretises the standards contained in black- and greylists. Insofar any discretion remains when applying the clauses contained in black- or greylists, the standards of the general clause emanate upon these lists.¹⁵²⁵ For this reason, the general clause can be referred to as the core of content control.¹⁵²⁶

Because a general clause is aimed to be a catch-all clause, the provisions contained in the applicable black- and greylists have to be examined first. The latter are not complete and merely exemplary.¹⁵²⁷

In most jurisdictions, the wording of a general clause is rather straightforward. Already Kötz in his report for the 50th German Jurists' Conference in 1974 wrote that 'the precise formulation of the general clause does not cause any excessive difficulties. One should at least choose formulations that, despite their inevitable vagueness, are as accurate and precise as possible. Hence, it is not recommendable to consider standard terms invalid without further ado if they are 'inequitable' or 'inadequate', or 'unilaterally favour' a party. The validity of standard terms

¹⁵²¹ Hawthorne 2012 *THRHR* 361.

¹⁵²² Kötz *Gutachten* 50. *DJT* 62.

¹⁵²³ See §§ 308 and 309.

¹⁵²⁴ Maxeiner 2003 *Yale J. Int. Law* 172.

¹⁵²⁵ Staudinger/*Coester* (2006) § 307 para 10 and 83.

¹⁵²⁶ Locher *Recht der AGB* 123.

¹⁵²⁷ Staudinger/*Coester* (2006) § 307 para 23. In the South African greylist contained in **reg 44**, this is expressly mentioned in **subreg 2(b)**: 'The list in subregulation (3) is non-exhaustive, so that other terms may be unfair for purposes of section 48 of the Act.'

should rather depend on the question of whether they cause an imbalance between the rights and obligations of the parties.¹⁵²⁸ Most general clauses in other jurisdiction therefore make clear that a clause is 'unfair' if there is some imbalance between the parties' rights and obligations, that is if the clause 'unreasonably disadvantage[s] the other party',¹⁵²⁹ 'constitute[s] a severe disadvantage for one of the parties',¹⁵³⁰ 'is unreasonably burdensome for the counterparty',¹⁵³¹ or 'causes a significant imbalance in the parties' rights and obligations arising under the contract'.¹⁵³² Unfortunately, South Africa chose another path.

Both the headings of section 48 ('Unfair, unreasonable or unjust contract terms') and Part G ('Right to fair, just and reasonable terms and conditions') make clear that section 48 is aimed at content control. The Consumer Protection Act does not contain any definition of what is 'unfair, unreasonable or unjust'. Therefore, one has to apply the ordinary meaning of these terms, and in the case of ambiguity, the courts must apply the principles of construction as amplified by the Act.¹⁵³³ According to section 2(1), the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. The use of the words 'unfair, unreasonable or unjust' in section 3 makes it difficult to interpret those words though. It will therefore be examined in the following if the provisions contained in section 48 contribute to a concretisation of the phrase 'unfair, unreasonable or unjust'. In terms of section 2(2), the courts may consider appropriate foreign and international law and international conventions. These can be very helpful too in order to define the concept of 'unfairness'. The German general clause of § 307 BGB, for instance, not only consists of a general standard in its paragraph (1) 1st sent. but also of three concretisations. Under § 307(1) 2nd sent., '[a]n unreasonable disadvantage may also arise from the provision not being clear and comprehensible'. Paragraph (2) of the same provision clarifies that an unreasonable disadvantage is 'to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates, or limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised'.¹⁵³⁴ If and how German legislation can be used for the understanding of the South African provisions is a topic of this thesis. For the

¹⁵²⁸ Kötz *Gutachten* 50. DJT 63. My own translation.

¹⁵²⁹ § 307(1) 1st sent. BGB (Germany).

¹⁵³⁰ § 879(3) ABGB (Austria).

¹⁵³¹ Article 6:233 BW (Netherlands).

¹⁵³² Article 3(1) of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993 and Art 3(1) of the Australian Consumer Law.

¹⁵³³ Van Eeden *Guide to the CPA* 182, Kellaway *Legal Interpretation* 229.

¹⁵³⁴ WLP/Wolf § 307 para 74.

moment, it should be sufficient to state that section 48 also contains 'concretisations' in its paragraph (2) which will be discussed further below.

Van Eeden argues that the legislator has introduced three different standards by choosing the wording 'unfair, unreasonable or unjust'.¹⁵³⁵ In contrast to this view, Sharrock maintains that these three terms overlap considerably in meaning and that the legislator should have chosen only one of them which would have served the same purpose.¹⁵³⁶ Sharrock's point of view is correct as these three adjectives are largely synonymous because an unreasonable clause (e.g., a clause that is excessively one-sided in favour of the supplier) is also unfair or unjust. What is more, one generally speaks of the 'fairness assessment' in this context, which includes unreasonable and unjust terms. Superfluously, the legislator chose even other synonyms for 'unfair' in other instances in section 48, such as 'inequitable'¹⁵³⁷ or 'unconscionable',¹⁵³⁸ which contributes even more to the general confusion. Instead, it should have opted for only one term. If the legislator was of the opinion that these different terms bear different meanings, they should have been defined in sections 1 or 48. In comparison with other legislation, only the EC Unfair Terms Directive¹⁵³⁹ and the Australian Consumer Law¹⁵⁴⁰ use the word 'unfair'. Other legislation, like Germany, Austria or the Netherlands, chose another structure according to which a clause is void if it causes an imbalance between the parties' rights and obligations.¹⁵⁴¹ Terms such as 'unfair' or similar terms are not applied at all there.¹⁵⁴² Alternatively, the

¹⁵³⁵ Van Eeden and Barnard *Consumer Protection Law* 258. Van Eeden merely refers to section 48(1)(a)(i) which concerns only 'unfair, unreasonable or unjust' prices. There is however no strong argument why his view should not also apply to the other instances of section 48.

¹⁵³⁶ Sharrock 2010 *SA Merc LJ* 307, Sharrock *Judicial control* 128.

¹⁵³⁷ Section 48(2)(b).

¹⁵³⁸ Section 48(2)(d)(i).

¹⁵³⁹ **Article 3(1) of the EC Directive on Unfair Terms in Consumer Contracts** 93/13/ECC of 5 April 1993: 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.

¹⁵⁴⁰ **Section 3(1) Australian Consumer Law** (Schedule 2 to the Competition and Consumer Act, 2010): A term is unfair 'if (a) it causes a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it'.

¹⁵⁴¹ **§ 307(1) BGB**: 'Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.' **§ 879(3) ABGB** (Austrian General Civil Code): 'Contractual provisions in standard business terms or contractual forms that do not determine a mutual principal obligation are void in any event if they constitute a severe disadvantage for one of the parties, having regard to all the circumstances of the case.' (My own translation). **Article 6:233 BW**: 'A stipulation from the applicable standard terms and conditions is voidable: (a) if it is unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case; (b) if the user has not given his counterparty a reasonable opportunity to take knowledge of the content of the applicable standard terms and conditions.'

¹⁵⁴² See § 307(1) BGB, § 879(3) ABGB (Austrian General Civil Code), and Article 6:233 BW (Dutch Civil Code).

legislator could have defined 'unfair' by including the other synonyms in order to maintain any additional differences in meaning not covered by 'unfair'.¹⁵⁴³

4.1 Structure and ambit of section 48

Section 48 contains several unfairness standards which will be dealt with below. The first unfairness standard is the 'general unfairness standard' of section 48(1) which deals with unfair, unreasonable or unjust terms or prices. This standard is complemented by section 48(2)(a) and (b), the so-called 'basic unfairness standards'. Furthermore, section 48(2)(c) deals with the consumer's reliance on representations or statements of opinion, unlike section 48(2)(d) which deals with non-compliance with section 49.¹⁵⁴⁴ The last two provisions are systematically not part of the first two unfair standards and can thus be called 'deceptive standard' and 'procedural standard',¹⁵⁴⁵ in order to achieve a more precise classification.¹⁵⁴⁶

In conclusion, compared to other legislation, the South African general clause is very burdensome.

4.1.1 The general unfairness standard of section 48(1)

Section 48(1) sets out what a supplier must not do in general: offer to supply, supply or enter into an agreement to supply, any goods or services at an unfair, unreasonable or unjust price¹⁵⁴⁷ or such terms, market goods or services in an unfair, unreasonable or unjust manner, or require a consumer or another person to waive any rights, assume any obligation or waive the supplier's liability on terms that are unfair, unreasonable or unjust, or impose such terms as a condition of entering into a transaction.

The general unfairness standard of section 48(1) even applies to provisions specifically agreed after negotiations, and not only to those in standard-form contracts or non-negotiated terms.¹⁵⁴⁸

¹⁵⁴³ Sharrock 2010 *SA Merc LJ* 307, Sharrock *Judicial control* 128.

¹⁵⁴⁴ Van Eeden and Barnard *Consumer Protection Law* 248 and 249.

¹⁵⁴⁵ See Van Eeden and Barnard *Consumer Protection Law* 250.

¹⁵⁴⁶ This is the terminology applied by Van Eeden. Other denominations are possible, of course. However, for the sake of simplification, the same terms will be applied in this thesis.

¹⁵⁴⁷ The question is if the abolished *laesio enormis* doctrine is applicable in respect of price. See Van der Merwe *et al Contract General Principles* 112. In terms of the *laesio enormis* doctrine (Latin: *abnormal harm*), a party could rescind an agreement if the price of exchange was less than a certain proportion of its actual value. The principle was developed so that people received a just price in exchange. This is in opposition to the Imperial Roman view, found in the *Corpus Juris Civilis*, according to which the parties to a contract were entitled to try to overreach each other. See 'Laesio enormis' at <https://www.proverbia-iuris.de/laesio-enormis>.

¹⁵⁴⁸ Sharrock 2010 *SA Merc LJ* 307, Sharrock *Judicial control* 128.

This is not the case in most other regimes, where individually negotiated clauses are not subject to content control.¹⁵⁴⁹

It is however puzzling that also the supply of goods or services on unfair terms is prohibited by section 48(1)(a) since any supply requires an agreement to supply (which is also regulated in paragraph (a)). What is more, it is difficult to imagine how a supply can take place without an underlying agreement.¹⁵⁵⁰ Naudé suggests that the legislature might have wished to make clear that section 48 is also applicable in cases where suppliers who grant access to their premises or facilities set up notices, e.g., at the entrance at their premises, which contain unfair terms purporting to bind consumers who gain access to those facilities. Under the common-law maxim *volenti non fit iniuria*,¹⁵⁵¹ such a notice would bind a consumer only if it entered into an agreement on those (unfair) terms, if the consumer relied reasonably that it had done so, or if it voluntarily assumed a risk.¹⁵⁵² In these cases, the so-called 'ticket-cases'¹⁵⁵³ could apply though by which an agreement is concluded without the customer's signature. These cases are relevant in situations where a great number of customers conclude the same kind of transactions with the same supplier, and where it is practically impossible to obtain a signature from every single customer. Hence, the term 'ticket cases' is not wide enough because it involves all cases where a supplier submits a document containing or referring to its terms and conditions, and which is not intended to be signed, before the consumer.¹⁵⁵⁴ The consumer will be bound to the supplier's standard terms if the latter has done what was reasonably sufficient, necessary, or possible to draw the consumer's attention to the provisions in question.¹⁵⁵⁵

If the supplier can assume from the consumer's conduct that he or she has either read and agreed to the standard provisions or is prepared to be bound by them without reading them, the supplier

¹⁵⁴⁹ This is the case for § 305b BGB: 'Individually agreed terms take priority over standard business terms', and also Art 2.1.21 of the Principles of International Commercial Contracts (PICC) set up by UNIDROIT: 'In case of conflict between a standard term and a term which is not a standard term the latter prevails.'

¹⁵⁵⁰ Sharrock 2010 SA Merc LJ 308, Sharrock *Judicial control* 129.

¹⁵⁵¹ *Volenti non fit iniuria* (Latin: 'no wrong is done to one who consents') is the defence that the claimant consented to the injury or to the risk of being injured. Knowledge of the risk is not sufficient, since there must be full and free consent to bear the risk. Law *Oxford Dictionary of Law* s.v. 'Volenti non fit iniuria'.

¹⁵⁵² Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹⁵⁵³ For the ticket cases see ch 2 para 4.1 d) above.

¹⁵⁵⁴ Christie and Bradfield *Law of Contract* 186 and 187.

¹⁵⁵⁵ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A) 991I-992A, *Jacobs v Imperial Group (Pty) Ltd* 2010 (2) All SA 540 (SCA) at [9].

can perform the contract. This is regularly the case where the supplier's document itself was sufficient to draw a reasonable consumer's attention to its content.¹⁵⁵⁶

The question of when a supplier's steps were sufficient to draw the consumer's attention to the provisions contained in a document (ticket) was dealt with in early cases, such as *Central SAR v McLaren* 1903 (TS) 727 (a case based on English law) and has since evolved as follows: If the consumer knows that the document in question contains terms without reading them, he or she is bound to them. If the client does not know that terms are printed on the ticket, he or she is only bound if the supplier took reasonable steps to draw the attention of a reasonable consumer to those terms, irrespective of whether they are printed on the ticket, or the ticket simply refers to them.¹⁵⁵⁷

In terms of section 11(3) of the Electronic Communications and Transactions Act,¹⁵⁵⁸ contractual provisions which are incorporated into an agreement and that are not in the public domain are regarded as having been incorporated into a data message if such information is referred to in a way in which a reasonable person would have noticed the given reference and incorporation, provided that the information is accessible in a form in which it may be read, stored and retrieved by the other party.¹⁵⁵⁹ Thus, a consumer is justified to ignore a document which does not appear to him, as a reasonable person, to be an agreement.¹⁵⁶⁰ The same applies if the consumer receives the document only after the contract has been made,¹⁵⁶¹ or where both factors are combined.¹⁵⁶²

If the consumer was meant to be bound by such a notice, it is submitted, that the word 'supply' in section 48(1)(a) would tacitly contain the requirement of entering into an agreement to supply. The fact that the word 'supply' is not put in a chronologically logical order with the other two verbs describing the 'contractual steps', namely 'offer to supply' and 'enter into an agreement to supply' speaks more for an inconsiderate mentioning of this superfluous verb.

¹⁵⁵⁶ Christie and Bradfield *Law of Contract* 187.

¹⁵⁵⁷ *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643E, *Cape Group Construction (Pty) Ltd v Government of the United Kingdom* 2003 (5) SA 180 (SCA) at 188.

¹⁵⁵⁸ 25 of 2002.

¹⁵⁵⁹ Section 11(3) ECTA.

¹⁵⁶⁰ See *Central SAR v McLaren* 1903 TS 727 (cloakroom ticket taken as a voucher to identify property); *Dyer v Melrose Steam Laundry* 1912 TPD 164 at 167-168 (laundry list taken for checking items and prices); *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C) (warehouse invoice containing conditions limiting the liability of the bailee); *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 (2) SA 709 (W) (invoice with reference to 'standard trading conditions'); *Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC) at 133 (dispatch note which required the consumer to enter the addresses of the sender and receiver).

¹⁵⁶¹ *Reynolds v Donald Curry & Co* 1875 NLR (1) 14; *WJ Lineveldt (Edms) Bpd v Immelman* 1980 (2) SA 964 (O).

¹⁵⁶² *Roseveare v Auckland Park Sporting Club* 1907 TH 230; *R v Thompson* 1926 OPD 141 at 143 (programme bought inside racecourse after the conclusion of the contract for admission at the gate).

What is more, even laypersons know that an agreement is the basis for any contractual obligation, even if concluded tacitly (by an implied acceptance). This especially applies after having paid a consideration, and because customers usually know that without any form of agreement between the parties, the consumer cannot expect any 'supply'.¹⁵⁶³ It is therefore unlikely that the example mentioned above could be subsumed under the term 'supply'. Nonetheless, the inclusion of the word 'supply' could make sense in cases where the initial contract was concluded before the Act came into effect, and the supply occurred after this date. Under section 52(2)(c), in its fairness enquiry, a court must consider those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the transaction occurred or agreement was made, *irrespective of whether the Act was in force at that time*.¹⁵⁶⁴ Naudé correctly argues that this implies that the fairness review of the terms in question will not only focus on the fairness at the time that the transaction was concluded but that also a change in circumstances making the provision unfair at the time of supply may be taken into account.¹⁵⁶⁵ In other words, the fairness enquiry is extended temporally. Since the Act has come into force over a decade ago, this differentiation should be merely of academic interest by now. It could still matter though for contracts that govern the continuous supply of goods or services.¹⁵⁶⁶

That the legislator also included the offer to supply in section 48(1)(a) originates from the fact, according to Sharrock¹⁵⁶⁷ and Naudé,¹⁵⁶⁸ that it envisaged that consumer organisations and other interested parties might wish to take action against suppliers who try to contract on unfair terms. The fairness control would therefore be temporally moved forward. Section 48(1)(a), read with section 4(1), seems to provide for a *locus standi* of consumer organisations, allowing them to seek relief against a mere offer on unfair provisions not to individual consumers, but to consumers in general since such an offer would be prohibited conduct under section 40. However, section 52 is written with having individual consumers in mind, not general use

¹⁵⁶³ In terms of unsolicited goods pursuant to s 21(1)(a), there is no agreement between the parties since there was no agreement on the price. The supplier regularly expects a payment at a later stage though. Therefore, the mere supply of unsolicited goods cannot take place on 'unfair terms' under s 48. See De Stadler 'Section 21' in Naudé and Eiselen (eds) *CPA Commentary* para 6. In the case of negative option marketing (s 31) there is no agreement between the parties as the agreement does not automatically come into existence by the mere fact that the supplier provided goods or services on the basis that the consumer did not opt out. See Van Heerden 'Section 31' in Naudé and Eiselen (eds) *CPA Commentary* paras 1 *et seq*.

¹⁵⁶⁴ Emphasis added.

¹⁵⁶⁵ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹⁵⁶⁶ Naudé puts forward this argument in another context, but it should be valid here too. See Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 22.

¹⁵⁶⁷ Sharrock 2010 *SA Merc LJ* 308, Sharrock *Judicial control* 129.

¹⁵⁶⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

challenges.¹⁵⁶⁹ Naudé suggests that this should not prevent consumer organisations from challenging such prohibited conduct of suppliers who offer unfair terms and conditions.¹⁵⁷⁰ This view is correct, but courts will have difficulties in applying the badly worded general clause – which itself is not very helpful for the concretisation of the applicable fairness standard – without the assistance of section 52. It is suggested that section 52 contains elements which emanate from the principle of good faith, which in other legislation is expressly anchored in their general clause.¹⁵⁷¹ Without the 'good faith' guidance of section 52 (paragraph (b): nature of the parties, their relationship, relative capacity, experience etc., paragraph (c): circumstances of the transaction, paragraph (d): the supplier's conduct...), the courts do not have sufficient guidance at hand to apply reasonable standards. This should not prevent consumer organisations though to challenge unfair terms under the general clause so that courts may develop these standards accordingly.

Pursuant to section 78, only accredited consumer protection groups are entitled to protect the interests of a consumer individually, or of consumers collectively before a *forum* contemplated in the Act. This is contradictory to section 4 which provides that any 'association acting in the interests of its members' or 'any person acting as a member of, or in the interest of, a group or class of affected persons' is entitled to approach the enumerated fora. However, section 78 could be *lex specialis* to section 4 so that only accredited consumer protection organisations can bring abstract challenges before the courts. This also would protect suppliers against expensive and baseless litigation by non-representative bodies.¹⁵⁷² In addition, accreditation provides for a minimum standard and protects consumers against fraudulent organisations.¹⁵⁷³

Such a minimum standard could also be assured if only those organisations were entitled to act on behalf of consumers who have some connection with the subject matter. § 3 UKlaG¹⁵⁷⁴ provides that in Germany, the following organisations have such a right: 1) qualified entities which demonstrate that they are inscribed in the current version of a list of qualified entities¹⁵⁷⁵

¹⁵⁶⁹ Also referred to as 'abstract', 'general use' or '*ex ante*' challenges. In the German part of this thesis, these challenges will be referred to as 'institutional actions' (*Verbandsklagen*).

¹⁵⁷⁰ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

¹⁵⁷¹ See, for instance, § 307(1) 1st sent or art 3(1) of the EU Unfair Terms Directive.

¹⁵⁷² Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 4.

¹⁵⁷³ See s 78(3) *et seq.*

¹⁵⁷⁴ UKlaG = Unterlassungsklagengesetz (Injunctions Act).

¹⁵⁷⁵ The conditions for the inscription in this list are laid out in § 4 UKlaG: 'Qualified entities - (1) The Federal Office of Administration shall keep a list of qualified entities. This list shall be published in the Federal Gazette as at 1 January of each year and sent to the Commission of the European Communities with a reference to Article 4(2) of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.6.1998 at 51). (2) Associations with legal personality whose functions as laid down in their statutes include promoting consumers' interests by education and advice on a non-

or in the list of the Commission of the European Communities, 2) associations with legal personality for the promotion of commercial interests, insofar as their membership includes a considerable number of businesses marketing goods or commercial services of the same or a similar type on the same market, insofar as their staffing, material and financial resources enable them actually to perform the interest promotion functions laid down in their statutes, and 3) the Chambers of Trade and Industry or the Chambers of Crafts and Labour. This shows that accreditation is not necessary as far as numbers 2 and 3 are concerned, but that minimum standards (legal personality, membership requirements, and financial resources) must be met. As long as such standards are met, the non-accreditation should not prevent an organisation from defending consumer rights. On the other hand, those standards have to be well defined in order to prevent unserious or hopeless court actions.

a) Unfair price, section 48(1)(a)(i)

The UN Guidelines for Consumer Protection do not recommend price control. Instead, they provide that ‘governments should encourage fair and effective competition in order to provide consumers with the greatest range of choice among products and services at the lowest cost’.¹⁵⁷⁶ The underlying assumption is that with effective competition, there is a fair market price. Therefore, courts should not be involved in price control. In order to function well and ensure that goods and services are available at affordable prices, a pricing system with the least possible interference by the State is necessary. All governmental measures to solve the problem of scarcity and affordability by raising salaries or prescribing prices have no positive effects in the long term, but a negative impact on the general economic picture.¹⁵⁷⁷ Van Eeden even argues that any interference by the State in terms of price control is an obstacle for a well-functioning economy with respect to the availability of goods and services at affordable prices.¹⁵⁷⁸ Furthermore, most courts do not have the expertise and the resources for an effective market research. Market research requires sophisticated and empirical studies which can only be applied by highly trained and specialised individuals and bodies, such as competition

commercial and non-temporary basis shall be inscribed on request in the list if their membership includes associations active in this field or at least 75 natural persons, if they have been in existence for at least one year and if their previous activity affords assurance that they perform their functions correctly. There shall be an irrefragable presumption that consumer centres and other consumer associations supported by public funding satisfy these requirements. (...)’

¹⁵⁷⁶ Paragraph 24 of the UN Guidelines for Consumer Protection (revision of 2015) at <https://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>.

¹⁵⁷⁷ Van Eeden and Barnard *Consumer Protection Law* 257 and 258.

¹⁵⁷⁸ Van Eeden *Guide to the CPA* 185.

authorities.¹⁵⁷⁹ For these reasons, article 4, read in conjunction with recital 19 of the EU Unfair Terms Directive, as well as § 307(3) BGB also excludes price control.¹⁵⁸⁰ The fact that the South African legislator introduces an 'unfair price concept' raises complex practical and theoretical questions: Can a supplier be accountable *ex post facto* for prices it had charged in the past? Will these prices still be fair in the future when assessed by a court?¹⁵⁸¹ Moreover, prices have a rationing and allocative function in the economy. By removing this function, the positive effects of real competition, such as the efficiency of production and the allocation of resources are abandoned.¹⁵⁸² It is submitted that price control ultimately will lead to the result that low prices cannot be sustained because of a dysfunctional economy and lack of competition. The outcome will be market failure.¹⁵⁸³

In addition, competition law and the rules on improper conduct in the negotiation phase provide sufficient – and probably a more effective – price control.¹⁵⁸⁴ Section 8(a) of the Competition Act,¹⁵⁸⁵ for instance, prohibits a dominant firm to charge excessive prices to the detriment of consumers. An excessive price is a price for goods or services which (a) bears no reasonable relation to the economic value of that good or service, and (b) is higher than the value referred to in paragraph (a).¹⁵⁸⁶ In *Harmony Gold v Mittal Steel*¹⁵⁸⁷ the Competition Tribunal indicated that a 'non-excessive price is a price that is determined by competitive conditions in the relevant market'. In *Mittal Steel v Harmony Gold*,¹⁵⁸⁸ the Competition Appeal Court held that the definition of 'excessive price appears to mandate an examination as to whether there is a reasonable relationship between the prices charged and the economic value of the good or service'. Section 9(1)(a) of the same Act prohibits any price discrimination which is likely to

¹⁵⁷⁹ Factors and steps to be taken into account for the determination of a 'fair' price are, *inter alia*, the costing data, necessary adjustments for comparative purposes, the determination of the appropriate methodology, the opportunity costs of capital, the depreciation and replenishment of the plant. The limitations of accounting procedures have to be taken into account too. See also UBH/*Fuchs* § 307 para 144, Stoffels *AGB-Recht* 202. The German courts provide for some very restrictive exceptions for the argument that disadvantageous terms can be compensated by an advantageous price (so-called 'price argument'). These exceptions concern above all electricity suppliers and will be discussed in the German part of this thesis. See, for instance, BGH *NJW* 1998, 1640 (1644).

¹⁵⁸⁰ WLP/*Wolf* § 307 para 303.

¹⁵⁸¹ See Van Eeden and Barnard *Consumer Protection Law* 252 and 253.

¹⁵⁸² Van Eeden and Barnard *Consumer Protection Law* 252 and 253.

¹⁵⁸³ Factors of market failure are, for instance, monopoly, imperfect competition, public goods, externalities, asymmetric information and common property resources. See Van Eeden and Barnard *Consumer Protection Law* 254.

¹⁵⁸⁴ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

¹⁵⁸⁵ 89 of 1998.

¹⁵⁸⁶ Definition of 'excessive price' in s 1 of the Competition Act.

¹⁵⁸⁷ *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* 2007 (1) CPLR 37 (CT).

¹⁵⁸⁸ *Mittal Steel South Africa Ltd, Macsteel International BV, and Macsteel Holdings (Pty) Ltd v Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009).

have the effect of substantially preventing or lessening competition.¹⁵⁸⁹ Price control under section 48 could force out suppliers by artificially set low prices. As a result, the choice of products in the market is reduced.¹⁵⁹⁰ According to Naudé, courts should thus only interfere where the price is manifestly unjust or there is an excessive advantage for the supplier.¹⁵⁹¹ On the other hand, the price is part of the core terms, and consumers can be expected to shop around in order to find a better price, on the condition that they are transparent. This market behaviour normally ensures that suppliers offer competitive prices. What is more, it seems difficult to conceive how a court can assess an unjust price and an excessive advantage for the supplier without analysing the whole agreement in its economic context.¹⁵⁹² Nonetheless, cases are imaginable where an agreement is so one-sided and imbalanced that the price/quality ratio is obviously affected. In practice, this should be limited to cases though where a simple comparison with other suppliers reveals that the price is excessive, e.g., for 'simple' all-day products. In any case, courts should apply their discretion in this context very carefully.

Although section 48(1)(a)(i) or any other provision of the Act do not contain any direct price control mechanism, it is not clear whether section 48(1)(a)(i) was intended to be a price control mechanism and a tool to control general price levels. If not, one has to ask whether it has a narrower scope, and if so, how far it reaches. Van Eeden is of the opinion that if it had been the legislator's intention to introduce such a price control mechanism, it would have inserted it preferably in other pieces of legislation which fall in the ambit of fiscal and monetary authorities because the Act is not the appropriate statute for this kind of control mechanism.¹⁵⁹³ As already mentioned earlier, a court would have to deal with different empirical and analytical questions in its fairness enquiry. Then, it would have to determine if this price is 'fair', and calculate a margin. As a price alone is meaningless in a market economy without taking into consideration other provisions (on risk, ownership, warranties, quality etc.), these must also be considered together with the relationship between the parties to the contract (relative bargaining power, for instance). The degree of competitiveness in the relevant market is also crucial for the determination of the 'fair' price.

¹⁵⁸⁹ Section 8(1)(e) CPA also contains a general prohibition of price discrimination with some exceptions when price differentiation is permitted. Sections 9 of the Competition Act and 8(1)(e) CPA have different conditions and objectives, however. In s 8, no domination is required, but the discrimination must be on the basis of grounds for unfair discrimination, whereas the objective of s 9 of the Competition Act is to protect competition.

¹⁵⁹⁰ Van Eeden and Barnard *Consumer Protection Law* 256.

¹⁵⁹¹ Naudé 'Introduction to Sections 48-52 and regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

¹⁵⁹² UBH/*Fuchs* § 307 para 144.

¹⁵⁹³ Van Eeden and Barnard *Consumer Protection Law* 258 and 259.

Under consideration of all these factors, it is rather unlikely that the legislator intended to introduce a price control mechanism into section 48(1)(a)(i). Van Eeden contends that this section appropriately operates where an unfair price is applied and other factors are present, such as unconscionable conduct or deception. In his opinion, the application of this section is not ‘explicitly limited by reference to prices at which similar goods or services are readily available to consumers’ because this provision authorises an extensive exercise and discretionary power.¹⁵⁹⁴

Naudé alleges that courts should only interfere with excessive prices where the agreement was concluded on the basis of misrepresentation or other unconscionable conduct under sections 40 and 41 as well as by applying the common-law rules on voidable contracts induced by improper means.¹⁵⁹⁵

Van Eeden's and Naudé's views can be interpreted to the effect that price control is not necessary because other mechanisms provided for in the Act are sufficient to prevent unfair pricing. In Germany, for instance, (mostly elderly) consumers tend to purchase excessively overpriced goods when undertaking so-called 'coffee trips' (*Kaffeefahrten*).¹⁵⁹⁶ These are coach trips to towns or other more or less interesting places where 'occasionally'¹⁵⁹⁷ products are promoted, usually at the end of the sightseeing tour, when having a break in a coffee-shop (hence the name 'coffee trips') or another venue. The salespersons first present their products, promote their incredible qualities and features, and then put pressure on their audience (which are trapped in the venue) by using sophisticated marketing strategies. The excursionists usually end up with low-standard products manufactured in the Far East for which they had paid multiple times more than the actual market price. Even in cases like this (if they existed in

¹⁵⁹⁴ Van Eeden and Barnard *Consumer Protection Law* 259 and 260.

¹⁵⁹⁵ Naudé ‘Section 48’ in Naudé and Eiselen (eds) *CPA Commentary* para 8.

¹⁵⁹⁶ ‘Kaffeefahrt’ is the non-legal term. The legal term is ‘excursion’ (*Ausflugsfahrt*). In terms of § 48 PBefG, the organiser determines the final destination. See Creifelds *Rechtswörterbuch* s.v. ‘Ausflugsfahrten’. § 48(1) PBefG provides that ‘[e]xcursions are tours that a supplier offers and performs with busses or passenger vehicles, according to a plan that is executed by him or her, for a purpose that is the same for and pursued by all participants.’ (My own translation). In practice, the sightseeing part of the tour (if any) is accessory. See Creifelds *Rechtswörterbuch* s.v. ‘Ausflugsfahrt’ and the very instructive documentary film ‘Abzocke Kaffeefahrt – Eingeladen und ausgenommen’ at <https://www.zdf.de/dokumentation/zdinfo-doku/abzocke-kaffeefahrt-104.html> (last retrieved on 2 November 2017, accessible on the ZDF Mediathek until 4 October 2018, and still available on YouTube at <https://www.youtube.com/watch?v=IUL-Mu3hxBQ>). See also ‘Wer in den Bus steigt, sitzt in der Falle’ *Süddeutsche Zeitung* of 6 April 2018 at <http://www.sueddeutsche.de/leben/kriminalitaet-wer-in-den-bus-steigt-sitzt-in-der-falle-1.3928107>.

¹⁵⁹⁷ In fact, the promoting and selling of the offered products is the sole objective of the organisers, since they have enormous margins due to their excessive price and low quality. The offered goods can be anything, from pillows with ‘incredible anti-allergic qualities’, to vitamins promising a better quality of life, and paramedical equipment.

South Africa), price-control would not be necessary since sections 40, 41 and 29 offer sufficient protection against unconscionable conduct and false, misleading or deceptive representations as well as reprehensible marketing methods.

At most, section 48(1)(a)(i) could have a warning function for suppliers. However, having the coffee-trips example above in mind, even this is arguable.

It would have been beneficial for the application of the Act if the legislator had not introduced section 48(1)(a)(i). The problems for the courts with regard to the determination of the fair price outweigh the argument put forward by Sharrock in terms of which price control is covered by the general unfairness standard because this standard also applies to negotiated terms after 'hard bargaining'. Other provisions, such as sections 30 and 41, offer sufficient protection. This provision should be deleted.

b) Unfair marketing, section 48(1)(b)

Unfortunately, section 48(1)(b) refers more to the process of marketing, negotiation and administration than to the control of the content of an agreement. Other parts of the Act already provide for unfair marketing, negotiation and administration, such as Part F. Section 40, for instance, regulates unconscionable conduct and is a catch-all clause which covers any form of unfair conduct, such as the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct in connection with the marketing of goods or services, their supply, or the negotiation, conclusion, execution or enforcement of an agreement.¹⁵⁹⁸

Part E provides for rulings in terms of marketing, too. According to section 29(a), certain parties must not market any goods or services in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as set out in section 41. Section 29(b) prohibits the marketing of goods and services in a manner that is misleading, fraudulent or deceptive in any way.

For the reasons above, the location of section 48(1)(b) is unfortunate. By creating unnecessary confusion with other provisions of the Act, it does not contribute to any clarifications, rather the contrary. Section 48(1)(b) should thus be deleted.

¹⁵⁹⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 10.

c) Requiring or imposing to waive rights, the supplier's liability or assume obligations, section 48(1)(c)

What is more, section 48(1)(c) is superfluous. It provides that a supplier must not require a consumer, or other person to whom goods or services are supplied at the direction of the consumer, to waive any rights, assume any obligation, or waive any liability of the supplier.

Section 48(1)(c) can be divided into several elements, namely the imposition of terms that are unfair, as a condition of entering into a transaction, requiring a specific action on the part of the consumer, i.e., the waiver of rights, the assumption of obligations or the waiver of any liability of the supplier, and the waiver of rights or the assumption of obligations being on unfair terms.¹⁵⁹⁹

Although 'to require' assumes a request to contract on specific terms,¹⁶⁰⁰ the mere use of a supplier's terms can be interpreted in that the consumer is 'required' to contract on the basis of these terms so that the conditions of section 48(1)(c) are fulfilled.¹⁶⁰¹ Van Eeden correctly argues that the mere incorporation of particular unfair provisions in a standard form contract and their presentation to the consumer may be regarded as an imposition of unfair terms 'as a condition' to contract. This applies above all when the supplier does not present alternative terms which are not unfair.¹⁶⁰² This view is supported by the formulation of § 305 BGB, where the 'pre-formulation' of standard business terms is expressed by words such as 'present (standard business terms to the other party' ('*Stellen*'),¹⁶⁰³ and the non-existing possibility of the consumer to contribute to the formulation of standard business terms.¹⁶⁰⁴

The wide formulation of section 48(1)(a) already includes the prohibition of section 48(1)(c). Therefore, it creates confusion by adding similar general provisions on conduct to already existing norms elsewhere.

The value of this subsection is thus disputable since its regulatory content does not reach beyond section 48(1)(a). Naudé therefore correctly maintains that it is superfluous.¹⁶⁰⁵ Thus, this paragraph should be deleted, too.

¹⁵⁹⁹ Van Eeden and Barnard *Consumer Protection Law* 251.

¹⁶⁰⁰ Sharrock 2010 *SA Merc LJ* 308, Sharrock *Judicial control* 129.

¹⁶⁰¹ Van Eeden and Barnard *Consumer Protection Law* 251.

¹⁶⁰² Van Eeden and Barnard *Consumer Protection Law* 251.

¹⁶⁰³ § 305(1) 1st sent.

¹⁶⁰⁴ § 305(1) 3rd sent. See UBH/*Ulmer and Habersack* § 305 para 26.

¹⁶⁰⁵ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

4.1.2 The basic unfairness standard of section 48(2)

Since the legislator chose the formulation ‘[w]ithout limiting the generality of subsection 1’ at the beginning of section 48(2), it can be said that the ambit of section 48(1) is supposed to reach beyond the instances of unfairness set out in section 48(2)(a) and (b). What is more, further instances are imaginable where a term is unfair, though their characteristics might be different from those described in section 48(2)(a) and (b).¹⁶⁰⁶ Although the legislator did not choose the word ‘deem’, section 48(2) seems to be a deeming clause. Instead of using the words ‘includes’ or ‘including’,¹⁶⁰⁷ which would have the same effect of not ‘limiting the defined or generic expression to the examples or items so enumerated’,¹⁶⁰⁸ the legislator chose the phrase ‘[w]ithout limiting the generality of subsection (1)’.

The phrase ‘without limiting the generality’ could mean that subsection (2) is *lex specialis* to subsection (1) (consequently, subsection (1) would be *lex generalis*). This would mean that when a clause is found to be unfair under subsection (2), subsection (1) must not be assessed anymore.

Van Eeden is of the view that the objective of section 48(2) is to make sure that section 48(1) is not interpreted restrictively, i.e., in a manner where only the instances of unfairness of section 48(2) are taken into account, but that also the deception standard of section 48(2)(c), read with section 41, as well as the procedural standard contained in section 48(2)(d)(ii) are included.¹⁶⁰⁹ This view is correct. Subsection (2) is not *lex specialis* to subsection (1), but the two provisions complete each other. It is suggested that subsection (2) has a radiating effect on subsection (1). Hence, when assessing if a clause is excessively one-sided in terms of subsection (2)(a), one has to take into consideration whether the consumer had to waive any rights in favour of the supplier, or if any terms have been imposed onto the consumer, for instance.¹⁶¹⁰ The same approach can be found in the German general clause where § 307(1) has a guiding function *vis-à-vis* subsection (2). Only where cardinal obligations are restricted, the legislator expressly stated that subsection (2) takes precedence over subsection (1).¹⁶¹¹ Only insofar, § 307(2) BGB is *lex specialis* to subsection (1).¹⁶¹²

¹⁶⁰⁶ Van Eeden and Barnard *Consumer Protection Law* 249.

¹⁶⁰⁷ As defined in section 2(7).

¹⁶⁰⁸ See s 2(7).

¹⁶⁰⁹ Van Eeden and Barnard *Consumer Protection Law* 250.

¹⁶¹⁰ Section 48(1)(c)(i) and (iii).

¹⁶¹¹ BT-Drs. 7/3919 at 23.

¹⁶¹² Stöffels *AGB-Recht* 204.

This 'radiating effect' is limited though, and subsection (2) is not helpful in concretising unfairness in terms of subsection (1). Section 48(2) gives examples for when a transaction is unfair, unreasonable or unjust. These 'guidelines' do not apply to the price charged by the supplier.¹⁶¹³ Unfortunately, only the first paragraph, relating to one-sidedness, helps define the concept of 'unfair, unreasonable or unjust', whereas paragraph (b) only uses the synonym 'inequitable' and therefore creates a certain circularity.¹⁶¹⁴ Therefore, my suggestion is that the interlacing of these two subsections is limited, which is deplorable. In the view that the lawmaker chose a very complicated structure for a general clause, one could have expected a more significant impact and scope of its individual elements.

Although section 48(2) provides when terms and conditions are unfair, unreasonable or unjust, the terms 'excessively one-sided'¹⁶¹⁵ and 'inequitable'¹⁶¹⁶ give room for a subjective interpretation.¹⁶¹⁷ The fact that certain terms are customary in the trade, or that certain suppliers put forward that in practice they never rely on the unfair term in an unfair manner and intend only to make use of it in a fair manner, is not a defence and does not lead to the result that such terms are permitted. This is because the potential unfairness or 'tendency' has to be judged, and not the actual use of a term.¹⁶¹⁸ On the other hand, the interpretation of these terms has to be done on a case-to-case basis.¹⁶¹⁹ Although the Act focuses on the individual consumer, contrary to §§ 305 *et seq.* BGB which cater to an abstract-universal approach, it is suggested that the Act 'borrows' elements of an abstract-universal approach in that the tendency of a term and not its actual application is to be assessed.

a) One-sidedness, section 48(2)(a)

Some items of the greylist of regulation 44(3) contain terms that are presumed to be unfair because of their excessive one-sidedness.¹⁶²⁰ According to the South African Law Commission, a relevant factor for one-sidedness is 'whether there is a lack of reciprocity in an otherwise reciprocal contract'.¹⁶²¹

¹⁶¹³ Van Eeden *Guide to the CPA* 184.

¹⁶¹⁴ In the same sense: Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹⁶¹⁵ Section 48(2)(a).

¹⁶¹⁶ Section 48(2)(b).

¹⁶¹⁷ Van Eeden *Guide to the CPA* 182.

¹⁶¹⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 13, Van Eeden and Barnard *Consumer Protection Law* 249.

¹⁶¹⁹ Van Eeden *Guide to the CPA* 182, Van Eeden and Barnard *Consumer Protection Law* 249.

¹⁶²⁰ See reg 44(3)(k), (m), (n) and (aa).

¹⁶²¹ Section 2(o) of the Bill of the SALRC published in SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998).

On the other hand, a term that *prima facie* seems to be detrimental to consumers may be fair if it is counter-balanced by another term or terms that are to the consumer's benefit.¹⁶²² A term may be so excessively one-sided though that even an overall balance of fairness may not 'save' it.¹⁶²³ In addition, the clause which is supposed to counterbalance the consumer's disadvantage has actually to be advantageous for the consumer in order to be equivalent to the benefit that is granted to the supplier by the other clause.¹⁶²⁴ For Naudé it is imaginable that a term which appears to be excessively one-sided may be justified if the consumer consciously decided to conclude the agreement on that basis after having considered alternatives. Therefore, also procedural factors should be relevant when assessing whether a 'one-sided' term is fair.¹⁶²⁵ Naudé took this view before the final wording of the Act was established. Her submission is supported by the wording of section 48(2) *in pr.* because the fairness enquiry not only covers individual clauses but also transactions or agreements as a whole. A purportedly unfair clause to which the consumer has agreed willingly should therefore be assessed against the backdrop of section 52. This does not mean that a term becomes automatically fair in cases where the consumer willingly concluded the agreement in the knowledge of the term in question. All the relevant factors in section 52 have to be assessed in these cases in order to examine under which circumstances the consumer concluded the agreement. If there is any indication of unconscionable conduct of the supplier, or where the consumer was taken advantage of because of his or her inexperience, such clauses/agreements will most likely to be unfair, despite the consumer's acceptance.

Naudé's view is therefore correct. In German law, §§ 305 *et seq.* generally take an abstract-universal approach when assessing a term's fairness, without having a concrete consumer in mind. German standard business terms legislation is a general law which governs a particular contract practice, i.e., standard terms.¹⁶²⁶ Nonetheless, with the insertion of § 310(3) no. 3 and

¹⁶²² Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 12. In German law, this phenomenon is referred to as 'compensation effect' (*Kompensationswirkung*). See Stoffels *AGB-Recht* 190.

¹⁶²³ Van Eeden and Barnard *Consumer Protection Law* 251.

¹⁶²⁴ See Sharrock 2010 *SA Merc LJ* 309, Sharrock *Judicial control* 130. Sharrock refers in note 81 to Deutch *Controlling Standard Contracts – The Israeli Version* (1985) 30 *McGill LJ* 458-472: 'Other terms of a standard contract can certainly be taken into account when judging the validity of standard terms. Such other terms should be considered when they provide consumers with benefits not available under existing law and those benefits constitute a fair equivalent for the displaced protection. For instance, when a supplier displaces a customer's right to repudiate the contract by giving him the right to free repairs for a year and such a right does not exist under the residual rules, it is possible that the limitation will be upheld. But a right to free repairs scarcely justifies exclusion of consequential damages if there is not proportional value between the right conferred and that taken away.'

¹⁶²⁵ Naudé 2006 *Stell LR* 371. This article was published before the CPA came into force and before its final wording was established.

¹⁶²⁶ Schmidt-Salzer *BB* 1995, 734-736.

the consideration of 'other circumstances attending the entering into of the contract', a concrete and individualistic approach of the circumstances is taken for consumer contracts.¹⁶²⁷ The Act does not assess fairness by taking a generalised-typified approach but a concrete-individual approach.

As noted above, a supplier cannot defend an unfair term by saying that it never relies on it in an unfair manner. A term should always be judged in the light of its potential unfairness or 'tendency', and not by the supplier's intention.¹⁶²⁸ With the discussion above in mind, the fairness scrutiny must hence be 'enriched' by procedural factors.

b) Adverseness, section 48(2)(b)

According to section 48(2)(b), a term is unfair if it is so adverse to the consumer as to be inequitable. Unfortunately, the legislator chose to define 'unfair' by using the synonym 'inequitable', which creates a certain circularity. This criterion is even more difficult to apprehend because there is no 'balancing' context like in section 48(2)(a) (one-sidedness presumes the consideration of two sides), and yet it must be seen within its commercial setting.¹⁶²⁹ In other words, the type of contract, the relationship between the parties, the particular trade practices and so forth must be considered.

It is recommended that for subsection (b), a two-tier enquiry is applied in which (1) the adverseness to the consumer, and (2) the inequitableness are examined. This is the same procedure as for the German general clause in which first a disadvantage, and second the unreasonableness of the disadvantage are assessed.¹⁶³⁰ It is submitted that the adverseness in section 48(2)(b) is comparable to the 'disadvantage' in § 307(1) 1st sent. For this purpose, a comparison between the legal situation with and without the clause in question has to take place. If the consumer's legal situation with the clause is worse than without it, the clause is adverse to the consumer. At this stage, the mere determination of whether there is adverseness suffices, and no evaluative assessment is necessary. The second stage consists in the enquiry of whether the clause is equitable. Evaluative elements, such as good faith or the balance of the parties' interests have to be considered at this stage. Elements in other provisions of the Act, such as one-sidedness (section 48(2)(a)), the evaluative judgement made in the black- or greylists, or procedural elements contained in section 52 should be taken into consideration

¹⁶²⁷ Hommelhoff/Wiedenmann *ZIP* 1993, 565 *et seq.*

¹⁶²⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 13. See also OFT *Unfair Contract Terms Guidance* (2008) at 9 and 10.

¹⁶²⁹ Van Eeden and Barnard *Consumer Protection Law* 252.

¹⁶³⁰ Stoffels *AGB-Recht* 192 and 193.

here. This demonstrates that these provisions are intertwined with each other and that the fairness evaluation is a complex undertaking, for which various and multiple factors have to be considered.

It is my submission that section 48(2)(b) would have served as a better starting point for a general clause than the actual verbose provision, in which subsection (b) is only one 'factor' to be considered.

4.1.3 The deceptive and procedural standards of section 48(2)(c) and (d)

a) False representations or statements of opinion, section 48(2)(c)

Only section 48(2)(a) and (b) is referred to as the 'basic unfairness standard', but not subsections (c) and (d), because terms which fall under these two standards will be regarded as unfair, irrespective of the meaning that may be ascribed to the words unfair, unreasonable or unjust' in section 48(1).¹⁶³¹

Section 48(2)(c), which is supposed to give guidance on the determination of unfairness, does not relate to content control, but unnecessarily confuses other forms of control with content control.¹⁶³² Van Eeden calls this standard 'deceptive standard', as opposed to the 'basic unfairness standards' of section 48(2)(a) and (b).¹⁶³³

Section 41 concerns false, misleading or deceptive representations. It provides that a supplier is not allowed to use false, misleading or deceptive representation concerning a material fact, use innuendo, exaggeration or ambiguity as to a material fact or fail to disclose a material fact, or must not knowingly allow consumers to believe false, misleading or deceptive facts by failing to correct an apparent misapprehension on the part of the consumer. A supplier has to disclose material facts properly, and failure to do so may be regarded as a false, misleading or deceptive representation. A person acting on behalf of a supplier may also not falsely represent that such person has any sponsorship, approval or affiliation or engage in conduct that the supplier is prohibited from engaging in.¹⁶³⁴

Praise of goods or service by a supplier, or sales talk or so-called 'puffing' with respect to material facts can be regarded as the use of 'exaggeration, innuendo or ambiguity as to a material fact' in terms of section 41(1)(b). The common law qualifies 'puffing' as mere sales

¹⁶³¹ Van Eeden and Barnard *Consumer Protection Law* 249.

¹⁶³² Naudé 2009 *SALJ* 518.

¹⁶³³ Van Eeden and Barnard *Consumer Protection Law* 250.

¹⁶³⁴ Section 41(2).

talk without any binding effect.¹⁶³⁵ However, under section 41(1)(b), exaggeration, innuendo or ambiguity concerning a material fact are prohibited. If a consumer relied upon exaggeration, innuendo or ambiguity as to a material fact, it renders a contract or term unfair under section 48(2)(c).¹⁶³⁶

The term 'statement of opinion' is not qualified in the Act. Therefore, it includes *any* opinions and not only false, misleading or deceptive opinions. This should be considered by suppliers of legal and medical services, such as advocates or medical practitioners, as a term or agreement can be declared unfair if a consumer had relied on an opinion.¹⁶³⁷

Van Eeden cites the case of *Office of Fair Trading v Ashbourne Management Services Ltd and Others*¹⁶³⁸ as an example where a consumer relied on a deceptive or misleading representation or statement of opinion of the supplier. He argues that section 48(2)(c) would apply in this case.¹⁶³⁹ This case involved standard form contracts for gym memberships ranging from 12 to 24 and 36 months. The UK court held that average consumers tended to over-estimate how often they would use the gym once they had become a member, and also unforeseen circumstances might prevent them from using it. The court was of the view that the supplier's business model was designed and calculated to take advantage of the inexperience and naiveté of average consumers at the lower end of the market and that the contract contained a trap for them. It is suggested though that this case does not fall under section 48(2)(c) because for a false, misleading or deceptive representation or a statement of opinion, an active action of the supplier is necessary. Examples are the use of illustrations that are different from the product being sold, materially misleading product warranties, or promises to replace, maintain or repair an article, the distortion of test results, the use the words 'sale' or 'special' in relation to the price of a product unless a significant price reduction has occurred.¹⁶⁴⁰ The fact that the supplier had

¹⁶³⁵ Christie *Law of Contract* 155, 158 and 273-274 where it is indicated that puffing has no legal effect, but that it is difficult to draw a line between mere puffing and misrepresentation. See also Van der Merwe *et al Contract General Principles* (2007) 112.

¹⁶³⁶ The Advertising Standards Authority (ASA) is the regulatory authority which is voluntarily regulating the advertising industry in South Africa. In terms of s 97(1)(a), the Consumer Commission may liaise with any other regulatory authority on matters of common interest and may exchange information pertaining to matters of common interest or a specific complaint or investigation. The Consumer Commission may thus ask the ASA to regulate 'puffing' in the advertising industry.

¹⁶³⁷ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 356.

¹⁶³⁸ *Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] EWHC 1237 (Ch). This judgment is accessible at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/1237.html&query=ashbourne&method=Boolean>.

¹⁶³⁹ Van Eeden and Barnard *Consumer Protection Law* 261.

¹⁶⁴⁰ Examples from 'False or Misleading Representations and Deceptive Marketing Practices Under the Competition Act' at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>. These examples should also apply to South Africa.

designed and calculated its contracts in a way to take advantage of inexperienced clients cannot be seen as an active deception of the consumer. Had the supplier affirmed *vis-à-vis* the consumer, despite the contrary, that the bulk of its clients regularly attend the gym until the end of their contract, one could certainly assume an active misleading deception. The mere statement of an obligation of the consumer in a contract clause is not sufficient, however. Furthermore, the UK court maintained that such membership contracts were unfair because they create a significant imbalance between the members' obligations and the gym's rights. Minimum terms of 12 months were not considered unfair where the contract allowed the members to suspend or cancel their membership (without incurring charges) in certain circumstances, such as financial or health reasons, or if the member moved out of the area or lost their job.¹⁶⁴¹ Hence, the court took a more nuanced view than Van Eeden suggests.

The legislature did not indicate any specific relationship between the representation or statement of opinion and the transaction or agreement, or standard provision like in the other instances of section 48(2). Du Plessis argues that the rationale behind the overlap of sections 41 and 48(2)(c) is not clear.¹⁶⁴² When taking subsection (c) literally, a term or agreement which generally would be fair (e.g., because it balances the parties' interests) becomes unfair because of the supplier's representation or statement of opinion. If a consumer purchases a vacuum cleaner of good quality which does its job perfectly, i.e., vacuuming, and the supplier untruthfully assured the consumer that this product could also be used as a pump in order to empty a fishpond, the underlying agreement would become unfair.¹⁶⁴³

This means that after the fairness review of the clause, one must determine whether the supplier has issued a deceptive representation or statement of opinion and if the latter is 'material'. How this can be realised in practice remains unclear though. If, for example, a clause in an agreement grants the consumer the right to return the goods within six months after delivery (which is merely a restatement of section 56(2) and fair *per se*), and the supplier orally assures the consumer that this right is indefinite, it is arguable if the clause becomes unfair, although the consumer is afforded the minimum legal rights under the Act.

¹⁶⁴¹ *Office of Fair Trading v Ashbourne Management Services Ltd and Others* [2011] EWHC 1237 (Ch) para [165].

¹⁶⁴² Du Plessis 'Section 41' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

¹⁶⁴³ My own example.

Du Plessis indicates that 'representation' should be interpreted broadly to ensure consumer protection.¹⁶⁴⁴ Material facts are those that are significant, of consequence or relevance.¹⁶⁴⁵ Section 41(1) does not require that such a material fact be related to the goods or services in question. It is my suggestion that section 48(2)(c) could play a role, for instance, where a supplier explains a particular term of the agreement to the consumer, and by doing so 'embellishes' it so that the consumer is of the view that he has certain rights (e.g., concerning the content and the conditions of a warranty). Therefore, in not all instances, there is a lack of reference to a contractual provision, as Van Eeden suggests.¹⁶⁴⁶ This broad interpretation would indeed improve consumer protection.

Naudé correctly suggests that it would have been much more elegant and efficient if, in terms of false, misleading or deceptive representations, the provision of section 48(2)(c) had been inserted into section 41 instead. Section 41 should have provided that a term is voidable if it is severable from the rest of the contract, and consensus on it was obtained on the basis of misrepresentation. Currently, a court must first declare a term unfair on the basis of misrepresentation under sections 48(2)(c) and 52. This is a convoluted way to achieve protection against false representations.

b) Unfairness, section 48(2)(d)

Similarly to paragraph (c), the inclusion of paragraph (d) of section 48(2) is also unsystematic because it is unrelated to content control. According to this provision, a term is unfair if the agreement was subject to a term contemplated in section 49(1) and the fact, nature and effect of that term were not drawn to the attention of the consumer in a manner that satisfied the requirements of section 49. Van Eeden calls this standard hence 'procedural standard'.¹⁶⁴⁷ Here again, the contents of section 48(2)(d) should have been included rather in section 49 with the effect that a term is voidable if the requirements are not fulfilled.¹⁶⁴⁸

Because section 52(1) regulates the powers of the court in case of a contravention of section 40, 41 or 48, section 48(2)(d) seems to have no extra-judicial effect, and to be not binding, a court must first declare a term unfair. In order to strengthen the consumer's position, courts should interpret any prohibition contained in this part of the Act, including those in section 48, as not binding on the consumer *per se*, and section 52 should be interpreted in that it just

¹⁶⁴⁴ Du Plessis 'Section 41' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

¹⁶⁴⁵ Du Plessis 'Section 41' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

¹⁶⁴⁶ Van Eeden and Barnard *Consumer Protection Law* 261.

¹⁶⁴⁷ Van Eeden and Barnard *Consumer Protection Law* 250.

¹⁶⁴⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

enumerates the orders which a court may make in case of a legal dispute.¹⁶⁴⁹ Article 6 of the EU Unfair Terms Directive provides that unfair terms shall 'not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.' The Act, which does not contain such a provision, should apply the same standard.

In summary, it can be said that the South African general clause is very burdensome, lacks clarity, is quite unsystematic and does not correspond to international standard and good legal practice. Unfortunately, the legislature took the concept of a 'catch-all clause' too literally because it also regulated 'concretisations' that do not have their place in a general clause, such as the procedural and deceptive standards. The comprehensive formulation of this clause can only be explained by the supposition that the legislator aimed at a regulation that comprised all sorts of actions or gives guidance to the courts. Unfortunately, this objective has not been reached. A clearer and shorter clause with precise guidelines, such as the general clause in the EU Unfair Terms Directive or § 307 BGB, would have been more effective.

4.1.4 Other guidelines for the determination of unfairness

a) List of considerations set out in section 52(2)

Section 52(2) contains a list of 'factors' that the court must consider in any proceedings concerning a transaction or agreement between a supplier and consumer if a person alleges that the supplier contravened section 40, 41 or 48, and the Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability. According to this provision, the court must consider the matters contained in this list only after considering the principles, purposes and provisions of the Act.

§§ 305 *et seq.* BGB do not contain a similar list of factors. § 310(3) no.3, which deals specifically with consumer contracts, merely provides that 'in judging an unreasonable disadvantage under section 307(1) and (2) [general clause], the other circumstances attending the entering into of the contract must also be taken into account.' Article 4 of the EU Unfair Terms Directive (which was the reason for the insertion of § 310 into the BGB) contains a similar, but wider, clause.¹⁶⁵⁰ §§ 305 *et seq.* do not define the 'other circumstances attending the entering into of the contract'. Recital 16 of the EU Directive gives some guidance and makes

¹⁶⁴⁹ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

¹⁶⁵⁰ **Article 4:** '(...) the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

clear what has to be taken into consideration: the bargaining positions of the parties, whether the consumer had an inducement to agree to the term, or whether the goods or services were sold or supplied to the special order of the consumer. Fuchs is of the view that one can distinguish between three categories of circumstances attending the entering into the contract, namely 1) the personal qualities of the contractual party (level of his or her personal business experience), 2) the particularities of the concrete situation when concluding the contract (e.g., pressure, taking the other party by surprise, explanations), and 3) particular atypical interests of the consumer (the aimed use of the good known by the supplier).¹⁶⁵¹

It is my submission that the factors contained in section 52(2) also have to be taken into account within the fairness enquiry of regulation 44(3). When the Act came into effect, the Minister had not yet made this regulation in terms of section 120(1)(d). There is no reason why a court should only consider the factors as mentioned earlier in terms of the general and basic fairness standards of section 48, and not in terms of presumably unfair provisions contained in regulation 44(3).

Given the legislator's efforts to 'provid[e] for an accessible, consistent, harmonised, effective and efficient system for redress for consumers',¹⁶⁵² it is surprising that section 52 only applies to courts and not to the other entities, such as consumer courts or the Tribunal. This creates a different standard of content control between the entities involved in consumer protection, including the courts, which is clearly against the legislator's intention. This becomes clear, for instance, when considering that the Tribunal the procedure of which is set out in sections 142 to 148 of the National Credit Act, will have to consider the same rulings of consumer courts, ombuds or arbitrators, as well as appropriate foreign and international law, international conventions, declarations and protocols relating to consumer protection as a court when interpreting or applying the Act. Since the Tribunal has been instituted by the National Credit Act and is also applying and interpreting this piece of legislation while aiming at the same time at a coherent jurisprudence in terms of both Acts, it must otherwise be feared that the Tribunal will not necessarily follow the same considerations as a court, notably when being excluded from applying the factors mentioned in section 52(2).

Naudé points out that there are compelling grounds for granting ordinary courts sole jurisdiction over disputes about alleged unfair terms. Not only the list of section 52(2) is

¹⁶⁵¹ UBH/*Fuchs* § 307 para 406 *et seq.* See also BAG NZA 2006, 324 (328).

¹⁶⁵² Section 3(1)(h).

exclusively geared towards courts, but also the powers to make specific orders under section 52 (3) and (4).¹⁶⁵³ The fact that provincial consumer courts, ombuds or the NCC are not mentioned in section 52 speaks, according to Naudé, for this interpretation. Furthermore, the DTI was concerned that the ordinary courts' jurisdiction would be eroded by creating various tribunals.¹⁶⁵⁴

She argues that common-law courts follow a system of precedent, and their decisions are reported which 'bodes better for legal certainty'. In addition, they are composed of legally trained magistrates and judges who would understand contract law better than laypersons serving in consumer courts.¹⁶⁵⁵ Lastly, she suggests that the use of a contract term becomes prohibited conduct only after a court has declared its unfairness and that therefore the other redress entities of the Act have jurisdiction to act against a supplier only after the provision in question has been declared unfair by an ordinary court.¹⁶⁵⁶

Naudé's arguments are however clearly against the wording of section 48 which implies that the use of unfair terms is prohibited in terms of the Act.¹⁶⁵⁷ It is submitted that her position contradicts the legislator's intention to provide for an accessible, consistent, harmonised, effective and efficient system for redress for consumers.¹⁶⁵⁸ If ordinary courts were in a better position to decide whether terms are unfair, the efforts undertaken by implementing a parallel redress system, consisting of consumer courts, the Tribunal, the National Consumer Commission and alternative dispute resolution agents, would be neutered. Moreover, most disputes are decided in the lower courts, the rulings of which will not be reported. What is more, consumers will often not be in a position to afford High Court proceedings, especially in a consumer context where rather small amounts are involved. Furthermore, section 69¹⁶⁵⁹ lists several other institutions tasked with deciding a dispute on unfair terms, such as the Tribunal,

¹⁶⁵³ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹⁶⁵⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 7. See the minutes of this briefing at 'Consumer Protection Bill: Workshop Day 2' at <https://pmg.org.za/committee-meeting/9055/>. According to the briefing, the DTI's intention was that consumers may either directly approach the court for a declaration that a term is unfair, or approach the relevant ombud. The latter could then enter a consent order to be taken to court or the Tribunal in order to make an order of court. As a result, the ordinary court would not have to decide over the dispute. However, the intention also may have been not to bestow jurisdiction upon the Tribunal and consumer courts, as otherwise, s 52 would have given powers to these institutions as well.

¹⁶⁵⁵ Naudé 2010 *SALJ* 527.

¹⁶⁵⁶ Naudé 2010 *SALJ* 525.

¹⁶⁵⁷ Naudé 2010 *SALJ* 525.

¹⁶⁵⁸ Section 3(1)(h).

¹⁶⁵⁹ The problems involved with this provision have already been discussed elsewhere. In its current form, s 69 is unconstitutional as it restricts the consumer's fundamental right of access to court under s 34 of the Constitution. See Van Eeden *Consumer Protection Law* (2013) 303.

ombuds, alternative dispute resolution agents as well as the National Consumer Commission. Therefore, it is surprising that section 52(2) only refers to the courts.¹⁶⁶⁰ It can thus be said that if section 52 were only applicable to courts, there would be no real impact on the eradication of unfair contract terms.¹⁶⁶¹ The legislator might have omitted to insert the other entities, which is why this provision should be applied by analogy to the other entities so that they are given the same powers as the courts in order to ensure effective redress.

A direct application of section 52(2) by the Tribunal and the other entities, save the courts, would be *contra legem* with a view to the current wording of this provision. Since the factors contained therein are an emanation of the legislator's value judgment, and the cases dealt with by the courts or the other entities of the Act are similar, it is submitted that section 52(2) has to be applied by analogy by the Tribunal, the consumer courts as well as all ADR agents in terms of the Act in order to achieve coherence.¹⁶⁶² The best solution would be however if the legislator changed the wording of this provision and included all consumer protection entities, especially the Tribunal. This would lead to a consistent and harmonised consumer redress system in terms of section 3(1)(h) and resolve the anomaly instituted by section 52.

Other possible options of the legislator in terms of consumer redress and the courts' role in the light of the German regime will be discussed in Part III.

Section 52(2) focuses mainly on procedural unfairness, as opposed to substantive unfairness dealing with the content of a term.¹⁶⁶³ Unfortunately, some substantive fairness factors that the South African Law Commission had suggested¹⁶⁶⁴ were not included in the Act.¹⁶⁶⁵ In some instances however, control on substantive unfairness alone would also be justified as the use of standard contract terms creates procedural unfairness because of the lack of incentives for the consumer to read and bargain about terms.¹⁶⁶⁶ This applies irrespective of whether the consumer 'could have acquired identical or equivalent goods or services from a different supplier'¹⁶⁶⁷ because it is highly unlikely that a consumer will shop around and compare not only the goods in question but also the terms involved. In many cases though, procedural and

¹⁶⁶⁰ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

¹⁶⁶¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

¹⁶⁶² See Creifelds *Rechtswörterbuch* s.v. 'Analogie'. For a more detailed presentation of analogy in law, see 'Precedent and Analogy in Legal Reasoning' at <http://plato.stanford.edu/entries/legal-reas-prec>.

¹⁶⁶³ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

¹⁶⁶⁴ Naudé 2006 *Stell LR* 374.

¹⁶⁶⁵ Some of those factors will be discussed below in the context of factors that a court should consider, under the premise that the list in s 52(2) is not exhaustive.

¹⁶⁶⁶ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 16.

¹⁶⁶⁷ See s 52(2)(i).

substantive unfairness cannot be separated due to the structural inequality caused by the use of standard form contracts.¹⁶⁶⁸ The ‘visibility’ or prominence of a term must be considered in conjunction with its content when its fairness is enquired, for instance. What is more, in *ex-ante* challenges, where no consumers are directly involved, substantive fairness is likely to play a more significant role, as opposed to procedural fairness, although ‘generalised’ procedural fairness factors, such as the bargaining position of the supplier (even without its counterpart) and the prominence of a term will still have to be considered.¹⁶⁶⁹

Even though section 52 does not expressly state it, it is submitted that the list contained in subsection (2) is not exhaustive.¹⁶⁷⁰ There are many instances, which will be discussed below, which are not mentioned in the list but considered in foreign legislation. They can thus be taken into account by South African courts in terms of section 2(2). The list does not exclude this possibility. Hence, factors that serve as the best international model of relevant factors, and which can be found in the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission in 2005¹⁶⁷¹ should also be considered by the courts. The Bill contains, among others, the following substantive fairness factors: (c) the balance of the parties' interests, (d) the risks to the party adversely affected by the term, (e) the possibility and probability of insurance, (g) the extent to which the term (whether alone or with others) differs from what would have been the case in its absence, and (j) the nature of the goods or services to which the contract relates.¹⁶⁷²

Moreover, Sharrock and Naudé suggest that the word ‘must’ at the beginning of section 52(2) must be changed into ‘may’ in order to give courts the discretion to discuss only factors they consider relevant in a given case. The authors are of the opinion that ‘must’ probably implies that the parties should bring evidence on *all* the listed factors.¹⁶⁷³ It is my suggestion that the word ‘must’ can be also interpreted in that the courts ‘must’ *not only* consider the matters contemplated in subsection (1) of section 52, *but also* (the relevant) factors in subsection (2). Thus, the word ‘must’ merely ensures a link between subsections (1) and (2). A change of the

¹⁶⁶⁸ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 12. See also *Barkhuizen v Napier* at para [149] where Sachs J already recognised this in his minority judgment. See also BVerfG NJW 1993, 36.

¹⁶⁶⁹ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹⁶⁷⁰ Some authorities, like Naudé or Sharrock, are of the same opinion. See Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 11, Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 135.

¹⁶⁷¹ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 13, Naudé 2006 *Stell LR* 373 and 374.

¹⁶⁷² Section 14(4) of the Unfair Contract Terms Bill published in Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

¹⁶⁷³ Sharrock 2010 *SA Merc LJ* 309, Sharrock *Judicial control* 131.

word ‘must’ into ‘may’ could thus lead to the perception that the courts are not obliged to consider other circumstances than the principles, purposes and provisions of the Act, besides the assessment of sections 40, 41 or 48 respectively, but that they have discretion in this regard. The purpose of section 52(2) is that the courts also assess the factors listed therein, however.

For the sake of a better understanding and a direction to the courts, the legislator should make this clear and reformulate the first sentence in subsection (2) as follows:

'(2) In any matter contemplated in subsection (1), the court must consider, *inter alia*, the following factors, if applicable –¹⁶⁷⁴
(a)...

This formulation is clear enough in that the courts must consider also other circumstances than those mentioned in section 52(1), and that the list in section 52(2) is not exhaustive.

In any event, section 52 seems to be the mechanism for the implementation of sections 40 and 41 as well as for the general clause.¹⁶⁷⁵

It is further submitted that the location of this list of factors in section 52(2) is an obstacle for predictability and certainty as these factors only apply in a dispute. It would have been advantageous also to allow the possibility to make a term void *per se* in an extra-judicial context. Naudé correctly argues that a court which is not sufficiently aware of the realities in terms of standard form contracts may lay too much importance to the factors listed in section 52(2) and decide that a term is fair, instead of taking into consideration other circumstances.¹⁶⁷⁶

Furthermore, predictability and certainty would be enhanced if a court would be prepared to declare a term unfair *per se* in a particular industry, or based on the ‘tendency of the clause’. Such an objective finding (‘objective’ because it would declare a term void regardless of the parties of the particular case) would not only be in the interest of the consumers, but also in the interest of the suppliers of the trade sector in question, advance predictability, and eliminate unfair terms in the given sector and probably also in other related and unrelated sectors. This is because some unfair terms are so repugnant that they rarely can be fair.¹⁶⁷⁷ The same

¹⁶⁷⁴ My own suggestion emphasised.

¹⁶⁷⁵ *The National Consumer Commission v Western Car Sales t/a Western Car Sales* NCT/81554/2017/173(2)(b). The NCC held that a reading of s 48 in conjunction with s 52 indicates that s 48 remains exclusively reserved for (adjudication) by a court of law.

¹⁶⁷⁶ Naudé 2006 *Stell LR* 372, Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹⁶⁷⁷ See also Naudé ‘Section 48’ in Naudé and Eiselen (eds) *CPA Commentary* para 17. In *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA), the SCA decided in an obiter dictum that a term excluding liability for death caused negligently would probably be contrary to public policy because it conflicts with s 11 of the Bill of Rights, namely the right to life. It should be noted that terms excluding or limiting the liability for death or personal injury are presumed to be unfair under reg 44(3)(a).

approach can be found in German law where the circumstances of the parties involved in a particular transaction are not taken into account but rather the transactions of the type and classes of the participants.¹⁶⁷⁸ In the unfairness enquiry, one therefore must also consider the socio-economic context in which the term is used. This also applies to so-called ‘general use’ challenges brought by consumer organisations or regulators, where no individual consumer is involved in the given dispute. As mentioned before, not only the content of the term but also its application in the given surroundings have to be considered.¹⁶⁷⁹

A court that is confronted with a general use challenge cannot apply section 52(2) directly but has to rely on its inherent jurisdiction in order to consider factors it deems relevant for the given case. In other words, the court is not obliged to consider any factor listed in section 52(2).¹⁶⁸⁰ The legislator should have drafted section 52(2) also having general use challenges in mind in which consumer protection organisations institute proceedings not involving individual consumers.¹⁶⁸¹ The experience in other countries has shown that unfair contract provisions can more effectively be eradicated with general use challenges as opposed to individual complaints.¹⁶⁸² It would thus be beneficial if this provision would be redrafted accordingly.

The legislator chose to locate this list in section 52(2) so that it is also applicable to sections 40 and 41 and is constructed for a more procedural approach. Alternatively, the legislator could have chosen to insert a reference in section 48 to section 52(2), stating that the factors in this list are to be considered for the determination of whether an agreement or a term is unfair.

In the following, the factors listed in section 52(2) will be discussed in detail as well as some other, not listed, factors the courts should consider.

aa) Fair value of the goods or services

In terms of section 52(2)(a), the court must consider the fair value of the goods or services in question. The ‘fair’ value relates to the price of a good or a service and therefore is a substantive fairness consideration. The price may be challenged under section 48((1)(a)(i) which has been already discussed above.¹⁶⁸³ As mentioned, courts should be careful to interfere with pricing

¹⁶⁷⁸ BGHZ 22, 91 (98), BGHZ 17, 1 (3).

¹⁶⁷⁹ Naudé ‘Section 48’ in Naudé and Eiselen (eds) *CPA Commentary* para 18.

¹⁶⁸⁰ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 11.

¹⁶⁸¹ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 4.

¹⁶⁸² Naudé 2006 *Stell LR* 379 and 380, Naudé 2010 *SALJ* 519 and 520. In Germany, the possibility of institutional actions (*Verbandsklagen*) by certain qualified bodies, such as professional associations, offer the advantage that legal actions have a general effect and give a great deal of bargaining power to associations by means of extrajudicial ‘declarations of discontinuance’. See Stoffels *AGB-Recht* 477 *et seq.*

¹⁶⁸³ See para 4.1.1 a).

issues because they do often not have the technical skills to assess the 'fair' price. In addition, the fact that a price for a good or a service exceeds the market price of the relevant goods or services is in itself not sufficient to declare it unfair. It was not the legislator's intention to introduce a price control mechanism.¹⁶⁸⁴ Often, the price of a product reflects the fact that other terms have influenced this price in terms of exemption clauses (which is likely to lower the price compared to similar products) or extended warranties or guarantees (which will increase the price compared to the market price). Such a price/quality ratio¹⁶⁸⁵ has to be considered if brought forward by a supplier, especially when the consumer had a choice between several options as regards the inclusion or exclusion of an exemption clause or extended warranty/guarantee and a different price.¹⁶⁸⁶ Therefore, when assessing whether a price of a product is fair, one should also take into consideration other terms (e.g., exemption clauses), besides factors such as the market price of similar goods or services or the supplier's margin.

The first proposal for an EU Council Directive on unfair terms in consumer contracts of 1990 contained a provision according to which the price-performance ratio was to be considered in terms of the fairness control.¹⁶⁸⁷ Above all German authors argued that in a free market economy, the price-performance relationship should be determined by the market and that the directive should not apply to the 'principle obligations' of the contract.¹⁶⁸⁸ After a debate, the price-performance ratio consideration was finally not introduced into the EU Directive on unfair contract terms.¹⁶⁸⁹ Article 4(2) of the Directive expressly sets out that '[a]ssessment of the unfair nature of the terms shall relate [not] to the adequacy of the price and remuneration'.

Courts should only interfere where the price is manifestly unjust or there is an excessive advantage for the supplier.¹⁶⁹⁰

bb) Nature of the parties to the contract

Another factor, listed in section 52(2)(b), is the nature of the parties to the transaction or agreement in question, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position.

¹⁶⁸⁴ Sharrock 2010 *SA Merc LJ* 309, Sharrock *Judicial control* 131.

¹⁶⁸⁵ See Recital to the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993.

¹⁶⁸⁶ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 16.

¹⁶⁸⁷ OJ EC 1990 No. C 243 at 2.

¹⁶⁸⁸ Brandner/Ulmer *Common Mkt. L. Rev.* 1991, 647, 651-654, Bunte *FS Locher* 329, 331, 333.

¹⁶⁸⁹ See art 4(2).

¹⁶⁹⁰ Naudé 'Introduction to Sections 48-52 and regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

This factor relates to procedural fairness since it concerns the circumstances surrounding the conclusion of the agreement.¹⁶⁹¹ Already before the promulgation of the Act, unequal bargaining power was considered 'a factor that together with other factors plays a role in consideration of public policy'.¹⁶⁹²

As even educated and experienced consumers need protection, one should not lay too much importance to their sophistication and bargaining positions when assessing the fairness of a term or agreement. First, no consumer can be expected to read long standard term agreements when concluding an agreement because of the high transaction costs.¹⁶⁹³ Second, standard terms are often presented on a take-it-or-leave-it basis, and consumers often understand them as invariable.¹⁶⁹⁴ When presenting a standard term contract, there is an inherent structural inequality of bargaining power between the parties.¹⁶⁹⁵ Thus, courts should interfere in instances where unfair terms are hidden in the small print. This applies also when the supplier has informed a consumer of those terms, but at an inappropriate time, for instance, in the last minute before signing the contract.¹⁶⁹⁶

'Bargaining position' does not only mean the power of a party to impose specific terms but also other factors. According to the Law Commission of England and Wales and the Scottish Law Commission, the following questions have to be asked when assessing the parties' respective bargaining power:¹⁶⁹⁷

- (a) Was the transaction unusual for either or both of them?
- (b) Was the complaining party offered a choice over a particular term?
- (c) Did that party have a reasonable opportunity to seek for a more favourable term?
- (d) Did that party have a realistic opportunity to enter into a similar contract with other persons, but without that term?
- (e) Could that party's requirements have met in other ways?

In its Explanatory Note, the Law Commission puts forward other factors which could be important when evaluating the strength of the parties' bargaining positions, such as '(f) whether

¹⁶⁹¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 17.

¹⁶⁹² *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para [12], *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [59].

¹⁶⁹³ UBH/*Fuchs* before § 307 para 34, MüKo/*Basedow BGB* before § 305 para 5.

¹⁶⁹⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 17, Naudé 2006 *Stell LR* 366 and 377.

¹⁶⁹⁵ See, for instance, BVerfG *NJW* 1993, 36, Raiser *Recht der AGB* 91 *et seq.*

¹⁶⁹⁶ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

¹⁶⁹⁷ Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005) at 43.

it was reasonable, given that party's abilities, for him or her to have taken advantage of any choice offered under (b), or available under (e).¹⁶⁹⁸

In practice, the 'complaining party' mentioned under (b), and referred to as 'that party' in the other questions, will be in most cases the consumer, and the question of whether the transaction was unusual for either party or both of them (a) unlikely concerns the supplier.

However, the supplier's superior bargaining power based on the fact that it can dictate terms is not sufficient to declare a provision unfair. This is the case where a consumer is professionally advised, for example. In instances where the consumer suggests a specific term – e.g., a term promulgated by a trade association – which is of his or her disadvantage (without him or her knowing it), and the supplier accepts this term, the supplier may be acting in bad faith, however. The mere fact that the consumer proposed this term should therefore not rule out its unfairness.¹⁶⁹⁹ Cases, where a consumer had no opportunity to take independent advice, or make an informed judgment about the contract, may be regarded as a weak bargaining position. On the other hand, the fact that the parties had equal bargaining power does not make a term fair *per se*.¹⁷⁰⁰ Hence, factors of procedural factors must not be assessed in isolation because the substantive fairness of a term crucial.

Another factor to be taken into account is the consumer's ability to understand the language of the contract. If the supplier knows that its counterpart is unable to understand the agreement, it must explain the terms until the consumer understands them. Otherwise, the provisions are likely to be unfair. This is in line with section 40(2) which provides that 'it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of (...) inability to understand the language of an agreement'.¹⁷⁰¹ A factor that certainly has to be taken into account in this regard is the fact that the supplier had the possibility to draft its terms without haste and by taking legal advice, whereas the consumer is confronted with pre-formulated and rather comprehensive standard provisions that he or she cannot apprehend easily in the given situation.¹⁷⁰²

¹⁶⁹⁸ Paragraph 45 of the Explanatory Notes to the Unfair Contract Terms Bill, set out in *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005) at 161.

¹⁶⁹⁹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

¹⁷⁰⁰ Sharrock 2010 *SA Merc LJ* 311, Sharrock *Judicial control* 132.

¹⁷⁰¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 21.

¹⁷⁰² Lieb *AcP* 178 (1978) 202.

cc) Existing or foreseeable circumstances

The third factor in section 52(2)¹⁷⁰³ concerns the circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether the Act was in force at that time.

This factor even applies to circumstances arising after the conclusion of contracts that were concluded before the Act was in force. Naudé legitimately alleges that also the actual supply of goods or services on unfair terms may be challenged on the basis that the terms are unfair at the time of supply. This applies regardless of whether they could have been considered unfair at the time of conclusion of the contract in which the supply was agreed upon, provided that the supply occurred after the general effective date of the Act.¹⁷⁰⁴ This follows when reading section 52(2) with section 48 and Schedule 2 item 3 as well as the definition of ‘transaction’ which includes the actual supply of goods and services. This is important for contracts on the continuous supply of goods or services.¹⁷⁰⁵

A court will first assess whether a term was fair at the time at which the agreement was concluded, and then consider subsequent circumstances that were foreseeable at that time. However, too much uncertainty in contractual relations would arise if courts easily declared terms unfair that would have been fair at the time of the conclusion of the contract.¹⁷⁰⁶ Courts should thus have good reasons to declare a term unfair under these circumstances.

According to Sharrock, only circumstances of which both parties knew about or should have reasonably foreseen are relevant in terms of paragraph (c).¹⁷⁰⁷ It is submitted that also circumstances of which only the supplier knew about or that were reasonably foreseeable only by him or her, are to be considered. It would be illogical to exclude circumstances that are only known or foreseeable by the supplier, especially with regard to his or her ‘insider’ knowledge of the relevant industry. The supplier's trade association or chamber of commerce and industry will often ‘warn’ its members about changes in the law which is why the supplier often knows well in advance about changes in circumstances, unlike the consumer. This is, for example, the case where a supplier sells a used car to a consumer, knowing by its trade association that the manufacturer of this car plans to recall this particular model because of severe technical problems causing a number of accidents. The consumer had no opportunity to know about these

¹⁷⁰³ Paragraph (c).

¹⁷⁰⁴ 31 March 2011.

¹⁷⁰⁵ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 22.

¹⁷⁰⁶ Sharrock 2010 *SA Merc LJ* 311, Sharrock *Judicial control* 132.

¹⁷⁰⁷ Sharrock 2010 *SA Merc LJ* 311, Sharrock *Judicial control* 132.

circumstances because they had not been revealed for the general public yet, neither by the manufacturer nor by the press. This recall was therefore foreseeable only by the supplier but not for the consumer. The same applies to successful lobbying influencing Parliament in terms of which, e.g., car manufacturers push for new standards (having in mind that they can sell new cars). Car dealers might be well aware of such changes long before the general public. Such one-sided knowledge or foreseeability should thus be considered in the fairness scrutiny.¹⁷⁰⁸

Unlike German law¹⁷⁰⁹ and other legal systems, South African law does not recognise a doctrine of 'change of circumstances' or 'hardship' allowing the cancellation or adaption of a contract when *unforeseeable* circumstances arise. This even applies if the conditions of a contract become too harsh, such as an explosion of the cost of performance due to a rise of the costs for raw materials, because those circumstances must be *foreseeable* in order to be taken into account in terms of section 52(2)(c). Since the South African legislature seems 'paralysed with indecision' on this topic, the common law should be developed in this respect as the Act does not provide for the consideration of such circumstances.¹⁷¹⁰ This could be done by introducing a definition of hardship in order to cover frustration of purpose and impracticability.¹⁷¹¹

In this context, Sharrock suggests that a possible solution in South African law would be the reliance on a tacit resolutive condition.¹⁷¹² Then, 'a contract terminates, even though it is not

¹⁷⁰⁸ My own examples.

¹⁷⁰⁹ In German law, this is referred to as 'interference with the basis of the transaction (*Störung der Geschäftsgrundlage*)' (§ 313 BGB) which is based on the former doctrine of 'cessation of the basis of the transaction (*Wegfall der Geschäftsgrundlage*)' which was originally developed by the courts, and corresponds to the English doctrine of frustration. See Sharrock 2010 *SA Merc LJ* 312 note 99, Sharrock *Judicial control* 133 note 99. § 313 BGB: '(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.' The English doctrine of frustration, on the other hand, provides for the possibility *that* a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract. See Law *Oxford Dictionary of Law* s.v. 'Frustration of contract'.

¹⁷¹⁰ Hutchison *PhD thesis* 245, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 24. Naudé correctly states that Sharrock is wrong when arguing that para (c) suggests that an unforeseeable change of circumstances is a factor to be considered in determining whether a contract or term is unfair. See Sharrock 2010 *SA Merc LJ* 311, Sharrock *Judicial control* 132. See also Hutchison 2010 *Stell LR* 414, Hutchison 2010 *SALJ* 84.

¹⁷¹¹ Hutchison *PhD thesis* 232 *et seq.*

¹⁷¹² Sharrock 2010 *SA Merc LJ* 312 note 99, Sharrock *Judicial control* 133 note 99.

physically or legally impossible to perform, if circumstances change so fundamentally as to remove the basis of the contract and negate the purpose or object that the parties had in mind when they contracted'. The definition as mentioned earlier applies to the English law doctrine of frustration but could also be applied in the context of a tacit resolutive condition. The admittance of such a tacit resolution by the South African courts in the case of a fundamental change of circumstances removing the basis of a contract would be a step towards better consumer protection and be in the economic interest. It is not in the interest of the parties, of public policy or the economy to uphold agreements that are so hard to fulfil that one – or even both – economic actors of a contract bear too harsh consequences.

Meanwhile, nothing hinders the parties from negotiating a clause that expresses the parties' will to cancel the contract in case of an unforeseeable change of circumstances. Admittedly, this solution is a more or less 'tailored' one that does most probably not apply to mass contracts. A more effective solution would therefore be an innovative change towards a tacit resolutive condition by the courts.

dd) Conduct of the supplier and the consumer

The conduct of the supplier and the consumer, respectively, is a factor listed in section 52(2)(d). Since 'conduct' is not defined, the court may consider any conduct relevant.¹⁷¹³ It is my suggestion that conduct may also take the form of an omission, e.g., where the supplier did not fully answer the customer's questions about liability so that the consumer did not obtain a full picture of his or her rights and obligations. Circumstances where the supplier puts pressure on the consumer to sign the contract without giving him or her the opportunity to read the agreement are another example. Pressure can take all kind of more or less subtle forms. Where a supplier tells a consumer that a certain price for a product only will be maintained until the end of the business day and that afterwards, it will go up, this can be seen as a form of pressure to sign the contract immediately.

Naudé correctly argues that employees should be trained to advise consumers to read all provisions of the agreement in questions before signing it, at least the provisions that must comply with the requirements of section 49.¹⁷¹⁴ It is suggested that this requires that those provisions be written in plain language so that the consumer is able to understand the content of these provisions. Otherwise, even when having a chance to read all, or at least the most

¹⁷¹³ Sharrock 2010 *SA Merc LJ* 312, Sharrock *Judicial control* 134.

¹⁷¹⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 25.

critical clauses, a consumer has no better understanding – or protection – than as if he or she has not read them. Therefore, the best practice would be, it is submitted, to give the opportunity to read the (well-written and understandable) provisions and to summarise them afterwards for the consumer in a concise, understandable and honest way. This would also give the consumer the opportunity to ask pertinent questions. This procedure requires well-trained employees who have a deeper understanding of the provisions. In cases where the consumer refuses such a summary or the reading of the clauses while having the opportunity, this conduct will certainly also have to be considered by the court in favour of the supplier in terms of paragraph (d).

ee) Existence of negotiations and their extent

Contrary to other legislation,¹⁷¹⁵ the Act also allows a court to assess the fairness of negotiated terms.¹⁷¹⁶ Negotiated and non-negotiated terms should be treated differently though as also the parties treat them differently. In addition, the fairness of negotiated terms in the context of a B2B contract will have to be assessed differently from those within a B2C relationship. If terms are not negotiated, this does not mean that they are automatically unfair. On the other hand, when negotiations take place over a particular term, and no changes will be made to that term, this does not mean that the term has become fair if it was unfair at the beginning.¹⁷¹⁷ It should be noted that not only the contract as a whole must be assessed in terms of fairness, i.e., if it was freely and voluntarily concluded, but also whether a given provision can be regarded as the product of the consumer's self-determination. This is not the case for unfair standard terms of which the consumer had no knowledge.¹⁷¹⁸

This factor leads to the *a contrario* conclusion that the use of standard terms in contracts may be an indication of unfairness due to a lack of negotiation because non-negotiated terms are rarely regarded as the proper expression of the self-determination of the parties. This is the reason why fairness intervention is justified in these cases.¹⁷¹⁹ Genuine negotiation may thus be an indication of fairness. This does not mean though that all non-negotiated terms are unfair or that all negotiated terms are fair.¹⁷²⁰ The fact that the greylist in regulation 44 merely

¹⁷¹⁵ See, for instance, art 3(1) of the EU Unfair Terms Directive, §§ 305(1) and 305b BGB, § 6(2) Austrian KSchG, art 6:231a Dutch BW.

¹⁷¹⁶ Naudé 2007 SALJ 138 to 140. In this regard, one should also consider Ngcobo J's statements in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [57]: 'The extent to which the contract was freely and voluntarily concluded is clearly a vital factor [in the determination of whether a term is contrary to public policy] as it will determine the weight that should be afforded to the values of freedom and dignity'.

¹⁷¹⁷ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 26 and 27.

¹⁷¹⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 26 note 1.

¹⁷¹⁹ See BVerfG NJW 1990, 1469.

¹⁷²⁰ Stoop *LLD thesis* 151.

presumes certain terms to be unfair is an implicit recognition of this statement. One should not forget that suppliers instruct their front desk employees to contract with consumers on a controlled basis. They are usually not allowed to deviate too much from the company's standard provisions. This has obvious advantages because in most cases, employees dealing directly with customers do not have the expertise to predict the legal repercussions when altering liability or other clauses. What is more, too much negotiation would be contrary to the rationalisation effect of standard terms. Rationalisation only takes place where a considerable number of contacts are dealt with in the same manner. Rationalisation means cost savings and organisational advantages for the supplier because the negotiations become less burdensome for the parties and the resulting transaction costs can be seen as an efficient resource allocation.¹⁷²¹ On the other hand, this non-negotiation obviously affects the term's fairness.¹⁷²²

The Act does not define the term 'negotiation'. With regard to other factors, it is assumed that this factor requires the presence of choice. The question is therefore if the consumer had a real opportunity to influence the contents of the contractual terms. The mere fact that a supplier presents the consumer with more than one pre-formulated alternative to choose from therefore does not qualify as 'negotiation'.¹⁷²³ It is suggested that real negotiation only takes place where the parties have the liberty to alter terms without being limited to pre-formulated clauses. In practice, this is likely to happen very rarely, however, at least in B2C contracts. The reasons for that lie in the rationalisation effect of standard terms in mass contracts.

In general, courts should not easily interfere where there is a genuine negotiation between the parties.¹⁷²⁴ It is submitted that the conduct of the parties during the negotiations¹⁷²⁵ has also to be taken into account when assessing the fairness under paragraph (e). Paragraphs (d) and (e) are therefore intertwined in some cases. Hence, where a consumer aims to negotiate specific terms, and this is obvious to the supplier (for example, by expressly or impliedly making this clear to the supplier), or where on the contrary one party clearly indicates by its conduct that it does not want to negotiate, this should be taken into consideration.

¹⁷²¹ Schäfer and Ott *Ökonomische Analyse* 394, Kötz *JuS* 2003, 211 *et seq.*

¹⁷²² Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 27.

¹⁷²³ Stoop *LLD thesis* 152.

¹⁷²⁴ Sharrock 2010 *SA Merc LJ* 312, Sharrock *Judicial control* 134.

¹⁷²⁵ Section 52(2)(d).

ff) No legitimate interest of the supplier

Under section 52(2)(f), the court must consider whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier.¹⁷²⁶

The importance of the legitimate interest factor is highlighted in the Australian consumer protection legislation, where it is a central criterion of the general clause.¹⁷²⁷

It is suggested that the combination of the phrases 'not reasonably necessary' and 'legitimate interest' requires a two-step enquiry, namely first of the legitimacy of the supplier's interest, and second, of the reasonableness of the consumer's required action.

In any event, the assessment of the legitimate interest of the supplier begs the question of whether a term represents a proportionate response to the supplier's interest, such as a risk faced by it, and other possible ways by which it could have protected its interest as well as market practice.¹⁷²⁸ Where the supplier limits its liability, one has to consider whether it was reasonable to expect it to insure itself against the liability and whether the consumer could be expected to insure him- or herself. The question of whether the supplier had advised the consumer timeously to take insurance, or whether the consumer should otherwise have realised that he or she needed insurance, are essential factors for this enquiry too.¹⁷²⁹ The possibility and probability of insurance is explicitly listed in the Unfair Contract Terms Bill proposed by the Law Commission in the UK.¹⁷³⁰

gg) Plain language requirements

The next factor is the extent to which any documents relating to the transaction or agreement satisfied the plain language requirements of section 22.¹⁷³¹

¹⁷²⁶ Two **factors of the SA Law Commission's list** implicitly refer to the legitimate interest criterion: '(m) whether a term is unduly difficult to fulfil, or imposes obligations or liabilities on a party which are *not reasonably necessary* to protect the other party' and '(n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is *not reasonably necessary* to protect his or her interests'. Emphasis added.

¹⁷²⁷ **Section 3(1) Australian Consumer Law** (Schedule 2 to the Competition and Consumer Act, 2010) provides that a term is unfair 'if (a) it causes a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is *not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it*'. Emphasis added.

¹⁷²⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 28.

¹⁷²⁹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 30.

¹⁷³⁰ Section 14(4)(f). The fact that the supplier could insure itself was also an important factor in the UK case *George Mitchel (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 where the court regarded an exemption clause in a B2B contract for the supply of seeds as unreasonable under the Unfair Contract Terms Act 1977 because the supplier could have insured itself against the risk of crop failure without increasing significantly the contract price.

¹⁷³¹ Section 52(2)(g).

Section 22 has been discussed in detail further above.¹⁷³² In summary, agreements must be written in plain language under sections 50(2)(b)(i) and 22. A contract that is not written in plain language is not unfair in itself, but it may nevertheless be unfair to enforce it.¹⁷³³ The fact that all consumer contracts must be written in plain language should make it easy for the courts to strike out terms as unfair that do not meet the requirements of section 22.¹⁷³⁴ In this context, the OFT took the stance that an agreement (or term) which is not written in plain language is in itself sufficient to render a term unfair.¹⁷³⁵ In addition, a lack of transparency, which is part of the plain language requirement, could be the primary or sole reason to consider a provision unfair.¹⁷³⁶

With regard to the importance that the Act lays on the plain language requirement and the objectives of the Act in terms of section 3, terms or agreements written in verbose language should be considered unfair *per se*, except where the supplier's representative clearly explained them to the consumer so that the consumer knows what his rights and obligations are. In practice, this should however only concern short standard terms. Long terms and conditions which are so unclear that a consumer cannot easily understand them after the conclusion of the contract should be considered unfair (despite the supplier's explanations) since the consumer ultimately will struggle to understand them after the contract has been executed. In these cases, only terms written in plain language assure that the consumer knows its rights and obligations and can easily refer to them. In addition, consumers confronted with such provisions cannot be sure if the supplier's representative is able to explain the terms accurately. This submission has the advantage that suppliers will be incited to improve the language of their terms and conditions and apply good commercial practice.

hh) Consumer's knowledge of unfair provisions

In terms of section 52(2)(h), a court must consider whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, having regard to any custom of trade, and any previous dealings between the parties.

¹⁷³² See ch 2 para 3.2 a) above.

¹⁷³³ Sharrock 2010 *SA Merc LJ* 313, Sharrock *Judicial control* 134. See also *Barkhuizen v Napier* para [183].

¹⁷³⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 31.

¹⁷³⁵ Office of Fair Trading *Unfair Contract Terms Guidance* (2008) 135-88.

¹⁷³⁶ Paragraph 41 at 159 Law Commission of England and Wales and Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

This provision is astonishing at first sight because knowledge of an unfair term does not make it fair. On the other hand, terms may be fair if the supplier specifically pointed them out, and the consumer agreed to them. Hence, an onerous term is more likely to be fair if the supplier had referred to its content and consequences because this might be an indication that the consumer consciously decided to conclude the agreement after having weighed alternatives.¹⁷³⁷ This is thus an issue of procedural fairness taking precedence over substantial fairness.

The knowledge of a term requires that the consumer has read it or that the supplier has explained it to the consumer. Therefore, suppliers should at least give consumers an opportunity to read the provisions of the contract because adverse terms are more likely to be regarded as fair if the consumer knew or reasonably ought to have known of their existence.¹⁷³⁸ It is proposed that the term 'knowledge' does not necessarily mean that the consumer must have a deeper understanding of the given term, but at least some understanding of its legal implications. The more unfair the term is, the deeper the knowledge should be, however. The phrase 'of the existence and extent' in paragraph (h) speaks for this argument. It is furthermore suggested that this knowledge must be concrete and not abstract or general. This means that the consumer must know of the content of a given term. Therefore, it is not sufficient that the consumer merely knows that the presented document contains certain restrictions, but what kind of restrictions, e.g., a limitation of the supplier's liability.

The phrase 'or ought reasonably to have known' means that that the consumer has had the opportunity to acquaint him- or herself with the term, but did not take it. It can be said though that the mere fact that standard terms are presented to the consumer does not qualify for this condition because consumers usually do not read contract terms for the reasons already discussed elsewhere. It is suggested that 'reasonably' means that the consumer had enough time to make herself acquainted with the term and that the surrounding circumstances were favourable to do so.

A consumer is more likely to know a term if it attracted its attention. Hence, the prominence of a term is critical. Under section 49(4)(a), clauses limiting or excluding liability as well as acknowledgements of facts have to be presented in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer.¹⁷³⁹ Such terms are very onerous as they

¹⁷³⁷ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 34.

¹⁷³⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 34.

¹⁷³⁹ Before the CPA came into effect, jurisprudence had decided that harsh terms written in small print and to which the consumer has not been informed could either be surprising so that there was no reasonable reliance of consensus (see *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA)), or would probably

may have negative consequences for the consumer. The problem with the prominence given to a provision within a document is that usually, standard terms contain a number of provisions which are disadvantageous for the consumer, and therefore might be unfair. The more unfair terms a document contains, the more difficult it is for a supplier to give particular prominence to them. It is therefore submitted that, where necessary, the supplier has to explain the onerous terms to the consumer in order to escape from a negative consequences in terms of section 52(2)(h). This can be done summarily but requires that the supplier's staff be trained to do so.

The fact that a consumer signed or initialled an onerous term according to section 49(2) is not necessarily a proof that he or she knew about the given term. Often, consumers are easy prey for suppliers assuring that their signature or initials are 'a simple formality', and consumers sign or initial without having knowledge of the terms in question. Therefore, it seems problematic to argue that signing or initialling is equal to the knowledge of the given terms.¹⁷⁴⁰

Naudé suggests that suppliers could grant a cooling-off period to consumers during which they have the opportunity to read and understand the terms and to shop around for alternatives.¹⁷⁴¹ Griggs correctly argues though that the mere knowledge of a provision does not necessarily lead to a rational decision of the consumer.¹⁷⁴² Therefore, the understanding of the term and its implications is essential. A cooling-off period might nonetheless be a good solution because the factors that will ultimately lead to the consumer's decision are most probably beyond the supplier's sphere of influence and rather belong to the psychological sphere. Consumers often reach irrational decisions, even if they have all the necessary knowledge to do otherwise.¹⁷⁴³

be contrary to public policy as the consumer was not informed of the term in small print (see *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD)).

¹⁷⁴⁰ The problem of initialling has been discussed in detail above. See ch 2 para 3.2 b) cc) above.

¹⁷⁴¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 37.

¹⁷⁴² Griggs 2005 *Competition and Consumer Law Journal* 51.

¹⁷⁴³ Eiselen and Naudé 'Introduction' in Naudé and Eiselen (eds) *CPA Commentary* para 22. In Germany, the Verbraucherzentrale Bundesverband (VZBV), the umbrella organisation of the German consumer protection organisations, tends to establish a dubious guiding model for the 'typical' consumer. The VZBV argues that the model of the 'responsible' consumer has the disadvantage that such a 'responsible consumer' is often seen as identical with a well-informed and rationally acting *homo oeconomicus* who succeeds in making decisions that maximise its economic and other advantageous. Therefore, the VZBV suggests a more differentiated model which considers the different areas in which the consumer makes an economic decision. Hence, a consumer might be a 'vulnerable consumer' in one area, or a 'confident' or 'responsible' in other areas. The VZBV puts forward that in any event, consumers need 'paternalistic assistance' to a certain degree, above all in situation where they are not able to reach rational decisions despite all necessary information at hand. As a consequence, the VZBV suggests direct interventions in individual consumer decisions, reaching from information that includes the entire housekeeping, or even administrative prohibitions or officially prescribed consumption. It is suggested that these measures confuse social policy and consumer protection and reflect a degree of paternalism that is not compatible with the German social market economy. They do not only put consumers under tutelage, but also do not consider the general-objective approach of §§ 305 *et seq* which does not take into account the individual consumer in the given situation. See 'Unmündige Verbraucher als neues Leitbild' in *Frankfurter Allgemeine Zeitung*, 20 February

Commercials, others' influence, aspiration, status, materialism and other factors often play a crucial role in this respect. A cooling-off period would at least give a chance to the consumer to rethink his or her decision. Most suppliers are probably hesitant in offering a cooling-off period though, unless the consumer requires more reflection. Unfortunately, often the supplier's business model favours deals that are made on the spot because the employee in charge will be entitled to a commission.

§ 305(2) BGB¹⁷⁴⁴ chooses another way by which the supplier simply has to explicitly refer to the contract terms at the time when the parties enter into a contract in an acceptable manner, and the consumer has to have the opportunity to take notice of their contents.¹⁷⁴⁵ If the reference to such terms is only possible with disproportionate difficulty, it is sufficient to post the terms in a clearly visible manner at the place where the contract is concluded. In special cases (transportation, telecommunications, information services etc.), § 305a allows incorporation without compliance with these requirements if the consumer agrees to their applying. If these conditions are not fulfilled, the terms do not become part of the contract. It is irrelevant if the consumer took the opportunity to take knowledge of the given terms.¹⁷⁴⁶ In the German regime, it is therefore not necessary to expressly point out unfair terms as long as the entire legal instrument of standard terms has been duly incorporated into the contract. It is also not relevant if the consumer has read or understood the standard provisions.

The courts also have to take into consideration any previous dealings between the parties when judging if the consumer had knowledge or ought reasonably to have known of the existence and extent of an unfair term. The wording of this provision is quite unfortunate as it could mean that a consumer who has already had some kind of business with the same supplier before is supposed to know the terms of a contract. Then it would be curious though that the legislator chose the word 'dealing', which is not defined in section 1, instead of the term 'transaction'.¹⁷⁴⁷ A reason could be that the definition of 'transaction' in section 1 is written from the supplier's

2018 at <http://www.faz.net/aktuell/wirtschaft/verbraucherschuetzer-propagieren-fragwuerdiges-leitbild-15455696.html>.

¹⁷⁴⁴ § 305(2) BGB: 'Standard business terms only become a part of a contract if the user, when entering into the contract, - 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and - 2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents, and if the other party to the contract agrees to their applying.'

¹⁷⁴⁵ WLP/Pfeiffer § 305 para 62.

¹⁷⁴⁶ UBH/Ulmer and Habersack § 305 para 145, Stoffels *AGB-Recht* 99.

¹⁷⁴⁷ See s 1 s.v. 'transaction'.

perspective ('"transaction" means in respect of a person acting in the ordinary course of business...'), and that section 52(2)(h) exclusively refers to the consumer. Other provisions of the Act use the term 'transaction' indiscriminately though,¹⁷⁴⁸ and the long title and section 3(1)(g) even speak of 'consumer transactions'. The reason to choose the term 'dealing' rather indicates that the previous 'business' between the parties had not necessarily led to the conclusion of a contract. Otherwise, the legislator could have chosen at least the noun 'deal', indicating that the negotiations between the parties were finalised by a contract, or 'transaction'. Therefore, 'dealing' can only refer to negotiations of some kind before the conclusion of the current transaction.¹⁷⁴⁹

This presumes that the consumer has knowledge about particular terms, or at least that he or she reasonably should know them. As already explained, consumers typically do not read terms and conditions though. Furthermore, the previous dealings could have contained different terms. It is therefore submitted that the courts must look into the current transaction as well as the content of the previous dealings in order to establish whether they contained similar terms. In practice, this assessment factor will not be of too much importance in my opinion.

The courts should also take into consideration any customs of trade. It is my submission that this factor should be taken with a pinch of salt as most individual consumers cannot be expected to know about the customs of trade of a particular sector. In B2B contracts, this might be different.

In any case, courts should also consider if the party understood a term's meaning if a person in a similar position as the consumer would usually expect a similar transaction in the given situation, the information given to the consumer before he or she signed the contract as well as further explanations made by the supplier. Furthermore, the courts should assess whether the consumer had a reasonable opportunity to absorb provided information as well as the complexity of the transaction, whether it was transparent and if the consumer took professional advice or it was reasonable to expect to have done so. These considerations are relevant for the Law Commission of England and Wales and the Scottish Law Commission¹⁷⁵⁰ but should also

¹⁷⁴⁸ See, for instance, ss 2(3), 5(1)(a) or 14(1).

¹⁷⁴⁹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 35.

¹⁷⁵⁰ Paragraph 45 of the Explanatory Notes to the Unfair Contract Terms Bill, set out in *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005) at 161.

apply in South Africa. Interestingly, the UK Law Commissions refer to the 'knowledge and understanding', and not only to 'knowledge'.¹⁷⁵¹

It is important to note that terms remain unfair, even if they have been explained to the consumer, if the latter was informed of them in the very last minute, i.e., when the decision to conclude the contract and all sorts of arrangements have already been made.¹⁷⁵²

By and large, courts should not lay too much importance on this factor but rather construe it in the sense that knowledge of the provision in question could merely serve as a 'warning' or information to the consumer as regards the existence of the term. This 'warning' or information did however not necessarily exist in previous dealings with the supplier.

ii) Possibility to acquire identical goods or services elsewhere

In their fairness enquiry, courts also must consider the amount for which, and circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier.¹⁷⁵³ Consequently, a supplier's terms are more likely to be regarded as unfair if the consumer had the possibility to purchase similar goods or services elsewhere on better terms.

'Amount' certainly refers to the price – or value – of the goods or services and reminds of paragraph (a) of the same section. Paragraph (i) expressly relates to the price offered by other suppliers though, a factor which is only implied in the fairness enquiry of paragraph (a). The term 'circumstances' is not defined and could mean, it is suggested, the terms themselves under which a product is acquired, but also, similar to the discussion above on German law,¹⁷⁵⁴ the surrounding circumstances of the contract, such as another supplier's conduct (explanations, pressure etc.), or the existing stock/supply of a given article in the consumer's geographical area. The consideration of another supplier's conduct seems to be too hypothetical though since it requires an actual transaction between the consumer and another, alternative supplier. Consequently, this would mean that the circumstances are put into relation to other suppliers, which seems to be a difficult task. The consumer cannot be expected to bring forward this kind of information which, in addition, is difficult to prove. Therefore, 'circumstances' can only refer to the terms under which the consumer could have acquired identical or equivalent goods or

¹⁷⁵¹ Emphasis added.

¹⁷⁵² Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 37.

¹⁷⁵³ Section 52(2)(i).

¹⁷⁵⁴ Concerning § 310(3) no. 3.

services from a different supplier. The legislator should make this clear by replacing 'circumstances' by 'terms and conditions'.

Furthermore, the question begs to be asked what implications the phrase 'could have acquired' means. On the one hand, this could mean that the mere theoretical – or abstract – possibility for the consumer must be considered so that a consumer does not need to know or ought to have known that similar goods were obtainable on better terms elsewhere. In this case, the mere fact that they were would be sufficient. Such an *ex post facto* appreciation would be difficult though. Furthermore, it would be challenging to define what 'from a different supplier' means: It could mean from a different supplier in the area/town/province of the consumer, or in South Africa as a whole, or internationally (with e-commerce the latter possibility cannot be disregarded). In this case, it is very probable that anywhere another supplier offers the same product or service at a better price and on better terms. On the other hand, this phrase could mean that the focus has to be put on the consumer's concrete situation, i.e., whether the consumer could have acquired similar products on better terms because another supplier offered those with the consumer knowing this.

In a competitive market, the consumer certainly cannot be expected to shop around and compare all kinds of prices and 'circumstances'. What is more, terms cannot be judged in isolation, but only within their context as, for instance, the price often reflects liability or warranty issues which are stipulated in other provisions. Consumers will not be able to assess this kind of questions. Therefore, the focus has to be on the concrete, and not an abstract, possibility for the consumer to obtain similar products on better terms. In any case, the mere theoretical possibility to obtain better terms elsewhere should not count against the consumer.¹⁷⁵⁵

Naudé correctly states that in instances where the consumer had a real possibility to understand the terms, it will be difficult to declare a term unfair because he or she could have obtained a similar product on better terms elsewhere.¹⁷⁵⁶ In this case, the consumer reached an informed decision.

In the view of the problems related to this factor, it should not be of much relevance in practice.

¹⁷⁵⁵ See also Naudé 2006 *Stell LR* 368, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 38, Sharrock 2010 *SA Merc LJ* 313 note 111, Sharrock *Judicial Control* 135 note 111. Naudé and Sharrock are of the same opinion.

¹⁷⁵⁶ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 38.

jj) Special order goods

According to the last factor listed in section 52(2), the courts also must consider in the case of the supply of goods, whether goods were manufactured, processed or adapted to the special order of the consumer.¹⁷⁵⁷

This factor only applies to goods, but not to services.¹⁷⁵⁸ The legislator had probably in mind that services, compared to goods, are more often adapted to a client's needs, whereas special order goods are the exception and have to be considered differently in the fairness enquiry. One can thus argue that goods are more often mass products than services insofar as they are repeatable without modification, whereas services can be individualised more easily.

According to Naudé, paragraph (j) refers to goods with unusual characteristics that are usually not manufactured by a supplier in its ordinary course of business, or to the processing or adaptation of goods according to the client's wishes, not generally undertaken by the supplier.¹⁷⁵⁹ An example is a supplier who usually produces metal terrace roofs, and who manufactures a metal gate made of the steel frames that are usually used for the roofs.

The rationale of this factor is certainly that fairness has to be assessed differently if the consumer required goods which are normally not manufactured by the supplier, and for which the latter has not the same expertise as for his or her usually produced goods.

Naudé's point of view seems to be too narrow, and it is suggested that item (j) also covers cases in which a supplier delivers goods that he or she normally manufactures, but that were produced with different measurements, for instance. A carpenter, for example, who regularly manufactures bookcases with standard measurements will also manufacture bookcases that fit into a room with very high or very low ceilings. Also in these cases, paragraph (j) should be applied as this provision refers to bespoke products in general, irrespective of whether they were produced in the normal course of business. Otherwise, suppliers specialising in custom-made products would be excluded. Furthermore, the wording of item (j) does not restrict its application to goods that are not manufactured in the ordinary course of the supplier's business.

¹⁷⁵⁷ Section 52(2)(j).

¹⁷⁵⁸ The same applies to **item (e) in Schedule 2 of the UK Unfair Contract Terms Act, 1977**, according to which particular regard must be had to 'whether the goods were manufactured, processed or adapted to the special order of the customer'. On the other hand, the **preamble of the EC Unfair Terms Directive** of 1993 also includes services: Particular regard shall be held to '(...) whether the goods or services were sold or supplied to the special order of the consumer'.

¹⁷⁵⁹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 39.

It is important to note that terms which exclude liability for manufactured and supplied goods are void if they conflict with sections 55, 56 and 61. Suppliers will nevertheless still be able to include exemption clauses because liability for damages caused by defective goods under the common law is broader than liability under section 61.¹⁷⁶⁰

b) Other factors not listed in section 52(2)

As mentioned earlier, the list of section 52(2) should not be considered exhaustive. The South African Law Commission explicitly indicated in item (z) of its guidelines that a court might consider in its fairness enquiry any other factor.¹⁷⁶¹ The South African Law Commission Report contains twenty-six factors that a court may consider in this regard. In this context, also other factors, drawn on foreign jurisdictions, might be interesting.¹⁷⁶² The more factors are identified, the more the level of uncertainty resulting from the unfairness criterion is reduced. This approach ensures that any enquiry into substantive fairness is properly balanced.¹⁷⁶³

In the following, some of these factors will be discussed.

aa) Nature of the goods or services

In terms of section 52(2)(b), the court must consider, *inter alia*, the nature of the *parties* to the given transaction or agreement. Paragraph (j) of this section refers to the very nature of the 'special-order goods'. It thus seems only logical to include the nature of the goods or services in question too.¹⁷⁶⁴ Recital 18 of the EU Unfair Terms Directive explicitly provides that 'the nature of goods or services should have an influence on assessing the unfairness of contractual terms'. After all, the nature of the goods or services is one of the main characteristics of the goods or services sold and has a direct impact on the formulation of the terms and conditions. Therefore, a particular term concerning the cancellation of a subscription, for instance, will have to be assessed differently, depending on the nature of the product sold, e.g., a newspaper subscription, as opposed to the provision of gas or electricity. Also other aspects should be taken into account here: If a product which was on display for a while is sold to a consumer, it might well be justified to exclude certain liabilities in terms of warranty, provided that the supplier has informed the consumer of the fact that it is selling a product which had previously

¹⁷⁶⁰ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 39.

¹⁷⁶¹ Bill of the SALRC published in SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at 213.

¹⁷⁶² See s 2(2).

¹⁷⁶³ Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 135-136.

¹⁷⁶⁴ See s 14(4)(j) of the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

been displayed, which means that it had already been touched and tried out by a certain number of customers. This could also apply to products of an experimental nature that have not been well tested yet¹⁷⁶⁵ or a clause which stipulates that the consumer forfeits a deposit when withdrawing from a contract for the sale of land, given the high transaction costs involved and the supplier's likely loss of profit.¹⁷⁶⁶

In this regard, it is not sufficient that a supplier sells a product *voestoots* under section 55(6) by simply labelling the sale as '*voetstoots*'. On the contrary, the supplier has to describe the condition of the goods in order to warn the consumer that there may be defects so that he or she is able to examine the item closer.¹⁷⁶⁷

bb) Balance of the parties' interests

Contrary to section 52(2)(f), it is not sufficient to focus only on the legitimate interests of the supplier as section 48(2)(a) clearly implies that a term must not be excessively one-sided. On the contrary, in a synallagmatic contractual relationship, the parties' rights and obligations should be balanced. An overall view of all contractual terms is therefore necessary.¹⁷⁶⁸ Article 3(1) of the EU Unfair Terms Directive says that '[a] contractual term (...) shall be regarded as unfair, if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. § 307(1) 1st sent. BGB contains a similar provision, but instead of a 'significant imbalance', an 'unreasonable disadvantage' is required.¹⁷⁶⁹ § 879(3) of the Austrian ABGB¹⁷⁷⁰ requires 'a severe disadvantage for one of the parties'.¹⁷⁷¹ In German literature, content control is justified by the concept of 'warranted rightness' (*Richtigkeitsgewähr*) which is based on the premise that contracts reflect an 'objectively righteous order' that is disturbed in the case of a structural imbalance. This imbalance has to be mended by legal control.¹⁷⁷² The balance of the parties' interests thus seems to be the foundation of every contract.

¹⁷⁶⁵ In this case, a clause limiting liability for consequential loss might be justified, provided that it is not in conflict with s 61.

¹⁷⁶⁶ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 47. In this case, for such a forfeiture clause, probably s 17 is applicable.

¹⁷⁶⁷ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 48.

¹⁷⁶⁸ See s 14(4)(c) and (d) of the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

¹⁷⁶⁹ WLP/Wolf § 307 para 74.

¹⁷⁷⁰ ABGB = Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code)

¹⁷⁷¹ My own translation of § 879(3) ABGB.

¹⁷⁷² Schmidt-Rimpler *AcP* 147 (1941) at 149, Lieb *AcP* 178 (1978) 203.

A similar factor is whether there is a lack of reciprocity in an otherwise reciprocal contract.¹⁷⁷³

cc) Inter-dependent terms

This factor means that the terms of an agreement must not be seen in isolation, but that also the circumstances and the context of the agreement must be considered.¹⁷⁷⁴ In other words, the contract ‘as a whole’ must be taken into account since a provision of the agreement that confers a benefit on the consumer might be commensurate with the detriment caused by the provision alleged to be unfair.¹⁷⁷⁵

The greylist of regulation 44 contains a number of one-sided terms in favour of the supplier.¹⁷⁷⁶ The terms listed therein are therefore more likely to be fair if they are commensurate with a right granted to the consumer, either in the same term or in another term.¹⁷⁷⁷

dd) Extent to which a term differs from the *ius dispositivum*

Another factor is the extent to which the term differs from what would have been in the case of its absence.¹⁷⁷⁸ The South African Law Commission formulated this criterion in its list as follows: ‘(w) whether, to the prejudice of the party against whom the term is proffered, the party proffering the term is otherwise placed in a position substantially better than that in which the party proffering the term would have been under the regulatory law, had it not been for the term in question; (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled’. The German BGB chose a much more comprehensive formulation by which unfairness is presumed if a term ‘is not compatible with essential principles of the statutory provision from which it deviates’.¹⁷⁷⁹ This refers to the residual rule in the relevant part of the BGB.¹⁷⁸⁰

The Law Commission's formulations require that a given term has to be compared with the residual rules. In addition, the common law must be considered residual rules. Those have been

¹⁷⁷³ Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 136.

¹⁷⁷⁴ See s 52(2)(c) and (e). See also art 4 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 and art 83(2) of the Proposal for a Regulation of the European Parliament and of the Council on the Common European Sales Law COM (2011) 635 final of 11 October 2011 and art 32(2) of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final, submitted on 8 October 2008.

¹⁷⁷⁵ Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 136.

¹⁷⁷⁶ For instance, reg. 44(3)(h), (i), (j), (k), (l), (m), (n), (o) and (aa).

¹⁷⁷⁷ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 49.

¹⁷⁷⁸ This is the formulation of s 14(4)(g) of the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

¹⁷⁷⁹ § 307(2) no. 1.

¹⁷⁸⁰ For the discussion what the phrase ‘essential principles of the statutory provision’ means, see Stoffels *AGB-Recht* 197 *et seq*, with further references.

developed during a long period of time and represent a fair balancing of interests of typical suppliers and consumers, having the given type of contract in the background. One has to keep in mind though that the residual rules do not always represent a fair balancing of the parties' interests as they may differ from trade sector to trade sector. Therefore, a deviation from residual rules in itself is not automatically unfair but can fairly balance the parties' interests. One should also consider that the generalised *naturalia* of a contract, i.e., the terms included *ex lege*, do not necessarily ensure a fair balancing of the parties' interests and that it might be justified to deviate from them in order to reflect the realities of the given industry.¹⁷⁸¹

ee) Greater costs for the supplier if the term was to be omitted

Another comparison between the term and residual rules begs the question of whether the supplier would have to bear higher costs in the case of the absence of the term.¹⁷⁸² Hence, a term might be fair if it represents a fair balancing between the consumer's and the supplier's interests. A slight increase in costs due to the omission of the term would probably not make it fair. If the supplier can insure itself against the risk in question without materially increasing the price paid by the consumer, the term will probably be unfair.

Higher costs for the supplier are inextricably linked to higher prices for the consumer. In German law, the so-called 'price argument'¹⁷⁸³ by which an unfair clause might become fair if the supplier compensates this with a lower price, is generally not relevant. The reasons put forward are that each legal disadvantage can be justified somehow with economic reasons and that the client is unlikely to receive fair compensation for this disadvantage. Furthermore, the advantage in terms of the price is not measurable with regard to the price that would be fair in the absence of the term.¹⁷⁸⁴

These arguments have admittedly some weight. We have seen above that questions linked to prices are always difficult to assess. Thus, not too much importance should be laid on this factor.

ff) Limitation of essential rights and duties

Terms limiting essential rights and duties inherent in the nature or essence of the contract jeopardise the attainment of the contractual purpose and are likely to be unfair.¹⁷⁸⁵ Under

¹⁷⁸¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 45.

¹⁷⁸² Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 136.

¹⁷⁸³ *Preisargument*.

¹⁷⁸⁴ UBH/*Fuchs* § 307 para 144 and 145.

¹⁷⁸⁵ See § 307(2) BGB: 'An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision - 1. is not compatible with essential principles of the statutory provision from which it deviates (...)' See also

§ 307(2) no. 2 BGB, a provision is presumably unfair if it 'is not compatible with essential principles of the statutory provision from which it deviates'.¹⁷⁸⁶ The type of contract in question defines the essential rights and duties. In *Mercurius Motors v Lopez*,¹⁷⁸⁷ the court decided that an exemption clause which 'undermines the very essence' of the type of contract should be clearly and pertinently brought to the consumer's attention. Naudé and Lubbe correctly argue that even if the consumer signs such a contract with knowledge of the exemption clause, the fact that it undermines the very essence of the type of contract is an indicator that it may be contrary to public policy. They argue that this is an indication for the fatally compromised bargaining power of the consumer and the fact that the supplier took improper, unconscionable advantage of the consumer's position. In their view, a term might nonetheless be fair when considering other circumstances.¹⁷⁸⁸ It is suggested that it is problematic to sanction terms that put at stake the nature or essence of the contract and the attainment of the contractual purpose because they distort the contract as a whole. Such terms should thus never be fair.

c) South African case law

Some South African judgments and principles derived therefrom also give some guidance for the revetment of the concepts of unfairness and unreasonableness, but also for the role that the principle of good faith plays. As mentioned above, the common law is still applicable under section 2(10) so that common-law jurisprudence is still a valuable source under the Act. The debates on good faith in South African law of contract can best be characterised by the words of Hawthorne: 'The core ethic of the law of contract may be identified as either the belief in individualism or an avowal to co-operativism. Adherence to either paradigm determines the acceptance or rejection of a doctrine of good faith.'¹⁷⁸⁹

The principle of freedom of contract was regarded as a cornerstone of South African law upon which the courts heavily relied. The doctrine encompasses several different notions: the parties must be able to freely negotiate the terms of their agreement, decide with whom they wish to contract, or that they must be free to decide not to contract. The principle of *pacta sunt*

Director General of Fair Trading v First National Bank [2002] 1 All ER 97 para [54]: 'It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction'.

¹⁷⁸⁶ For the discussion what the phrase 'essential principles of the statutory provision' means, see Stoffels *AGB-Recht* 197 *et seq*, with further references.

¹⁷⁸⁷ 2008 (3) SA 572 (SCA).

¹⁷⁸⁸ Naudé/Lubbe 2005 *SALJ* 441.

¹⁷⁸⁹ Hawthorne 2006 *Fundamina* 71.

servanda, i.e., that full effect should be given to agreements, is of utmost importance in this regard.¹⁷⁹⁰

This topic has already been discussed in detail above,¹⁷⁹¹ which is why a summary should suffice here.

Even though the principle of good faith was not expressly rejected in *Bank of Lisbon & South Africa Ltd v De Ornelas*¹⁷⁹² where the court held that it was rather an informative norm that merely informed substantive rules and principles, this case is crucial regarding the decline of a general defence based on good faith because the majority of the court refused to acknowledge a substantive contractual defence based on good faith.¹⁷⁹³ Indeed, the court expressly held that the *exceptio doli generalis* was not received into Roman-Dutch law and thus was not received in South African law.¹⁷⁹⁴

The majority ruling was heavily criticised by academia,¹⁷⁹⁵ but created a binding precedent and had to be followed by lower courts. With the abandonment of the *exceptio doli generalis*, there was no general equitable remedy available to the courts to decide not to enforce an otherwise valid agreement.¹⁷⁹⁶

The question of good faith also came up in *Afrox Healthcare Ltd v Strydom*.¹⁷⁹⁷ One of the issues in *Afrox* was very similar to that raised in *Brisley v Drotzky*, namely whether good faith can be used by the court to refuse to enforce a certain term included in the contract.¹⁷⁹⁸

The court restated that good faith is an informative consideration underlying the existing substantive rules and doctrines and not a substantive ground or defence by which the court can declare invalid a contract or refuse to enforce a contractual provision.¹⁷⁹⁹ Hawthorne refers to the *Afrox* case as the 'zenith of condonation of aggressive capitalistic entrepreneurship' as legal certainty and commercial and economic interests again were the critical considerations in favour of the traditionalist approach.¹⁸⁰⁰ He also criticises that the court acknowledged the

¹⁷⁹⁰ Hawthorne 1995 *THRHR* 163, Tladi 2002 *De Jure* 308.

¹⁷⁹¹ See ch 1 para 1 above.

¹⁷⁹² *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

¹⁷⁹³ Hawthorne 2004 *THRHR* 297.

¹⁷⁹⁴ At 608. See also Glover (2007) *SALJ* 450.

¹⁷⁹⁵ Lubbe and Murray *Contract* 391; Hawthorne/Thomas 1989 *De Jure* 146, 148-149, 154.

¹⁷⁹⁶ Hawthorne/Thomas 1989 *De Jure* 146, 154, Hawthorne 2004 *THRHR* 297.

¹⁷⁹⁷ 2002 (6) SA 21 (SCA).

¹⁷⁹⁸ Brand 2009 *SALJ* 81.

¹⁷⁹⁹ Bhana/Pieterse 2005 *SALJ* 876.

¹⁸⁰⁰ Hawthorne 2004 *THRHR* 299.

widespread use of standard form agreements without considering the effect of such a contract on consensus. The use of standard form agreements actually undermines the notion of freedom to contract and party autonomy.¹⁸⁰¹

According to common law, contracts or provisions that are contrary to public policy are unenforceable. As confirmed many times by the courts, public policy is anchored in constitutional values.¹⁸⁰² Therefore, a term that offends against a constitutional value will be unfair under the Act as well. It is important to consider that the mere offence of one's individual sense of propriety and fairness does not suffice, and that a more principled approach is requested that uses objective criteria, as Sachs J states in his minority judgment in *Barkhuizen v Napier*.¹⁸⁰³ According to Sachs J, such an approach must consist in the enquiry of the 'tendency' of the provision in question and the extent to which it affects standards of reasonable and fair dealing that the community would consider intrinsic to appropriate supplier/consumer relationships. This must be done in the context of the contract as a whole.¹⁸⁰⁴ Sachs J also relates to procedural fairness by stating that it would be unfair to hold a person to one-sided terms of a transaction to which it apparently did not actually agree, and where nothing indicates that its attention was drawn and the legal significance of which a reasonable person in its position could not be expected to be aware.¹⁸⁰⁵

Sachs J states in *Barkhuizen v Napier*¹⁸⁰⁶ that one-sided clauses do not affect 'only the indigent and the illiterate who in practice remain ignorant of everything the document contains; the fact that consumer protection is especially important for the poor does not imply that it is irrelevant for the rich.'¹⁸⁰⁷ Therefore, a control over unfair contract terms protects the autonomy of consumers, by forcing suppliers to actually obtain informed consent to onerous provisions in a fair manner, instead of hiding them in small print.¹⁸⁰⁸ In addition, as already discussed, the consumer's transaction costs involved in reading complex standard terms in small print are too high. It is therefore unlikely that the consumer will focus on other things than the core terms.

¹⁸⁰¹ Hawthorne 2004 *THRHR* 299.

¹⁸⁰² See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁸⁰³ 2007 (5) SA 323 (CC).

¹⁸⁰⁴ *Barkhuizen v Napier* para [146]. Hutchison is of the opinion that this case must be read in context and that only where constitutional values and principles – here the constitutional right of access to the courts – the question of fairness or reasonableness becomes relevant. See Hutchison *et al. Law of Contract* 32.

¹⁸⁰⁵ *Barkhuizen v Napier* para [147].

¹⁸⁰⁶ *Barkhuizen v Napier* (2007) (5) SA 323 (CC).

¹⁸⁰⁷ *Barkhuizen v Napier* at para [149]. Sachs J's equations indigent and/or illiterate = poor, and consequently educated = rich can only be explained from a stylistic point of view as he probably did not want to repeat the same nomenclature.

¹⁸⁰⁸ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

What is more, it will be difficult to negotiate most terms and find someone who is authorised to negotiate about standard terms.¹⁸⁰⁹ Strictly speaking, it is the very nature of standard terms to be ‘employed without variation in all transactions of a similar kind’.¹⁸¹⁰ The suppliers’ advertising which mostly suggest that the consumer’s experience with the supplier will only be positive, also contributes to consumers’ behaviour. This especially applies if they are unsophisticated and take for granted ‘information’ contained in advertising. Most unsophisticated consumers will thus assume that standard terms are invariable.¹⁸¹¹

The notion of public policy is important as it is inseparably linked to other concepts, such as fairness, justice, equity and reasonableness.¹⁸¹² When determining fairness, the test, according to Ngcobo J is, first, whether the clause itself is reasonable, and second, if so, whether it should be enforced in the light of the circumstances which prevented compliance with the clause.¹⁸¹³ The question of how *Barkhuizen v Napier* should be interpreted was debated since it had the potential to change the law of contract radically.¹⁸¹⁴ Some commentators even suggested that it led to the resurrection of the *exceptio doli generalis*.¹⁸¹⁵ Academia wondered after *Barkhuizen v Napier* whether the court's approach left sufficient room for the law of contract to be infused with constitutional values.¹⁸¹⁶ Many authors felt that the court's approach was too conservative and did not promote a more equitable society.¹⁸¹⁷ Brand, who usually takes a more traditional stance and thus is not a friend of open-ended concepts such as good faith, argued that more judicial activism might be appropriate to ensure development in a constitutional direction.¹⁸¹⁸

The SCA tried to narrow the effect of the wide dicta of *Barkhuizen v Napier* in *Bredenkamp and Others v Standard Bank Ltd*.¹⁸¹⁹ The court stated that it did 'not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and

¹⁸⁰⁹ Naudé ‘Introduction to sections 48-52’ in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹⁸¹⁰ Harker 1981 *SALJ* 16.

¹⁸¹¹ Eiselen 1989 *De Jure* 44; Naudé ‘Introduction to sections 48-52’ in Naudé and Eiselen (eds) *CPA Commentary* para 13.

¹⁸¹² *Barkhuizen v Napier* para [51].

¹⁸¹³ *Barkhuizen v Napier* para [56].

¹⁸¹⁴ Hutchison *et al Law of Contract* 31.

¹⁸¹⁵ Glover 2007 *SALJ* 449, Kerr 2008 *SALJ* 241, Sutherland 2008 *Stell LR* 390 (Part 1) and 2009 *Stell LR* 50. For the discussion on the *exceptio doli generalis* see ch 1 para 2 above.

¹⁸¹⁶ Bhana 2007 *SALJ* 274.

¹⁸¹⁷ Davis 2008 *SAJHR* 319, 324.

¹⁸¹⁸ Brand 2009 *SALJ* 89.

¹⁸¹⁹ 2010 (4) SA 468 (SCA).

reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated'.¹⁸²⁰

In *Naidoo v Birchwood Hotel*,¹⁸²¹ however, *Barkhuizen v Napier* was also interpreted in that even if a clause is considered to be reasonable on that first enquiry, it may still not be enforceable in the particular circumstances of the case if it denies a party an adequate and fair opportunity to have the dispute resolved by a court of law.¹⁸²²

In *Everfresh v Shoprite Checkers*¹⁸²³ it was said obiter that the law of contract should be infused with constitutional values, including values of *Ubuntu*,¹⁸²⁴ which inspire many constitutional aspects.¹⁸²⁵ In this case, both the majority and minority judgments expressly mention the importance of the principle of good faith in contractual relationships.¹⁸²⁶ The court stated that if the case had been properly pleaded, the concept of *Ubuntu* and the principle of good faith might have been crucial in the applicant's favour.¹⁸²⁷ According to Moseneke DCJ, *Ubuntu* 'emphasises the communal nature of society and carries in it ideas of humaneness, social justice and fairness' and includes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'. In addition, according to Moseneke, '[c]ontracting parties certainly need to relate to each other in good faith'.¹⁸²⁸

Moseneke's view about the infusion of constitutional values into the law of contract certainly has its merits. Mokgoro argues that *Ubuntu* can be an appropriate principle to use to inform the

¹⁸²⁰ At para [50].

¹⁸²¹ 2012 (6) SA 170 (GSJ). In this case, the court had to decide whether a clause exempting the hotel from claims for bodily injury suffered by a hotel guest by negligence on the part of a hotel employee was lawful. The court held that such a clause could not be enforced in the particular circumstances, even if it is not objectively unreasonable and contrary to public policy. According to the court, to deny a guest judicial redress for injuries he sustained while exiting through the hotel gates, which is not supposed to be an inherently dangerous activity, offends against notions of justice and fairness.

¹⁸²² At paras [47]-[53]. The court held that a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and therefore unenforceable. To deny a hotel guest judicial redress for injuries he or she suffered in exiting the hotel gate because of the negligent conduct of the hotel (not properly maintaining the gate, not warning the guest) offends against the notions of justice and fairness.

¹⁸²³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). Mupangavanhu is of the view that the Constitutional Court missed the opportunity in *Everfresh v Shoprite* to settle the question 'whether the spirit, purport, and objects of our Constitution require courts to encourage good faith in contractual dealings or whether the Constitution insists that good faith requirements are enforceable'. See Mupangavanhu 'Yet another missed opportunity to develop the Common Law of Contract? An analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30' at <https://repository.uwc.ac.za/xmlui/handle/10566/1988?show=full>.

¹⁸²⁴ *Ubuntu* is a philosophical concept found in Southern Africa focusing on people's allegiances and relations with each other. See Hutchison *et al Law of Contract* 185 note 93, with further references.

¹⁸²⁵ *Everfresh v Shoprite Checkers* para [71].

¹⁸²⁶ *Everfresh v Shoprite Checkers* paras [23], [26], [36], [37], [61], [68], [72], for example.

¹⁸²⁷ *Everfresh v Shoprite Checkers* para [71].

¹⁸²⁸ *Everfresh v Shoprite Checkers* para [72].

new developments in the law of contract and that the flexibility of the concept is an advantage. As a basis it has a certain invariable focus on the greater good, the interest of the community and dignity.¹⁸²⁹ It is nonetheless my submission that the concept of *Ubuntu* does not help determine fairness in a legal context. *Ubuntu* certainly contains valuable elements for a peaceful life in society but is more of a philosophical rather than legal nature. The difficulty of this concept is that it is explained differently by various people rather than defined concisely (which is probably an inherent problem with this concept).¹⁸³⁰ It is possible of course, and often necessary, to revert to philosophical and other concepts in constitutional law, such as dignity, respect etc. Most of the concepts contained in *Ubuntu* are already present in the concepts of good faith, public policy though, or are just the fundamental basis of each society. Hence, it is not necessary or even helpful to add another, rather vague concept which does not introduce new elements for the determination of constitutional values.

In *Beadica*,¹⁸³¹ the Constitutional Court recently confirmed that courts cannot refuse to enforce contract terms for equity considerations, such as good faith, fairness and reasonableness because these values have no self-standing status. Only where contractual terms or their enforcement would be so unfair that they are contrary to public policy, a court has the right to refuse to enforce them.¹⁸³²

The *pacta sunt servanda* principle still plays a crucial role in the context of the control of contracts by the courts through the principle of public policy. The protection of this maxim is indispensable for the achievement of the objectives set out in the Constitution.¹⁸³³ This

¹⁸²⁹ Mokgoro 1998 *Buff. Hum. Rts. L. Rev.* 16, 18 *et seq.*

¹⁸³⁰ Eze explains the concept of *Ubuntu* as follows: "A person is a person through other people" strikes an affirmation of one's humanity through recognition of an "other" in his or her uniqueness and difference. It is a demand for a creative intersubjective formation in which the "other" becomes a mirror (but only a mirror) for my subjectivity. This idealism suggests to us that humanity is not embedded in my person solely as an individual; my humanity is co-substantively bestowed upon the other and me. Humanity is a quality we owe to each other. We create each other and need to sustain this otherness creation. And if we belong to each other, we participate in our creations: we are because you are, and since you are, definitely I am. The "I am" is not a rigid subject, but a dynamic self-constitution dependent on this otherness creation of relation and distance.' See Eze *Intellectual History* 190 and 191. It should be noted that in the second minority judgement of *Beadica*, Victor AJ stresses the importance of *Ubuntu* in the South African law of contract. According to Victor AJ, *Ubuntu* is a constitutional value that adds a value of substance, and together with other values, forms a transformative basis in the adjudicative process when deciding whether an unfair contract term has to be enforced or not. *Ubuntu* has a greater and context-sensitive reach, especially where there is inequality in the bargaining power between the parties. This concept is wider than fairness. Victor AJ is of the view that adjudicating fairness cannot be done within a set of neutral legal principles, but in a manner that ensures objective, reasonable practicality and certainty. *Ubuntu* thus does not exclude or undermine certainty in contract, but remains a central consideration in harmony with the other values. See *Beadica* at paras [206]-[216].

¹⁸³¹ [2020] ZACC 13 (17 June 2020).

¹⁸³² *Beadica* at para [80].

¹⁸³³ *Beadica* at paras [83]-[85].

principle is not absolute, though, and where several constitutional rights and values must be considered, for the determination of whether enforcement of the terms would be contrary to public policy in the given case, these must be carefully balanced against each other.¹⁸³⁴

In *Beadica*, the Constitutional Court also specified that the principle of 'perceptive restraint' must not hinder the courts from shying away from their constitutional duty to infuse public policy with constitutional values. Hence, the degree of necessary restraint must be balanced against the backdrop of the constitutional rights and values.

The ambivalence on the exact role of fairness in the case law decided before the Act was somewhat mitigated by the *Beadica* case. The ideas and arguments contained in this case give some certainty to the courts when deciding whether a term has to be struck down because of unfairness in terms of the Act. Undoubtedly, the principle of freedom of contract cannot be regarded as absolute.¹⁸³⁵

d) Foreign legal systems

As section 2(2)(a) provides that the courts, the Tribunal or the Commission may consider appropriate foreign and international law when interpreting or applying the Act, it is interesting to see how other legal systems deal with unfairness and define this concept. Some of them have already been presented above. Obviously, section 48(2) or the non-exhaustive list of factors in section 52(2) are not sufficient to give a satisfactory guideline to the judiciary.

The general clause of the EC Unfair Terms Directive provides that a term is unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.¹⁸³⁶ The 'significant imbalance' mentioned in the Directive reminds of the excessive one-sidedness mentioned in section 48(2)(a) and therefore does not provide new aspects in the determination of unfairness. Unlike the Directive and section 48, the BGB refers to an 'unreasonabl[e] disadvantage' rather than a 'significant imbalance' or an 'excessive one-sided[ness]'. § 307 BGB reads: 'Provisions in standard business terms are ineffective if, *contrary to the requirement of good faith*, they *unreasonably disadvantage* the other party to the contract'.¹⁸³⁷ § 879(3) of the Austrian

¹⁸³⁴ *Beadica* at para [87].

¹⁸³⁵ Hawthorne 2004 *THRHR* 295.

¹⁸³⁶ Article 3 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993.

¹⁸³⁷ Emphasis added.

ABGB,¹⁸³⁸ which contains the general clause to § 6 KSchG,¹⁸³⁹ also refers to a disadvantage for the other party to the contract, but in contrast to § 307(1) BGB, the disadvantage has to be 'severe'.¹⁸⁴⁰ This should be similar in most cases to 'unreasonably' in terms of § 307(1) BGB because only 'objectively justified deviations from the dispositive law constitute a severe disadvantage'.¹⁸⁴¹ Besides the unreasonable disadvantage, another dimension, namely good faith, is added, which could give some more guidance. Pursuant to § 307(2) BGB, an unreasonable disadvantage is, in case of doubt, to be assumed, if a provision 'is not compatible with essential principles of the statutory provision from which it deviates', or 'limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised'. The statutory provision from which the provision deviates is the residual rule in the relevant part of the BGB and other statutory provisions.¹⁸⁴²

The concepts of a 'significant imbalance',¹⁸⁴³ and an 'unreasonable disadvantage',¹⁸⁴⁴ suggest that such an imbalance or disadvantage has to be balanced in order to be fair. This is expressed in *Barkhuizen v Napier* as follows: 'the idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damage for breach, should be matched by corresponding benefits to the other party'.¹⁸⁴⁵

Unlike the BGB which provides the two circumstances as mentioned earlier in which an unreasonable disadvantage exists, the Dutch Civil Code merely provides that a term is voidable if it is 'unreasonably detrimental to the adhering party'.¹⁸⁴⁶

¹⁸³⁸ ABGB = Allgemeines bürgerliches Gesetzbuch (Austrian General Civil Code). **§ 879(3) ABGB:** 'Contractual provisions in standard business terms or contractual forms that do not determine a mutual principal obligation is void in any event if it constitutes a severe disadvantage for one of the parties having regard to all the circumstances of the case.' My own translation.

¹⁸³⁹ Unlike in other legal systems, in Austria the general clause is contained in a different code than the back and greylists. The Konsumentenschutzgesetz (KSchG) came into effect on 1 October 1979 and did not contain a general clause from the beginning. On 1 July 1992, subparagraph (3) was inserted into § 879 ABGB. It is submitted that the legislator considered it more systematic to insert this provision rather in this piece of legislation than into the KSchG, as the other provisions of § 879 ABGB also concern the invalidity of contracts. See website of the Austrian Bundeskanzleramt at <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40045312>.

¹⁸⁴⁰ '(...) gröblich benachteiligt'.

¹⁸⁴¹ Kothbauer 2011 *Immolex* 160 ('Zur Inhaltskontrolle des § 879 Abs. 3 ABGB') at https://www.onlinehausverwaltung.at/Portals/1/publikationen/immolex_2011-05_§_879_Abs_3_ABGB.pdf (no longer available).

¹⁸⁴² WLP/Wolf § 307 para 105 *et seq.*

¹⁸⁴³ Article 3 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993.

¹⁸⁴⁴ § 307 BGB.

¹⁸⁴⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [165], where Sachs J cites Collins *Law of Contract* 253.

¹⁸⁴⁶ Article 6:233 BW.

According to article 2(b) of the Proposal for a Common European Sales Law, good faith and fair dealing can be defined as ‘a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’. In other words, the supplier has to bear in mind the consumer’s interests when drafting or submitting its standard terms and act honestly and openly. Accordingly, the House of Lords suggests that when interpreting the EC Unfair Terms Directive, good faith also ‘looks to good standards of commercial morality and practice’ and contains the notion of ‘fair and open dealing’ which also includes ‘community standards of fairness and reasonableness’.¹⁸⁴⁷ This means, according to Lord Bingham of Cornwall that a ‘term should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps.’ Furthermore, potentially disadvantageous terms should be given appropriate prominence. ‘[F]air dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position (...)’.¹⁸⁴⁸ This is also expressed in section 40 of the Act. One must nevertheless not forget that good faith not only concerns issues of fair dealing, i.e., procedural fairness, but also substantial fairness which concerns the content of a transaction or a term. Lord Steyn makes this clear in the same case: ‘Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.’ Therefore, good faith requires a composite test that consists of both procedural and substantive fairness. A useful question one should ask is whether or not a consumer would have accepted a certain clause or term had it been drawn to their attention.¹⁸⁴⁹

Section 24(1) of the Australian Consumer Law¹⁸⁵⁰ is based on article 3 the EC Unfair Terms Directive¹⁸⁵¹ but does not refer to good faith. Instead, a legitimate interest criterion has been added under which a term is unfair if it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

In summary, the concepts of good faith and fair and open dealing should be considered by the courts when assessing whether a term is unfair.

¹⁸⁴⁷ *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 491 para [490], *Mylcris Builders Limited v Buck* [2001] UKHL 52 para [17].

¹⁸⁴⁸ *Director General of Fair Trading v First National Bank plc* [2002] 1 AC para [490].

¹⁸⁴⁹ *Director General of Fair Trading v First National Bank plc* [2002] 1 AC para [499].

¹⁸⁵⁰ Schedule 2 to the Competition and Consumer Act, 2010.

¹⁸⁵¹ See above.

In addition to that, the concept of a significant imbalance in the parties' rights and obligations which is not reasonably necessary to protect the legitimate interest of the supplier as well as the above-mentioned presumptions of the BGB should be taken into account. Lubbe has expressed the consideration for the interests of the consumer,¹⁸⁵² by the formulation that the supplier's interests 'must be tempered by a reasonable measure of concern' for the consumer's interests.¹⁸⁵³ Naudé adds that the consumer's fundamental right to dignity may encompass this same standard.¹⁸⁵⁴

e) Extra-legislative guidelines

Besides the provisions contained in the Act (including its regulations), the findings of the common law and foreign legislation, South Africa could also adopt an extra-legislative strategy in order to provide guidance to businesses and consumers. These could be helpful for the scrutiny of the fairness of contractual terms. The non-binding guidelines on terms which are considered unfair of the OFT¹⁸⁵⁵ could thus be a good example for the National Consumer Commission. These guidelines were based on the OFT's experience with negotiation and enforcement. As a matter of course, only the courts have the final saying of whether or not a term is unfair. Nevertheless, guidelines are an effective tool for preventive and reactive control and predictability. Especially for businesses, they are a valuable source for the drafting of their standard terms. What is more, these guidelines could have a proactive effect.

4.1.5 Burden of proof in terms of section 48

In terms of section 48, the consumer carries the risk of non-persuasion and therefore has to convince the court that a term is unfair, as opposed to regulation 44, where the burden of proof lies with the supplier. Some authors defend this solution by stating that the greylist is already very extensive and that it might be too drastic to lay the onus on the supplier in terms of section 48.¹⁸⁵⁶ The English and Scottish Law Commissions suggest that the burden of proof should never lay on the consumer because this would be too much a burden.¹⁸⁵⁷ Others take the view

¹⁸⁵² Article 2(b) of the Proposal for a Common European Sales Law.

¹⁸⁵³ Lubbe 1990 *Stell LR* 20.

¹⁸⁵⁴ Naudé 2006 *Stell LR* 366.

¹⁸⁵⁵ The Office of Fair Trading was a non-ministerial department which existed from 1973 to 1 April 2014. OFT's responsibilities passed to a number of different organisations when it closed. 'Office of Fair Trading' at <https://www.gov.uk/government/organisations/office-of-fair-trading> (no longer available). Some relevant information is still available in the UK National Archives at <http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk>.

¹⁸⁵⁶ See Naudé 2009 *SALJ* 535-536, with further references.

¹⁸⁵⁷ Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005), ss 16(1), 16(2) and 17(2).

that no provision on the burden of proof is needed or desirable as also the EC Unfair Terms Directive does not contain such a provision.¹⁸⁵⁸

Naudé favours the model suggested by the UK Law Commissions¹⁸⁵⁹ which distinguishes between litigation where individual consumers are involved, on the one hand, and general use challenges, on the other. In the first case, the burden of proof should lay on the business, whereas in the second case, the consumer organisation, regulator or National Consumer Commission should bear the onus. These institutions are in a stronger position than 'true' consumers to argue their case and more familiar with the legislation. In B2B transactions, the onus of proof should always remain on the complainant, however.¹⁸⁶⁰

A drawback of Naudé's differentiation is that it creates different standards depending on which kind of complainant (individual consumer or consumer organisation) is involved although the same terms and conditions are subject to the proceedings. Even though an individual consumer's position is weaker than the one of a consumer organisation in terms of bargaining power, financial strength and expertise, both are comparable in the sense that in standard form contracts, the supplier submits (imposes) its standard terms to its consumers. It is therefore suggested that the supplier should systematically bear the onus of persuasion that a term is fair.

In most cases, standard terms deviate from residual rules and are drafted in the interest of the supplier.¹⁸⁶¹ Not only under regulation 44 but also with regard to unlisted terms, the supplier has more insight than the consumer as to why a particular term has been formulated in a certain fashion, and therefore in a position to put forward arguments that speak for its fairness. This does not mean that the consumer – or a consumer organisation – can afford to be utterly passive during litigation. In general use challenges, consumer organisations would at least have to present arguments as to why a particular term is unfair in a specific economic context. Where individual consumers are involved, they should describe the context in which the agreement was made. The list contained in section 52(2) is a guideline for the material the parties should present in litigation. The supplier then would have to present counter-arguments so that the

¹⁸⁵⁸ See Naudé 2007 *SALJ* 141, with further references.

¹⁸⁵⁹ Section 16(1) of the Unfair Contract Terms Bill published in Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

¹⁸⁶⁰ Naudé 2009 *SALJ* 535.

¹⁸⁶¹ Naudé 2007 *SALJ* 142.

court can reach a decision based on factual and legal arguments. This view is in line with the fact that the unfairness of a term is a question of law rather than of fact.¹⁸⁶²

In practice, this solution would have the same results as the suggestion according to which the party who would have an advantage by the standard term in question (mostly the supplier) has to prove that the provision is reasonably necessary in order to protect its legitimate interests.¹⁸⁶³

Naudé asserts that a court should consider a provision's fairness on its own initiative, where the court or Tribunal has the legal and factual elements available for that undertaking.¹⁸⁶⁴ This is clearly against the wording of section 52(1), according to which a person has to allege that the supplier contravened section 48. Nevertheless, it does not make any sense if a court can enquire a term's fairness according to section 51 and regulation 44, but cannot do so under the general clause. As discussed before, the threefold fairness enquiry of these three provisions cannot be split. Naudé is therefore correct when suggesting that the Act should be amended accordingly in order to make this clear.¹⁸⁶⁵ This question is inextricably linked with the question of burden of proof. Although the fairness review is rather a question of law, and not a factual question, a provision for the allocation of the onus of proof is useful in order to allocate the risk of non-persuasion if no clear conclusion can be reached.¹⁸⁶⁶

4.2 Legal consequences

Pursuant to section 52(1), if in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that the supplier contravened section 48, and the Act does not otherwise provide a remedy sufficient to correct the relevant unfairness, the court, after considering the principles, purposes and provisions of the Act, and the matters set out in subsection (2), may seek an order contemplated in subsection (3).

From this provision derives that the court may not start a fairness enquiry on its own initiative but that 'a person' must allege that a transaction or agreement is unfair. As discussed earlier, the court should be able to assert a term's fairness on its own initiative though, as it can do in terms of section 51 and regulation 44.

¹⁸⁶² Vincenzo Roppo 'Workshop 3: The definition of "unfairness": the application of Article 3(1), 4(1) – and of the annexes of the Directive' in *European Commission Brussels Conference 1-3/7/1999 (1999)* at 128.

¹⁸⁶³ This solution has been adopted by s 24(4) of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act, 2010).

¹⁸⁶⁴ See Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (2013) 100.

¹⁸⁶⁵ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

¹⁸⁶⁶ Naudé 2007 *SALJ* 142.

If the court determines that a transaction or agreement was, in whole or in part, unjust, unreasonable or unfair, it may (a) make a declaration to that effect, (b) make any further order it considers just and reasonable in the circumstances, including, but not limited to, an order (i) to restore money or property to the consumer, (ii) to compensate the consumer for losses or expenses relating to the transaction or agreement, or the proceedings of the court, and (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.¹⁸⁶⁷

The court's possibility to make a declaration that an agreement was unfair implies that the underlying terms are void. Section 52 should however not be interpreted in that the prohibition against unfair terms in section 48 has no extra-judicial effect since the inclusion of unfair terms is clearly 'prohibited conduct' under section 40, read with section 48. The supplier may not rely on unfair terms, irrespective of whether the court has declared them void as this would be prohibited conduct in terms of section 1.¹⁸⁶⁸ Unfortunately, section 52(3) does not clearly provide that not the agreement as a whole is void and that it continues, as far as practicable, to have effect in every other respect.¹⁸⁶⁹ However, the doctrine of severability applies in terms of section 52(3) where the unreasonable part of the contract is to be severed from the rest in order to prevent the injustice that could have been caused by enforcing the agreement in its original state.¹⁸⁷⁰ Where the unreasonable part cannot be severed from the rest, e.g., for impracticability or economic reasons, the whole agreement is invalid.¹⁸⁷¹ Moreover, the Act should also make clear that if the supplier cannot rely on a provision as a result of the Act, the content of the contract is determined by the rules that would have applied in the absence of the term in question. In addition, it should provide that the contract is invalid if one party would suffer unreasonable hardship if it were bound by the agreement even after its amendment and the rules being applied in the absence of the given term.¹⁸⁷²

¹⁸⁶⁷ Section 52(3). The German **UKlaG** provides in its § 1 a right to require refrainment from use and withdrawal of recommendation of standard contract terms: 'Those who use provisions which are invalid under §§ 307 to 309 of the Civil Code in standard contract terms or who recommend such provisions for commercial use may be required to refrain from using such terms and to withdraw any recommendation made.' § 11 **UKlaG** sets out the effects of the judgment: 'If the user against whom judgment has been given fails to comply with an injunction based on § 1, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. However, this party cannot invoke the effect of the injunction if the user against whom judgment has been given could contest the judgment under § 10'.

¹⁸⁶⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 52.

¹⁸⁶⁹ See § 306.

¹⁸⁷⁰ Mupangavanhu 2012 *PELJ* 333.

¹⁸⁷¹ Christie and Bradfield *Law of Contract* 381.

¹⁸⁷² Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 52.

The list of examples in subsection (3) is non-exhaustive and constitutes an incentive for suppliers to cease illegal practices. The restoration of money or property or the compensation of the consumer for losses or expenses are individual measures with a limited impact with respect to a deterrent effect *vis-à-vis* suppliers to cease their illegal practices. They are nevertheless valuable because the consumer's position is being restored to its previous one.

Under section 52(3)(b), only the loss actually suffered by the consumer will be compensated, which is why it is very unlikely that a court will grant compensation for expenses relating to the proceedings on an attorney and client scale. This would infringe the supplier's fundamental right to equality before the law¹⁸⁷³ since in the absence of a term providing for costs on an attorney-and-won-client scale it would normally be entitled only to costs on the party-and-party-scale if it is unsuccessful.¹⁸⁷⁴

The restriction that only the proven and actual damage must be compensated does only apply to individual consumers, but not to a collective injury to all or a class of consumers in terms of section 76(1)(c). Naudé suggests that this widely formulated provision could be interpreted in that the court may grant punitive damages for collective injury to the consumers involved.¹⁸⁷⁵ This mechanism could thus be useful to help finance actions taken by consumer protection organisations against suppliers. Systematically, there is no reason why the legislator should have granted the possibility for punitive damages to a class of consumers, whereas this possibility is not given to individual consumers. Punitive damages combine punishment and the setting of public example. This kind of damages is awarded to punish the defendant rather than to compensate the claimant for harm done. They are exceptional and may be awarded when the defendant acted in a malicious, oppressive, fraudulent or grossly reckless way in causing the special and general damages to the plaintiff.¹⁸⁷⁶ What is more, this would lead to a different treatment of consumers, depending on whether an individual consumer, a class of consumers or a consumer organisation has brought an action before the court, with the same terms and conditions being the object to the proceedings. Such a punitive-damage mechanism might be useful for the financing of other proceedings. It is unlikely though that the legislator intended such a mechanism. It is suggested that the use of the wide term 'damages' only includes the actual loss but no punitive damages. What is more, consumer organisations should be

¹⁸⁷³ Section 9 of the Constitution.

¹⁸⁷⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 56.

¹⁸⁷⁵ Naudé 2010 *SALJ* 535.

¹⁸⁷⁶ See 'Damages' at <http://dictionary.law.com/default.aspx?selected=423>, *Law Oxford Dictionary of Law* s.v. 'exemplary (punitive, vindictive) damages'.

financed rather by their members and/or the State, and not by the proceedings of court actions. Financing by punitive damages could be an incentive for challenging only standard terms of suppliers that are 'worth it' financially.

On the other hand, requiring the supplier to cease or alter any illegal practice under section 52(3)(b)(iii) has a much more substantial impact on businesses and is a precious weapon against illegal practices. This type of order allows for preventive control as suppliers will have to alter their practice in future contracts. The court order should however be formulated in that not only the exact wording of a provision is prohibited but its effect and purpose. Ideally, the order should contain a suggestion for the rewording of the clause in order to make it fair. In that way, suppliers cannot circumvent the court order by merely reformulating the clause.¹⁸⁷⁷

As the list contained in section 53(3) is not limited, a court may also alter, amend or adjust a problematic term or the agreement as a whole. An argument for this approach is that a supplier might have honestly been of the opinion that a term was fair, whereas it was not.¹⁸⁷⁸ Some countries exclude this possibility because of the danger that a supplier might cynically include unfair terms knowing that a court may assist him if necessary by reducing the ambit of the clause in question.¹⁸⁷⁹

Naudé suggests that a court may also make a 'preventive order' in order to introduce a new practice for the supplier.¹⁸⁸⁰ As South Africa does not have an institution similar to the OFT in the United Kingdom giving guidance to suppliers and suggesting formulations, and court orders only have an effect on the parties of the process, such a 'preventive order' might create an imbalance within a particular industry, however. If one supplier is forced to comply with preventive measures, but not the other suppliers of the same sector because they are not involved in the particular court proceedings, this may cause a certain asymmetry. This approach could nevertheless have an extra-judicial effect and create a new practice within the industry as other suppliers might certainly aim to conform to judicial standards.

It is deplorable that section 52(3)(b) has been written with only having individual consumers in mind, and not also abstract challenges by consumer organisations. Unfair terms can generally only be eradicated when general use challenges are possible. Section 4(1) allows the persons mentioned in this provision to approach a court, the Tribunal or the Commission. Persons

¹⁸⁷⁷ Naudé 2010 *SALJ* 534, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 54.

¹⁸⁷⁸ This approach is possible in the Nordic countries.

¹⁸⁷⁹ Germany does therefore prohibit such an approach. See BGHZ 86, 297.

¹⁸⁸⁰ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 55.

acting as a member of, or in the interest of, a group or class of affected persons as well as associations acting in the interest of their members thus have standing under section 52.¹⁸⁸¹ It is therefore submitted that section 52(3) is not only applicable to individual consumers, but also to organisations having *locus standi* according to section 4(1). In order to make this clear, section 52 should be rewritten with having also abstract challenges in mind.¹⁸⁸²

The objective of section 52(3)(b)(iii), i.e., requiring the supplier to cease the use of specific terms, can also be achieved by general use challenges because under section 4(2)(b)(ii)(bb), the Tribunal or court may make any innovative order that better advances the realisation by consumers of their rights in terms of the Act. Naudé suggests that in any general use challenge a court will have jurisdiction to decide that the mere offer of the terms for general use to the public infringes section 48 and that the supplier may not continue offering such terms.¹⁸⁸³ She also suggests that under certain circumstances, orders should be published at the expense of the supplier since this would have a preventive effect.¹⁸⁸⁴ In any event, a court should direct the supplier to advise the NCC and provincial consumer protection agencies of its decision, especially if the court considered the term unfair in all the contracts concluded by that supplier.¹⁸⁸⁵ It should be noted that a court only decides on a particular matter and cannot state that a term is unfair in all contracts the supplier has concluded with other consumers. Nevertheless, both suggestions are to be welcomed and should be adhered to by the courts.

Another order could be a phased-in penalty¹⁸⁸⁶ per clause and per violation that would comprise an initial phase-out period for the supplier in order to adapt his terms gradually.¹⁸⁸⁷

Finally, section 53(4) provides that a court may make certain orders if in any proceedings before a court concerning a transaction between a supplier and a consumer a person alleges that a term is void in terms of the Act. The court may sever any part of the relevant agreement or provision, or alter it to the extent required to render it lawful if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole.¹⁸⁸⁸ The court may also declare the entire agreement, provision or notice void as from the date that it purportedly

¹⁸⁸¹ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

¹⁸⁸² Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 58.

¹⁸⁸³ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 59.

¹⁸⁸⁴ In Germany, the publication of the judgment is possible pursuant to § 7 UKlaG.

¹⁸⁸⁵ Naudé 2010 *SALJ* 515, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 61.

¹⁸⁸⁶ This kind of clauses is used in Germany and Sweden.

¹⁸⁸⁷ Naudé 2010 *SALJ* 515, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 62.

¹⁸⁸⁸ Section 52(4)(a)(i)(aa).

took effect.¹⁸⁸⁹ Thirdly, the court may make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.¹⁸⁹⁰

The fact that the court may make 'any further order that is just and reasonable in the circumstances' in terms of paragraph (b) is wide enough to give the court the power to alter unfair terms. The courts will nonetheless probably rather strike out unfair terms in order to avoid that suppliers use unfair terms hoping that the courts might refine them.¹⁸⁹¹

The enforcement mechanism of the Act will be discussed in detail in chapter 5.

4.3 Conclusion

The general clause of section 48 completes the threefold fairness enquiry alongside with the blacklist of section 51 and the greylist of regulation 44.

The terms 'unfair', 'unjust' and 'unreasonable' are synonymous and should not be assessed differently. Unfortunately, the South African general clause is unnecessarily burdensome, lacks clarity and is unsystematically structured. This could have been avoided by taking various foreign general clauses as examples.

Section 48(1) and (2)(a) and (b) contains various concretisations of the general clause. Section 48(2)(c) and (d), although part of the general clause, is systematically not part of content control.

In contrast to other regimes, the general unfairness standard of section 48(1) also applies to individually negotiated clauses. The formulation that also the supply of goods on unfair terms is prohibited is superfluous since at any rate, an agreement of some sort would be necessary in order to bind the consumer. The fairness enquiry could be extended time-wise though as the court must also consider circumstances that existed when the agreement was made, irrespective of whether the Act was in force at that time. In practice, this could still be relevant for agreements on the continuous supply of goods or services. On the other hand, the formulation 'offer to supply' in this section seems to provide for a *locus standi* of consumer organisations.

Under the premise that section 78 is *lex specialis* to section 4, consumer organisations must be accredited in order to be entitled to protect consumer interests. Other countries do not

¹⁸⁸⁹ Section 52(4)(a)(i)(bb).

¹⁸⁹⁰ Section 52(4)(b).

¹⁸⁹¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 64.

necessarily require accreditation as long as organisations fulfil some minimum standards. Non-accredited organisations fulfilling minimal standards should thus also be able to bring actions to the court.

Section 48(1)(a)(i) seems to introduce a price control mechanism. Such a mechanism raises complex practical and theoretical questions. Other pieces of legislation already offer sufficient measures to curtail prices and avoid price discrimination. In addition, since the price is part of the core terms, and only where a simple comparison with other suppliers reveals excessive pricing, courts should be able to apply their discretion in this regard. It is however unlikely that the legislator intended to introduce such a price control mechanism. The provision rather applies where an unfair price is applied and other factors are present, such as unconscionable conduct or deception. Sections 40, 41 and 29 offer sufficient protection against certain forms of consumer abuse so that section 48(1)(a)(i) is superfluous. The same applies to section 48(1)(b) and (c) which creates an unnecessary duplication of other provisions. Hence, these provisions should be deleted.

The formulation '[w]ithout limiting the generality of subsection (1)' in section 48(2) indicates that subsection (1) must not be interpreted restrictively. Since subsection (2) has a radiating effect on subsection (1), the former is not *lex specialis* to the latter. Although the Act focuses on individual consumers, the tendency of a term has to be judged, and not its actual use. Therefore, the Act seems to apply a mixed approach in this regard.

One-sidedness can lead to unfairness under section 48(2)(a). In this respect, terms that are detrimental to consumers can be counter-balanced by other provisions that outweigh the detrimental effect. Section 48(2)(b) requires a two-tier enquiry consisting of the adverseness to the consumer and the inequitableness of the term. Inequitableness can thus be assessed with the help of evaluative elements, such as good faith, or other provisions expressing an evaluative judgement. In any event, section 48(2)(b) would have been a better starting point for a general clause, instead of the over-complicated and unclear current formulation of section 48(1). This would also be more coherent with international standards.

The deceptive standard of section 48(2)(c) does not relate to content control and should have been inserted into section 41 instead. It seems clear though that for representations or statements of opinion, the supplier has to act actively, e.g., by using illustrations that are different from the product being sold. The overlap between sections 41 and 48(2)(c) is not clear though. The courts will have to establish whether a clause that is fair *per se* becomes unfair

because of the supplier's false representation. In any event, 'representation' should be interpreted widely.

The 'procedural standard' in paragraph (d) does not provide for content control either. As this provision seems to have no extra-judicial effect, and the Act does not contain a provision similar to article 6 of the EU Unfair Contract Terms Directive, courts should construe any prohibition contained in this part of the Act *per se* as not binding on the consumer, and section 52 should be interpreted in that it merely contains an enumeration of the orders a court may make.

The guidelines contained in section 48(2) are too broad and imprecise and therefore not really of assistance for the determination of unfairness. On the other hand, section 52(2) provides for guidelines as to when an agreement or a term is to be considered unfair. The wording of section 52 only allows courts to apply this provision but not the other redress entities, which creates different standards. Instead, the other entities should apply the factors listed in section 52(2) by analogy. In order to allow for a direct application, the legislator should reformulate section 52. Although section 52(2) is geared towards procedural unfairness, also other factors can be taken into consideration as the list is not exhaustive. International practice provides for good examples in this regard. Predictability and certainty could be enhanced if the court could make objective findings, regardless of the parties of a particular case. In this regard, the legislator should redraft section 52(2) having also general-use challenges in mind in order to allow for an abstract-universal approach.

Unlike the Unfair Terms Directive or the BGB, a factor of substantial fairness to be considered in section 52(2) is the 'fair value' of a good or service. Courts should apply this factor with prudence since the price alone is not sufficient in order to determine a term's fairness. Instead, the agreement as a whole must be considered as it might contain counter-balancing terms.

Another factor is the nature of the parties, their relationship to each other and their relative capacity, education, and so forth. Nonetheless, one should consider that even educated and experienced consumers need protection since a structural inequality is inherent in standard terms. Courts should thus only interfere where unfair terms are 'hidden' or where the supplier has informed the consumer of specific terms at an inappropriate time. For other fairness considerations, one should keep in mind that the supplier, unlike the consumer, had plenty of time and could take counsel for drafting its standard terms.

The circumstances of the transaction that existed or were reasonable foreseeable at the time that the transaction occurred also have to be considered, irrespective of whether the Act was in force at that time. In this regard, it is submitted that the supplier's knowledge is sufficient because of its insider-knowledge. The provision admits only the consideration of foreseeable circumstances, but courts should not hesitate to develop a doctrine of hardship in circumstances where unforeseeable circumstances make the fulfilment of a contract a burden for one party. This would also be in the economic interest.

Unlike other legislation, the Act permits the fairness enquiry of negotiated terms. B2B and B2C contracts should be treated differently, however. What is more, the fact that there has been no negotiation does not make a term unfair *per se* since the objective of standard terms is rationalisation. In the case of genuine negotiation, courts should hesitate to interfere, though.

The plain language requirement is also listed in section 52(2). Terms that are not written in plain language should be considered unfair, save where the supplier explains the terms to the consumer. This should however not apply to long standard terms because of their complexity. This approach will ultimately lead to better commercial practice.

The factor according to which the court must consider whether the consumer knew or ought reasonably to have known of the existence and extent of any unfair particular provision seems astonishing at first sight since knowledge of an unfair term does not make it fair. If the supplier specifically pointed out the given term and the consumer agreed to it, it might be fair though. The mere signing or initialling of a term is not equal to its understanding. A good solution would be to grant a cooling-off period. It is suggested that 'previous dealings' between the parties does merely necessitate some kind of previous negotiations, but not a finalised conclusion of an agreement. This element is problematic as consumers typically do not read terms and conditions, and those of previous dealings could have been different. The consideration of customs of trade seems to raise concerns too and should only matter in B2B agreements.

Also part of the fairness enquiry of section 52(2) is the consideration of the price for which and the circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier. 'Circumstances' can only refer to the terms and conditions since the assessment of hypothetical circumstances is impossible. The phrase 'could have acquired' is also problematic as the mere theoretical possibility of better terms or a better price is difficult to assess.

The last factor in the list of section 52(2) concerns special order goods (not services). If this factor referred only to goods that are manufactured outside the ordinary course of business, this would exclude suppliers who specialise in custom-made products. Hence, this paragraph should also apply to products manufactured in the ordinary course of the supplier's business.

Besides, other factors that are not listed in section 52(2) should be included in the fairness enquiry, such as the nature of the goods or services. Products that were on display, for instance, must certainly be assessed differently.

Furthermore, in a synallagmatic contractual relationship, the parties' interests should be evenly balanced, which is why the legitimate interests of both parties should be considered. The terms of an agreement must not be seen in isolation, but are inter-dependent, which is why the contract has to be assessed as a whole. What is more, the residual rules and the common law often represent a fair balancing of the parties' interests. Therefore, it is advisable to take into account the extent to which a term differs from what would have been in its absence.

Another factor often mentioned concerns more significant costs for the supplier in the case of the absence of the term. However, each legal disadvantage can somehow be justified economically and price-advantages are difficult to measure.

Terms limiting essential rights and duties inherent in the nature of the contract should never be fair since they jeopardise the attainment of the contractual purpose. The fact that the consumer signed them is merely an indicator of its compromised bargaining power.

Not only listed or non-listed factors should be considered in the fairness enquiry but also case law. The common law is applicable under section 2(10) and therefore infuses its principles. Terms that are contrary to public policy are unenforceable, and public policy itself is anchored in constitutional values. The concept of *Ubuntu* is not helpful however as it is rather a vague concept already included in the principle of good faith and the doctrine of public policy.

Section 2(2)(a) enables the courts to also consider foreign law. The fact that the general clause of section 48 lacks clarity is therefore counter-balanced to a certain degree by the fact that the courts can consult foreign law in order to adopt international standards. Extra-legislative guidelines similar to the non-binding guidelines of the former OFT could also provide for guidance, especially for businesses, and be a valuable tool for preventive and reactive control.

The distribution of the burden of proof between the consumer and the supplier, suggested by some authorities, and depending on the nature of the transaction (B2C/B2B), or on whether a

consumer organisation is involved, creates different standards. Suppliers have more insight into their respective businesses and can better defend themselves than consumers or organisations. Therefore, the onus should always lie with the supplier. The other party has to present its arguments though so that the court can reach a decision based on the arguments of both sides.

Furthermore, the courts should be able to assess the fairness of a term on their own initiative. Even though this is clearly against the wording of section 52(2), there is no obvious reason why a court can assess the fairness on its own initiative under section 51 and regulation 44, but not in terms of section 48. Section 52 should be amended accordingly.

The legal implications of unfair terms have also been discussed in this chapter. Since the inclusion of unfair terms constitutes prohibited conduct under section 40, section 52 has insofar also an extra-judicial effect. The legislator should clarify that the doctrine of severability is applicable, i.e., that not the agreement as a whole is void if it contains unfair terms. The Act should also provide that the contract is invalid if one party would suffer unreasonable hardship if it were bound by the agreement even after its amendment. Systematically, there is no room for punitive damages, as suggested by some authors, and the financing of court actions by such an instrument could be an incentive for consumer organisations to challenge only terms that are financially worth it. Requiring the supplier to cease or alter its illegal practice has a heavier impact on businesses than the restoration of money or property, for example, because it allows for preventive control and has a dissuasive effect. Preventive orders might create imbalances within a certain industry but could have an extra-judicial effect and create new practices within the relevant industries. Unfortunately, section 52(3)(b) has been written with individual consumers in mind, but not *ex-ante* challenges. Read with section 4(1), the *locus standi* of consumer organisations must be admitted, however. Section 52 should be amended in this regard. Other measures, such as the publication of a court order, or a phased-in penalty with an initial phase-out period are laudable measures, too.

CHAPTER 4 – INTERPRETATIONAL CONTROL

1. Introduction

Section 2 is the pivotal provision for the interpretation of the Act, as shown by its heading 'Interpretation'. This provision must thus be read in conjunction with other sections which provide further guidance for interpretation¹⁸⁹² in order to assess the legislator's intention.¹⁸⁹³ Since section 2(1) provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3, the latter provision is one of these provisions.¹⁸⁹⁴ Furthermore, section 4(2)(b)(i) provides that the Tribunal or a court must promote the spirit and purposes of the Act. According to section 4(3), in case of any ambiguity, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).¹⁸⁹⁵

In addition to interpretational rules, section 2 contains some miscellaneous provisions which do not directly refer to interpretation but rather provide for guidance for the calculation of a period in business days,¹⁸⁹⁶ or for the validity and protection of signatures and electronic signatures.¹⁸⁹⁷ Furthermore, section 2(7) contains a legal definition of 'includes' or 'including'. Section 2(5) refers to the determination of the monetary threshold in respect of section 5(2)(b) and is therefore out of place. It should have been inserted in section 6 instead.¹⁸⁹⁸

The interpretational rules of section 2 will be discussed below in detail. Despite the existence of these rules, the common law also plays its role as the consumer cannot be deprived of its common-law rights when interpreting the Act.¹⁸⁹⁹

Besides the interpretation of the provisions of the Act, the Act also contains provisions for the interpretation of terms and conditions of a supplier in section 4(4). This is the provision dealing with interpretational control in a narrower sense. Both, the interpretation of the Act and of standard terms will be presented below.

¹⁸⁹² De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

¹⁸⁹³ This is clearly set out in s 2(1).

¹⁸⁹⁴ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

¹⁸⁹⁵ I.e., 'vulnerable' consumers.

¹⁸⁹⁶ Section 2(6).

¹⁸⁹⁷ Section 2(3) and (4).

¹⁸⁹⁸ It is submitted that the legislator thoughtlessly copied s 2(4) NCA. Already the NCA suffers from the same structural problem. See ss 2(4), 7(1) and 42(1) NCA.

¹⁸⁹⁹ See s 2(10).

2. Purposive interpretation of the Act

Unlike many other pieces of legislation, section 2(1) provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. Hence, the Interpretation Act,¹⁹⁰⁰ as amended by the Interpretation Amendment Act,¹⁹⁰¹ does not apply to the Consumer Protection Act.

As section 2(1) provides that 'this Act' must be interpreted purposively, the Schedules to the Act, regulations made or notice issued by the Minister under the Act are also concerned by this approach.¹⁹⁰²

Usually, statutes are interpreted according to the ordinary grammatical meaning of the words contained therein. Contextual construction, i.e., the interpretation of the meaning that the words have in their broader legal context, is also current in South African law.¹⁹⁰³ The Constitutional Court held in *Kubayana v Standard Bank of South Africa Ltd*¹⁹⁰⁴ that it is a well-established principle that statutes must be interpreted with regard to their purpose and within their context, and that this general principle is supported by section 2(1) of the Act.¹⁹⁰⁵ This principle expressly requires a purposive approach to the Act's construction.¹⁹⁰⁶ Schreiner JA states in *Jaga v Dönges*¹⁹⁰⁷ that "'the context" is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.'¹⁹⁰⁸

The Act's self-proclaimed purposes in section 3(1) give a rather precise idea of its agenda in terms of consumer protection. The entire Act is infused with its purposes, including the

¹⁹⁰⁰ 33 of 1957.

¹⁹⁰¹ 45 of 1961.

¹⁹⁰² Section 1 s.v. 'this Act'.

¹⁹⁰³ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 305.

¹⁹⁰⁴ 2014 ZACC. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2008 ZACC 12 para [61], *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 ZACC 10 paras [17]-[18].

¹⁹⁰⁵ The decision concerned the National Credit Act, but the court's explanation in terms of statutory interpretation is also applicable to the CPA.

¹⁹⁰⁶ At para [18].

¹⁹⁰⁷ 1950 (4) SA 653 (A) at 662H.

¹⁹⁰⁸ See also *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646C which refers to 'the nature of the transaction as it appears from the entire contract', *Van der Post v Twijfelhoek Diamond Prospecting Syndicate* (1903) 20 SC 231, where an agreement was read in conjunction with two earlier contracts dealing with the same subject-matter, *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA) at 501-503, where two contracts signed on the same day were read together, or *Eastern Free State Board of Executors v Theron* 1922 OPD 174 at 178, where De Villiers JP states: 'If the object could be determined, a long step would have been taken towards ascertaining the meaning of the ambiguous words'.

preamble and the long title, and when interpreting this statute, one has to give effect to the purposes set out in section 3 specifically.¹⁹⁰⁹ The purposes mentioned in section 3 are not only crucial for the determination of the legislator's intention and the understanding of the spirit and scope of this piece of legislation, but with respect to the courts' obligation to interpret its provisions in a manner that gives effect to the Act's purposes.¹⁹¹⁰ What is more, these purposes can clearly be recognised by a paternalistic attitude towards the consumer as the weaker party to a contract. This is in keeping with international developments in terms of which public policy concerns can override freedom of contract in appropriated cases and by the increase in regulatory legislation.¹⁹¹¹ On the other hand, and as we will see later in the discussion in Part II, the German standard business terms legislation set out in §§ 305 *et seq.* primarily do not have the purpose of protecting the weaker party and of balancing the supplier's bargaining power.¹⁹¹² They rather aim to prevent abuse of freedom of contract-drafting and therefore protect all parties against the misuse of standard terms.¹⁹¹³ Hence, §§ 305 *et seq.* cannot be qualified as pure consumer protection provisions, with the exception of § 310(3) (consumer contracts).¹⁹¹⁴

One can see from the reading of section 3(1) that all provisions therein lead directly or indirectly to the conclusion that any ambiguous provision in the Act must be interpreted in favour of the consumer.¹⁹¹⁵ This approach can be a double-edged sword though as the interests of the parties are not always competing. If a court favours the consumer's interests in a particular case, this may ultimately lead to higher prices – or worse – make the product or business unprofitable. In the long run, this would go against the consumers' interests. This is why courts should also consider the broader economic impact of their decisions by taking into

¹⁹⁰⁹ The purposes of consumer protection legislation in general has been set out in the Crowther Report of 1971. Albeit the fact that this report was destined for UK credit legislation, it is still valuable as regards its findings in terms of consumer legislation. According to this report, consumer protection legislation has three main functions, namely 1) addressing the consumer's unequal bargaining position, 2) curbing malpractices in the commercial environment, and 3) managing the exercise of remedies. See Crowther Royal Commission on Consumer Credit Cmnd 4596/1971 at 234-235. See also the debate of the House of Lords of 28 June 1972 in this regard (HL Deb 28 June 1972 vol. 332 cc 928-977). In s 3 CPA, the consumer's lack of bargaining power is addressed in paras a, b, e and f. The curbing of commercial malpractices is addressed in paras c and d, while remedies are set out in paras g and h. For further reading on the same issue concerning the National Credit Act, see Vessio *LLD thesis* 149 *et seq.*

¹⁹¹⁰ Du Preez 2009 *TSAR* 65. See s 4(2) and (3).

¹⁹¹¹ Stoop *LLD thesis* 83.

¹⁹¹² Stoffels *AGB-Recht* 29.

¹⁹¹³ Eith *NJW* 1974, 16, 17.

¹⁹¹⁴ Locher *JuS* 1997, 390. See discussion in the introduction and historical overview in Part I ch 1.

¹⁹¹⁵ De Stadler is of the opinion that 'nearly all of these "means"' lead to this conclusion. However, ultimately, *all* of them lead to it, either directly or indirectly. See De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

account the interests of *both* parties.¹⁹¹⁶ The National Credit Act¹⁹¹⁷ deals with this problem in a more nuanced way than the Consumer Protection Act by providing that the purpose of the NCA is to protect consumers by 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.' Thus, it would have been beneficial if the legislator had inserted into section 2(1) the following additional phrase:

'(...) and by taking into consideration the broader economic impact that any interpretation of the Act might have.'

Moreover, the legislator could substantiate this additional consideration by introducing 'factors' that the court may¹⁹¹⁸ consider in terms of the economic consequences, such as the costs of production, the supplier's economic situation or the competitive situation in terms of the given product. Courts should normally not interfere with price control as they lack the necessary micro- and macro-economic expertise. In situations where ultimately adverse consequences for the consumer are visible, they should be able to reach a decision promoting equity though. This is also Van Eeden's view according to which a more equitable construction should be favoured to lessen the burden. He also assumes that the legislature does not intend to impair the rights of persons or confiscate their property.¹⁹¹⁹ De Stadler's remark that Van Eeden is of this view 'despite section 4(3)' could be read as if his view were *contra legem*.¹⁹²⁰ His opinion is however supported by section 3(1)(a) which provides that one of the objectives of the Act is a fair, efficient and sustainable consumer market. Fairness, efficiency and sustainability can only be achieved if a balance is struck between the parties' interests in order to create a legal framework that is sustainable for both sectors.¹⁹²¹ Otherwise, there is a real danger of market failure, which ultimately leads to higher prices, discontinuation of business models or products, or worse, the insolvency of suppliers. Van Eeden's view is thus in line with the Act.

Section 4(3) provides that if any provision of the Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit of the Act, and will best improve the realisation of consumer rights, particularly in respect of vulnerable persons mentioned in section 3(1)(b). It would probably

¹⁹¹⁶ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

¹⁹¹⁷ 34 of 2005.

¹⁹¹⁸ The legislator should not make the consideration of these factors compulsory by using the verb 'must' instead of 'may' as judges are often not sufficiently trained to consider such economic factors, except where obvious.

¹⁹¹⁹ Van Eeden and Barnard *Consumer Protection Law* 38.

¹⁹²⁰ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 15.

¹⁹²¹ Van Eeden and Barnard *Consumer Protection Law* 40. It is suggested that the term 'sectors' is incorrect in this context. Van Eeden means the supplier and the consumer. 'Sector' refers to the supplier's side in the sense of an area of the economy in which businesses share the same or a related product or service. See 'What is a Sector' at <http://www.investopedia.com/terms/s/sector.asp>.

go too far though to include into 'context' in section 4(3) also the larger economic context, and not only the context provided by the other provisions of the Act. Consumer rights are ultimately only realised if all factors, included macro- and micro-economic factors, are taken into consideration, though.

Purposive construction seeks to look for the purpose of the legislation before interpreting the words. Other interpretative rules require the courts to apply the literal rule first and to analyse the wording of a statute, whereas the purposive approach starts with the mischief rule in seeking the purpose or intention of Parliament. Thus, it is a much more flexible approach that gives the courts more freedom to develop the law in line with what they perceive to be the legislator's intention. The purposive approach readily embraces the use of extrinsic aids to enquire Parliament's intention.¹⁹²² The mischief rule applies where the particular purpose of a provision is not immediately apparent from the provision itself. According to this rule, courts may consider (1) the law that was applicable before the measure was passed, (2) the mischief or defect for which the law had not provided, (3) the remedy the legislator had appointed, and (4) the reason for that remedy.¹⁹²³ A purposive interpretation may lead to different results than a 'classical' statutory interpretation because the provisions must be interpreted in a way that benefits consumers.¹⁹²⁴

Lord Simon illustrated purposive interpretation in *Maunsell v Olins*¹⁹²⁵ by saying that the court's first task is to put itself in the legislator's position, to consider what knowledge, and statutory objective it had so that it is able to assess the meaning of the statutory language. According to Du Plessis, the purposive approach is one that gives meaning to a legislative provision against the backdrop of the purpose which it seeks to achieve in the context of the statute of which it is part.¹⁹²⁶ In *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission*,¹⁹²⁷ the court

¹⁹²² 'The Purposive Approach to Statutory Interpretation' at <http://e-lawresources.co.uk/Purposive-approach.php>.

¹⁹²³ *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) 852-853. A case that illustrates the mischief rule is *Royal College of Nursing of the UK v DHSS* (1981). The Royal College of Nursing brought an action challenging the legality of the involvement of nurses in carrying out abortions. The Offences Against the Person Act 1861 makes it an offence for any person to carry out an abortion. The Abortion Act 1967 provided that it would be an absolute defence for a medical practitioner to carry out abortions provided certain conditions were satisfied. Advances in medical science made possible that surgical abortions were largely replaced with hormonal ones, which were commonly administered by nurses. The courts were responsible for determining whether the nurses performing abortions were acting unlawfully as they were not medical practitioners. The courts found that the Act was intended to provide for safe abortions and that nurses could carry out such abortions.

¹⁹²⁴ Du Preez 2009 TSAR 66.

¹⁹²⁵ [1975] AC 373.

¹⁹²⁶ Du Plessis *Re-Interpretation* 96.

¹⁹²⁷ 2000 (2) SA 797 (SCA)

held that it is not the function of a court to disregard the language of a statute and impose its view of what the policy or object of a measure should be. Purposive interpretation or any other method of statutory interpretation is not necessary though where the language of the statute is clear and unambiguous.¹⁹²⁸ Then, a plain reading of its words suffices.¹⁹²⁹ In *Kubayana v Standard Bank of South Africa Ltd*,¹⁹³⁰ the Constitutional Court stated that legislation must be understood holistically and construed within the relevant framework of constitutional rights and norms. This does not mean that ordinary meaning and clear language may be disregarded.¹⁹³¹

The content of section 4(3) seems to be similar to section 2(1), read with section 3(1), but goes beyond their legislative content. Section 4(3) fosters the purposive interpretation by providing that the court or Tribunal must give preference to interpretations that favour vulnerable consumers.¹⁹³² In other words, where a court is confronted with a situation where two interpretational outcomes are possible, it must adhere to the construction that favours the consumer. On the other hand, sections 2(1) and 3(1) must be read with section 4(2)(b)(i) in terms of which the Tribunal or court must promote 'the spirit and purposes' of the Act. This could simply be a repetition of section 2(1). Section 4(2)(b)(i) has a stronger formulation though as it not only concerns the purposive interpretation of the Act. It also requires that the judicial bodies do not only *promote* the purposes of the Act but also its *spirit*. 'Promote' has obviously a different meaning here than in the definition contained in section 1, and rather means 'to help something happen, develop or increase',¹⁹³³ or 'to help or encourage to flourish'.¹⁹³⁴ Such an interpretation also corresponds to Kellaway's observation according to which words without a precise (or various) meaning (such as 'promote') have to be construed by looking at the object of the statute in question in order to find the legislator's intention.¹⁹³⁵ In law, the word 'spirit' means 'the real meaning or the intention behind something as opposed to its strict verbal interpretation'.¹⁹³⁶ Van Eeden is hence correct when stating that the word

¹⁹²⁸ *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 (2) SA 797 (SCA) at 810 D *et seq*; *Grey v Pearson* [1843-60] All ER Rep 21 (HL) 36, *Venter v Rex* 1907 TS 910 at 914-915.

¹⁹²⁹ At 810D.

¹⁹³⁰ 2014 ZACC 1.

¹⁹³¹ At para [18].

¹⁹³² De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 13.

¹⁹³³ See 'promote' in Merriam Webster Dictionary at <http://www.merriam-webster.com/dictionary/promote>.

¹⁹³⁴ See 'promote' in Dictionary.com at <http://www.dictionary.com/browse/promote>.

¹⁹³⁵ Kellaway *Legal Interpretation* 72.

¹⁹³⁶ Stevenson and Waite *Oxford Dictionary* s.v. 'spirit' (4).

'spirit' was employed to indicate a policy that the Act should not be interpreted too literally.¹⁹³⁷ It is thus suggested that the scope of section 4(2)(b)(i) is broader than the one of section 2(1) in that it commands the judges not to lose sight of the overall 'picture' of the Act. As stated above, ambiguous provisions must be interpreted in favour of the consumer, which might have economic implications that ultimately are not in the consumer's or the economy's interest. Although the Act's purpose is to protect vulnerable consumers, its spirit is certainly not to harm the economy. Therefore, the courts must detach from the wording of the Act and keep in mind the economic and other implications of their decisions.

2.1 Definitions

An aspect that is often overseen in terms of interpretation are the definitions contained in a piece of legislation. This legislative technique is customary South Africa and has its pros and cons. An advantage is that all definitions are located together and can easily be found. Other legal systems, like Germany, prefer defining terms within the section they relate to or which deals with a related question. A legal definition might nonetheless also apply to other sections in the given piece of legislation which makes it sometimes difficult to be aware of its existence.¹⁹³⁸ The South African technique is only fully efficient though if the list of definitions is complete and definitions are not 'hidden' elsewhere in the given statute. Furthermore, the list must be well-drafted, unambiguous in respect of its applicability and not be too extensive. What is more, the list of definitions must not contain too many cross-references.

Unfortunately, the Act does not maintain a high standard of unambiguity. For instance, the definition of 'used goods' cannot be found elsewhere in the Act and should preferably be deleted. What is more, other terms, such as 'promote' are not only used within their meaning set out in section 1, but also within other meanings.¹⁹³⁹ This could have been avoided by making clear when a specific term is to be understood with a certain meaning, or even better by using synonymous words.¹⁹⁴⁰ Especially the English language assiduously borrows its words from many different languages (Germanic languages, French, Latin and so forth)¹⁹⁴¹ and therefore

¹⁹³⁷ Van Eeden and Barnard *Consumer Protection Law* 40.

¹⁹³⁸ For instance, §§ 183 and 184(1) BGB define 'consent' and 'ratification' as prior or subsequent approval, respectively: § 183: 'Prior approval (consent) may be revoked until the legal transaction is undertaken, unless the legal relationship on which this consent is based leads to a different conclusion (...)'. § 184(1): 'Subsequent approval (ratification) operates retroactively from the point of time when the legal transaction was undertaken, unless otherwise provided.' These terms operate throughout the BGB and other civil law statutes, however.

¹⁹³⁹ See ss 3(1) or 4(2)(b)(i), for instance.

¹⁹⁴⁰ In ss 3(1) or 4(2)(b)(i), the word 'promote' could have been replaced by words such as 'foster', 'nourish', 'nurture', 'serve' or 'endorse', for example.

¹⁹⁴¹ See 'English language' at https://en.wikipedia.org/wiki/English_language#Word_origins.

has many synonyms. To a certain extent, this possibility should also exist in the other official languages of South Africa.

Section 1 contains intensional and extensional definitions.¹⁹⁴² Intensional (or connotative) definitions specify the necessary and sufficient conditions for the object or concept being defined as a member of a specific set. This is done mainly by underscoring the essence of the defined word by genus and differentia. For this purpose, a vast category (the genus) is taken and narrowed down to a smaller category by a distinguishing characteristic, the differentia.¹⁹⁴³

The Act also uses extensional definitions in the form of enumerations. Such enumerative definitions are generally used for an explicit and exhaustive listing of *all* the objects that fall under the concept or term in question. Enumerative definitions are therefore only possible for finite sets and only practical for relatively small sets. An example of an enumerative definition is 'loyalty credit or award' in section 1. Unfortunately, the Act uses enumerations in its definitions also for cases that concern vaster categories, such as 'goods' or 'service'. The purpose of enumerative definitions is to enumerate the objects included in the definition conclusively. This objective cannot be achieved though where the words 'includes' or 'including' are used, like in the Act. Greater certainty would have been achieved by defining these terms intensionally first, and then by adding, where necessary, examples.

Moreover, the definition of 'auction' in section 45 contains neither an intensional nor an extensional definition. This term is merely described by including 'a sale in execution of or according to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction'. The same applies to 'person' in section 1.

Strictly speaking, many terms contained in section 1 are no definitions, but rather precisions. For interpretational purposes and legal certainty, it would have been beneficial to define the terms in section 1 neatly and to insert definitions scattered elsewhere in section 1 by honouring the applicable techniques in this field.

Despite these imperfections and the fact that the Act is very far from these prerequisites, the definitions contained in section 1 are a valuable tool for the interpretation of the Act.¹⁹⁴⁴

¹⁹⁴² For an overview on this topic, see Cook *Dictionary of Philosophical Logic* s.v. 'Intensional definition'.

¹⁹⁴³ 'Agreement' for instance, is defined in s 1 as 'an arrangement or understanding between or among two or more parties [= *genus*] that purports to establish a relationship in law between or among them [= *differentia*].'

¹⁹⁴⁴ In the same sense: De Stadler 'Section 1' in Naudé and Eiselen (eds) *CPA Commentary* para 1, Du Preez 2009 TSAR 66.

2.2 Foreign law and other precedents

Section 2(2) provides that when interpreting or applying the Act, a person, court or Tribunal or the Commission may consider (a) appropriate foreign and international law, (b) appropriate international conventions, declarations or protocols relating to consumer protection, and (c) any precedents of a consumer court, ombud or arbitrator in terms of the Act, to the extent that such decision has not been set aside, reversed or overruled by a higher court.¹⁹⁴⁵ This provision is not mandatory ('may').¹⁹⁴⁶

The legislator does not define what 'appropriate foreign and international law' means. In order to qualify as 'appropriate' foreign law for the interpretation of the Act, it is submitted that the given foreign or international pieces of legislation must be of the same nature and the same subject matter. On the other hand, foreign legislation need not necessarily aim at consumer protection in a narrow sense. Otherwise, §§ 305 *et seq.* BGB would not apply since their primary purpose is not consumer protection but the prevention of the abuse of freedom of contract-drafting and the protection of all parties against the misuse of standard terms.¹⁹⁴⁷ It is further submitted that it is not necessary that these foreign or international regimes must be structured in the same manner as South African law. If a country has enacted questions pertaining to standard terms in a piece of legislation pertaining to other areas than consumer protection, the South African court may pick the relevant provisions in the piece(s) of legislation in question. Examples are the Austrian Konsumentenschutzgesetz, §§ 305 to 310 BGB or the UK Unfair Terms in Consumer Contracts Regulations. It also derives from section 2(2)(a) that the court may take several different pieces of legislation of various countries into account, so it does not have to stick to the regime of a particular country. This is a very flexible and original approach which allows adapting foreign or international law to the domestic situation.

A reason for such a flexible approach could be that South Africa does not have an extensive body of appropriate decisions in respect of consumer protection. The fact that the legislator created such an original 'toolbox' begs the question though whether this approach was indispensable, especially when considering that foreign and international law may influence

¹⁹⁴⁵ Interestingly, the National Credit Act 34 of 2005 restricts the considerations of the court to appropriate foreign and international law and does not contain provisions similar to paras (b) and (c) of s 2 CPA.

¹⁹⁴⁶ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 14.

¹⁹⁴⁷ Eith *NJW* 1974, 16, 17. This will be discussed in detail in Part II.

not only the interpretation of the Act but also its application.¹⁹⁴⁸ The provision of section 2(2) is even more astonishing when considering that the Act fosters a purposive interpretation, which already provides for a lot of guidance. Although it is true that South African courts do not have much experience in consumer protection matters, and especially the Consumer Protection Act, one might ask the – admittedly provocative – question of whether the legislator who had the ambitious goal to conform with high international standards for consumer protection¹⁹⁴⁹ might not have been better off if it had rather eliminated the shortcomings of the Act in order to provide a proper legislative basis on which the courts, the Tribunal and the Commission can build their decisions over time.

Moreover, the consideration of foreign law should be done carefully because each piece of legislation has to be seen in the light of the legal and socio-economic situation of the given country. Therefore, foreign legislation cannot be 'transposed' directly into the legislation of another country. This especially applies to South Africa with its unique socio-economic pattern. Courts should always consider this.¹⁹⁵⁰ On the other hand, the consideration of foreign and international law can be a precious 'tool' in order to align South African law to international standards where necessary. After all, the experience gained internationally cannot be overestimated. What is more, also suppliers benefit from foreign and international law, conventions, declarations or protocols.¹⁹⁵¹ In any event, the courts should consider foreign and international law appropriately and *cum grano salis* rather than applying it injudiciously to the Act. Nonetheless, it is hard to imagine, even if applied with precaution, how considerations developed in the context of an abstract-generalised approach – which is an international standard – can be applied within a framework whose system applies a particular-individualised approach.

¹⁹⁴⁸ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 14. In this regard, the interpretation of a foreign piece of legislation must be distinguished from the effort of international harmonisation of law. Many critics assert that the application of such international laws is often not uniform or harmonised since they are interpreted differently in the given jurisdictions. However, the CISG is an example of one of the most successful instruments of legal harmonisation. The proper collection and dissemination of information plays a crucial role in the consistent interpretation and application of an international convention. See Eiselen *FS Kritzer* 107 and 108.

¹⁹⁴⁹ See SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at (xiv) *et seq.*

¹⁹⁵⁰ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 14.

¹⁹⁵¹ Coertse 2014 *De Rebus* 27.

It is unclear if the law of the European Union is to be considered international law in terms of section 2(2)(a). Other sections of the Act using the term 'international law' are not of help as they do not provide any guidance on how to answer this question.¹⁹⁵²

The legal nature of the EU is widely debated. Some authorities argue that because of the mixed nature of the EU combining intergovernmental and supranational elements, it shares characteristics with both confederal and federal entities, and that consequently, its legislation is *sui generis*,¹⁹⁵³ i.e., a law of its own kind.¹⁹⁵⁴ It is generally considered more than a confederation but less than a federation,¹⁹⁵⁵ thus being appropriately classified as an entity of neither political form. Besides, the EU is often considered *sui generis* because its legal system comprehensively rejects any use of retaliatory sanctions by one Member State against another, which is a characteristic of international organisations.¹⁹⁵⁶

Others reject this theory as historically unfounded and put forward the lack of explanatory value of the *sui generis* theory that would not provide any external standard and would thus not be able to detect or measure the EU's evolution. This theory is based on the idea of undivided sovereignty, which poses unsolvable problems for an analysis of the political and constitutional dualism. Instead, one could see the normative ambivalence surrounding the sovereignty principle as part of Europe's federal nature. According to this view, EU law is supranational law,¹⁹⁵⁷ a special form of international law.¹⁹⁵⁸

¹⁹⁵² Preamble of the CPA, before the first bullet point, and s 5(3)(b).

¹⁹⁵³ Hlavac *Less Than a State, More Than an International Organization: The Sui Generis Nature of the European Union* Paper Georgetown Public Policy Institute December 2010 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719308.

¹⁹⁵⁴ *Law Oxford Dictionary of Law* s.v. 'sui generis'.

¹⁹⁵⁵ Marquand 2006 *Political Quarterly* 175.

¹⁹⁵⁶ See Creifelds *Rechtswörterbuch* s.v. 'Internationale Organisationen' and 'Supranationale Organisationen', Neulen *Recht A-Z* s.v. 'Supranationalität'.

¹⁹⁵⁷ Supranational law is a form of international law, based on the limitation of the rights of sovereign nations between one another. In the EC, sovereign nations have pooled their authority through a system of courts and political institutions. They have the ability to enforce legal norms against and for Member States and citizens, in a way that public international law does not. According to the European Court of Justice in the early case, 26/62, of *NW Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Admniistratie der Belastingen* [1963] ECR 1, (also known as *Van Gend en Loos*) it constitutes 'a new legal order of international law': 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.' See Creifelds *Rechtswörterbuch* s.v. 'Internationale Organisationen' and 'Supranationale Organisationen', Neulen *Recht A-Z* s.v. 'Supranationalität'.

¹⁹⁵⁸ Schütze *European Constitutional Law* 67-68.

The debate mentioned above has no impact on the question of whether EU law is international law in the sense of section 2 though. Although it is an important debate in terms of the definition of the EU itself, it has no consequences on the South African legislator's intention. It is submitted that the legislator wanted to include the law of the European Union into the notion of 'international law' since it intended to give the courts the possibility to fish in a big pool of already existing legislation and conform to international standards. A distinction between the law of the EU and (other) international law would therefore be artificial. What is more, there is no reason why a court should be able to consider law of another country but not EU law. The law of the EU, especially in the form of directives, has an umbrella effect on the legislation of the EU Member States.¹⁹⁵⁹ These have to transpose EU directives into their respective national regimes.¹⁹⁶⁰ In that way, national law is 'transformed' EU law. Through this process, harmonisation is achieved from which not only the economies of the EU Member States benefit by uniform application, but also the national courts, and ultimately the European Court of Justice which oversees the uniform application and interpretation of EU law. An exclusion of EU law as opposed to national ('foreign') law would thus be an unnecessary measure cutting off a valuable source, and artificial. Hence, under section 2(2)(a), a South African court may consider, e.g., the EC Consumer Sales Directive,¹⁹⁶¹ the EU Unfair Commercial Practices Directive,¹⁹⁶² or the Council Directive on Unfair Terms in Consumer Contracts,¹⁹⁶³ to mention but a few.

If EU law is international law in terms of the Act, this begs the questions if also decisions of the European Court of Justice (ECJ) have to be regarded as 'international law' in the sense of section 2(2)(a). The rulings of the ECJ are surely no 'legislation'. Section 2(2)(a) uses the term 'law' though. The ECJ's task consists in interpreting EU law and ensuring its equal application across all EU Member States.¹⁹⁶⁴ Its decisions are only binding to the parties involved, however, which does not prevent another Member State from conforming its legislation accordingly if the ECJ decision concerns a similar subject matter. As mentioned above, the

¹⁹⁵⁹ Vessio *LLD thesis* 154.

¹⁹⁶⁰ Articles 10 (ex 5) and 249 (ex 189) of the Treaty Establishing the European Community. If a Member State fails to implement a Directive, this violation may lead to proceedings brought by the Commission under art 169 of the EC Treaty against the EU Member State in question before the ECJ. See also 'Better Regulation Guidelines' at <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf> and 'Quellen und Geltungsbereich des Rechts der Europäischen Union' at https://www.europarl.europa.eu/ftu/pdf/de/FTU_1.2.1.pdf.

¹⁹⁶¹ 1999/44/EC of 25 May 1999.

¹⁹⁶² 2005/29/EC of 11 May 2005.

¹⁹⁶³ 93/13/EEC of 5 April 1993.

¹⁹⁶⁴ Article 220 of the Treaty Establishing the European Community (Treaty of Rome 1957). See also Law *Oxford Dictionary of Law* s.v. 'European Court of Justice (ECJ), Court of Justice of the European Communities'.

South African legislator aimed to ensure that courts can consider foreign sources. It is thus suggested that the term 'law' in section 2(2)(a) affords a broad interpretation in order to ascertain that all kind of foreign and international sources can be drawn upon as long as this seems 'appropriate' in terms of section 2(2). What is more, the ECJ interprets European law, and there is no reason why the South African entities should have access to the primary sources of law but not to decisions interpreting them. It is thus submitted that the courts, the Tribunal and the Commission can also consider the rulings of the European Court of Justice.

Another question is whether the appropriate foreign and international law has to be in force, or if also former law may be considered. On the one hand, one could argue that also former law could be considered as long it is 'appropriate' for the given situation. It is submitted though that only the existing foreign or international law should be taken into account. Provisions or decisions that have been set aside are no longer 'the law', and only the existing law reflects the actual international standard of consumer protection. Section 2(2)(c) expresses this idea with regard to domestic decisions. There is no reason why this standard should not also apply to foreign or international law and ECJ rulings.

Under the 'appropriate international conventions, declarations or protocols relating to consumer protection' falls the United Nations Guidelines for Consumer Protection, 1999, for instance.¹⁹⁶⁵

Section 2(2)(c) refers to domestic decisions and allows the court to consider them as long as they have not been declared invalid. It is astonishing that the courts may even consider decisions of ombuds and arbitrators. This might be of advantage where there is a lack of appropriate domestic court rulings. In the long run, this approach might however lead to confusion and be an obstacle in terms of a uniform interpretation and application of the Act. This is because a decision of a decision-making body may influence another decision-making body, even an ombud or arbitrator. According to Coertse, this cross-implementation will certainly create uncertainty, unpredictability and unreliability, these being the very essence of the *stare decisis* principle.¹⁹⁶⁶ Coertse argues that it is uncertain how every individual court, ombud or arbitrator will interpret and apply the Act in a manner that is consistent and sustainable.¹⁹⁶⁷ It is suggested though that the parallel consideration of decisions from various

¹⁹⁶⁵ Recently revised by the General Assembly in resolution 70/186 of 22 December 2015.

¹⁹⁶⁶ *Stare decisis* is a doctrine according to which a trial court is bound by appellate court decisions (precedents) on a legal question which is raised in the lower court. Reliance on such precedents is required of trial courts until an appellate court changes the rule, even when the trial judge believes it is 'bad law'. See *Law Oxford Dictionary of Law* s.v. 'stare decisis', 'Stare decisis' at <http://dictionary.law.com/Default.aspx?selected=2005>.

¹⁹⁶⁷ Coertse 2014 *De Rebus* 28.

sources does not impact the *stare decisis* doctrine. After all, the lower courts are bound to precedents set by the higher jurisdictions, and it is unlikely that a body such as the Commission would go against such precedents and prefer an arbitrator's or ombud's decision. On the other hand, where a higher court has not decided on a specific question, i.e., where there is no precedent, there is no reason why a lower court should not adopt the view of an ombud or an arbitrator, provided it is reasonable. Coertse has a point however by stating that it will be difficult to obtain consistent decisions because of the different decision-making bodies between which no hierarchy exists. In practice, this problem should be gradually resolved though since even bodies that are not part of the judicial hierarchy should adhere to rulings of the higher courts.

In theory, once the courts have reached a certain number of decisions and gained more experience, the inclusion of foreign and international law as well as decisions of ombuds and arbitrators will not be necessary anymore.

2.3 The use of the words 'includes' and 'including'

Section 2(7) provides that the word 'includes' and 'including' must not be used to limit the generic term or the enumerated example or item to which it relates.¹⁹⁶⁸ The two words are qualified by the phrase 'but is not limited to'.¹⁹⁶⁹ The provision excludes the common-law rules of statutory interpretation known as *eiusdem generis* and *noscitur a sociis*. Both rules take into account the context of a word when interpreting it. According to the *eiusdem generis* rule, a word of a more general meaning, when used with words describing species of the same genus, has to be restricted in its signification as not to include anything outside that genus, or class.¹⁹⁷⁰ According to Christie, this abstract description should be reserved for cases where the conclusion is drawn from the more comprehensive, more abstract context such as the nature and background of the given contract.¹⁹⁷¹

The *noscitur a sociis* rule states that 'the meaning of the general words being known from the company they keep'.¹⁹⁷² This means that it usually applies to restrict the wide meaning of a particular word by associating it with another word of narrower meaning. Therefore, the

¹⁹⁶⁸ 'Includes' can be found in s 1 s.v. 'goods', 'juristic person', 'person', 'premises', 'price', 'services' etc., but also in s 45 or 61(5), for instance. 'Including' is used, e.g., in ss 2(3), 2(6), 4(2)(b)(ii) or 15(3).

¹⁹⁶⁹ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

¹⁹⁷⁰ *S v Wood* 1976 (1) SA 703 (A) 707, Hutchison *et al* *Law of Contract* 267.

¹⁹⁷¹ See *Boss v Whyte* 1906 EDC 317-318. Christie and Bradfield *Law of Contract* 230.

¹⁹⁷² Christie and Bradfield *Law of Contract* 230.

reading of the context is important in order to understand the word, and the word must not be seen in isolation.¹⁹⁷³

As these common-law rules have a more extensive application than section 2(7), they are not excluded from the ambit of the Act. Only where the words 'includes' or 'including' are applied, the *eiusdem generis* and the *noscitur a sociis* rules are not applicable.

De Stadler correctly argues that the phrase 'unless the context indicates otherwise' in section 2(7) is an ineffective limitation as rules such as the aforementioned ones only apply in the context of a particular provision. Their exclusion by the use of the words 'includes' or 'including' does not restrict their common application within their scope of application.¹⁹⁷⁴

In practice, this means that a signature in terms of section 2(3) also includes other means than a handwritten or (advanced) electronic signature, provided they are (or will be) recognised by law. In the future, biometric signatures (iris, fingerprints) or signatures with an implanted chip¹⁹⁷⁵ will likely be recognised. Furthermore, 'electronic communication'¹⁹⁷⁶ is not only limited to 'communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar technology or device' but also includes other existing and future means of communication (this is highlighted by the phrase 'or any similar technology or device').

Note should be taken that 'includes' is written in the third person singular, which means that the plural form ('include') or the past tense or passive voice ('(to be) included') are not concerned. Hence, these verbal forms merely serve as synonyms for verbs such as 'comprise' or 'enclose'¹⁹⁷⁷ or in the negative form ('does not include').¹⁹⁷⁸

2.4 Conflict with other legislation

Section 2(8) provides that in case of an inconsistency between the Public Finance Management Act¹⁹⁷⁹ or the Public Service Act¹⁹⁸⁰ and Chapter 5 of the Consumer Protection Act, dealing

¹⁹⁷³ Christie and Bradfield *Law of Contract* 230.

¹⁹⁷⁴ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 24.

¹⁹⁷⁵ In Sweden, an implanted chip already serves as a 'key' for certain facilities or usages. It is thus likely that this technology will be expanded later to other usages. See 'Chip, der unter die Haut geht' at <http://www.faz.net/aktuell/wirtschaft/mikrochip-ersetzt-schlüssel-und-kreditkarte-in-schweden-15604931.html> (*Frankfurter Allgemeine Zeitung*, 24 May 2018).

¹⁹⁷⁶ Section 1.

¹⁹⁷⁷ E.g., in s 24(4): 'The Minister may prescribe (...) (c) the information that is required *to be included* in any trade description (...)', or ss 7(1)(b), 26(3), 70(4), 74(3), 79(2). Emphasis added.

¹⁹⁷⁸ E.g., in ss 1 ('court'), ('intermediary'), ('mark'), 43(1)(a), 81(2)(c).

¹⁹⁷⁹ 1 of 1999.

¹⁹⁸⁰ Proclamation 103 published in GG 15791 of 3 June 1994.

with national consumer protection institutions, the former statutes prevail. 'Inconsistency' means that two provisions are merely different but not in conflict. The latter is the case if the application of two provisions is not possible without leading to non-compliance with one of them.¹⁹⁸¹ The object of the Public Finance Management Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Public Finance Management Act applies.¹⁹⁸² The Public Service Act applies to or in respect of employees and in respect of persons who were employed in the public service or who are to be employed in the public service. With restrictions, it also applies to members of the services, educators or members of the Intelligence Services.¹⁹⁸³

As the objects of the Consumer Protection Act, the Public Finance Management Act and the Public Service Act differ and do not interfere with each other, with the exception of Chapter 5 of the Act, they can never apply concurrently.¹⁹⁸⁴

Under section 2(9), in case of any inconsistency between a provision of the Act and a provision of any other statute other than the Public Finance Management Act or the Public Service Act, the provisions of both statutes apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.¹⁹⁸⁵ Then, a supplier has to comply with both statutes.

Where such a concurrent application is not possible, then whichever provision extends the greater protection to the consumer prevails over the alternative provision.¹⁹⁸⁶ This provision conveys the idea of a purposive interpretation in terms of section 2(1) for the benefit of the consumer. As discussed above, it would be too much a simplification to say that what is in the supplier's interest is not in the consumer's interest as the interests of both parties do not always compete. The concept of 'greater protection to a consumer' is a subjective and unpredictable standard which creates uncertainty and confusion. It is therefore difficult to predict in advance which provision extends greater protection to the consumer under section 2(9) and to give sound legal advice.¹⁹⁸⁷ Before the Act was enacted, it was suggested that 'the provisions of the bill should (...) be made subservient to the specific provisions of other national legislation,

¹⁹⁸¹ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 26 note 6.

¹⁹⁸² Section 2 of the Public Finance Management Act.

¹⁹⁸³ Section 2 of the Public Service Act.

¹⁹⁸⁴ In the same sense: De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 26.

¹⁹⁸⁵ Section 2(9)(a).

¹⁹⁸⁶ Section 2(9)(b).

¹⁹⁸⁷ Du Preez 2009 *TSAR* 66.

treaty, convention or protocol'.¹⁹⁸⁸ It is submitted that any subservience to other, especially national legislation would have been in conflict with the purposive interpretation standard of the Act and would have introduced other interpretational problems.

Under section 2(9)(b) *in fine*, hazardous chemical products are treated differently because only the provisions of the Act relating to consumer redress will apply.¹⁹⁸⁹ It is noteworthy that the term 'hazardous chemical products' cannot be found elsewhere in South African legislation. The term usually used is 'hazardous chemical substances' or shortly 'HCS'. A hazardous chemical substance is defined as 'any toxic, harmful, corrosive, irritant or asphyxiant substance, or a mixture of such substances (...) which creates a hazard to health'.¹⁹⁹⁰ These are, for instance, household chemicals used for the cleaning of surfaces. The Act merely contains a definition of 'hazard' in section 53(1)(c), according to which this word means 'a characteristic that (i) has been identified as, or declared to be, a hazard in terms of any other law; or (ii) presents a significant risk of personal injury to any person, or damage to property when the goods are utilised. The Act uses the term 'hazardous or unsafe goods', except in section 2(9).¹⁹⁹¹

The divergent terminology begs the question of why the legislator chose the term 'hazardous chemical product' instead of 'hazardous chemical substance'. The term 'product' is not defined in the Act, unlike the term 'producer' which, 'with respect to any particular goods, means a person who (...) generates, refines, creates, manufactures or otherwise produces the goods (...)'.¹⁹⁹² From this definition, one can conclude that the outcome of the actions as mentioned earlier by a producer is a 'product'. The term 'substance' consequently does not necessitate such an action, which is why a substance can also exist by nature (e.g., naturally existing acids). Thus, the term 'substance' is more extensive than 'product' since the latter requires at least some further processing of an existing substance, or is the outcome of a combination of several substances. It is suggested though that the legislator did not intend to restrict the application of section 2(9) *in fine* to hazardous chemical *products*, and that all such *substances* are included.

¹⁹⁸⁸ Parliament of South Africa research unit 'Synopsis of submissions made on the Consumer Protection Bill'. The electronic resource mentioned by Du Preez is unfortunately no longer available. See Du Preez 2009 *TSAR* 66 note 77.

¹⁹⁸⁹ The CPA does not specifically deal with hazardous products, but Part H, and specifically s 59 governs the recovery and safe disposal of designated products or components which could include hazardous chemical products.

¹⁹⁹⁰ Section 1 (definitions) of the Hazardous Chemical Substances Regulations, 1995.

¹⁹⁹¹ See s 58(2)-(4).

¹⁹⁹² Section 1.

According to De Stadler, this provision causes interpretational problems. On the one hand, it could be interpreted in that it applies to inconsistencies between the Act and other pieces of legislation concerning hazardous chemical products, *except* in the case of consumer redress. Then, the provisions of the Act would apply irrespective of which statute affords the greater protection to consumers. On the other hand, section 2(9) could be read in that the analysis set out in this section should be performed *only* in the case of consumer redress provisions of competing legislation.¹⁹⁹³

It is submitted that in case of hazardous chemical products, the analysis of section 2(9) has to be performed, except in matters related to consumer redress. In this case, the provisions of the Act apply regardless of the question of whether the other piece of legislation offers better consumer protection. This becomes clear when considering the last phrase of section 2(9) ('...provided that in the case of hazardous chemical products...') as a sentence of its own, and is read as: 'In the case of hazardous chemical products...'). Then, it is evident that this phrase is meant to prevail in consumer redress matters. The legislator should thus amend this provision accordingly.

De Stadler also criticises that the Act does not explain which provisions are meant by 'relating to consumer redress'. She argues that 'consumer redress' could be understood in that all provisions of the Act concern the redress of consumers.¹⁹⁹⁴ The legislator would probably have chosen a phrase such as 'the provisions of the Act' in this case, however. In addition, a reading of all provisions using the term 'redress' does not permit this interpretation.¹⁹⁹⁵ Therefore, 'consumer redress' should be interpreted narrowly and merely concerns the dispute resolution mechanisms of Chapter 3 (sections 68 to 78).

It is somehow astonishing that the legislator did only treat hazards related to chemical substances differently, and not also other hazards, such as environmental (photocopy machines), psychological (bright lights or loud sounds in shops), or radiation hazards (radioactivity).¹⁹⁹⁶ A reason might be the prevalence of hazards related to chemical products in households and their traceability. Harms from other sources are often difficult to relate with

¹⁹⁹³ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 29. Van Heerden mentions this provision without elaborating further. See Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 24 note 5.

¹⁹⁹⁴ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 29.

¹⁹⁹⁵ Preamble (b): 'accessible, transparent and efficient redress', preamble, 4th bullet point: 'develop effective means of redress', s 3(1)(h): 'system of redress', s 4(2)(b)(ii): 'access to redress'.

¹⁹⁹⁶ For more hazards see, e.g., 'Types of hazards' at <http://fortresslearning.com.au/cert-iv-content/design/types-of-hazards/>.

certainty to a given hazard, or they are detectable with difficulty or only after a long time because of their long-term effects. What is more, most South Africans regularly deal with household products or similar substances, as opposed to radioactivity, for instance.

Two additional remarks seem to be important in this context: First, if the common law provides greater protection than the Act in terms of losses related to hazardous chemical substances, consumers can exercise their rights afforded in terms of the common law.¹⁹⁹⁷ Section 2(9) only concerns inconsistencies between statutes but not those between the Act and the common law. Second, section 2(9) only applies to consumers¹⁹⁹⁸ but not to employees suffering exposure to hazardous chemical substances at their working place. Employees must therefore seek protection under the common-law rules as far as there is no protection afforded by other legislation.

2.5 Common-law remedies

Section 2(10) provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. Like section 56(4)(a), this section serves as a 'savings clause' with regard to the common law.¹⁹⁹⁹ This must be viewed with the presumption in mind — which can only be revoked where the language of the given statute is unclear — that the legislator did not intent to alter the common law unless this is unambiguously indicated in the given statute.²⁰⁰⁰ According to Du Plessis, '[l]egislation must (...) be interpreted in the light of the common law, must as far as possible be reconciled with related precepts of the common law and must be read to be capable of co-existing with the common law'.²⁰⁰¹ Put differently, legislation and the common law co-exist, and statutes such as the Act have to be construed with regard to the common law. Obviously, this extension of the consumer's rights by including the common law serves consumer protection.

Section 2(10) must be read with section 69(d) in terms of which a person can only approach the courts²⁰⁰² if all other remedies available to that person in terms of *national legislation* have been exhausted. This provision could be understood to the effect that the consumer can still rely on the common law and approach the ordinary courts directly to exercise any remedy for which the Act — which is national legislation — does *not* provide, and seek the enforcement of

¹⁹⁹⁷ Section 2(10).

¹⁹⁹⁸ See definition of 'consumer' in s 1.

¹⁹⁹⁹ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 29.

²⁰⁰⁰ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 31 read with note 2.

²⁰⁰¹ Du Plessis *Re-Interpretation* 178.

²⁰⁰² In terms of the definition of 'courts' in s 1, this excludes consumer courts.

such remedy. Such cases do not raise concerns, and they are in keeping with sections 69(d) and 2(10). In cases where both the Act and the common law provide a remedy, the question is whether the consumer can approach the ordinary courts directly. The reading of section 69(a) to (d) leads to the conclusion that first, the remedies of paragraphs (a) to (c) have to be exhausted before the consumer is entitled to approach the courts in terms of paragraph (d). Then, the Tribunal, the ombud with jurisdiction, the industry ombud, the consumer court of the province or the alternative dispute resolution agent under paragraphs (a) to (c) would have primary jurisdiction over such a matter.²⁰⁰³ To restrict the consumer's right to access to the civil courts could infringe section 2(10). On the other hand, section 69 refers to the enforcement of *any* right in terms of the Act or in terms of a transaction or agreement as well as to the resolution of any dispute with a supplier.²⁰⁰⁴ Hence, claims based not on the rights created by the Act itself, but also under the common law could be included.

De Stadler suggests that the Act should be interpreted narrowly so as not to unduly take away the consumer's right to approach the ordinary courts directly.²⁰⁰⁵ This view is convincing with regard to its outcome. As regards the narrow interpretation requisite, one could also argue though that not only section 2(10) but also section 69(d) has to be interpreted narrowly. This ultimately leads to contradictory results. It is suggested that section 2(10) prevails over section 69(d) because it applies to all provisions of the Act. The wording of subsection (10) is unambiguously clear in this regard ('[n]o provision...'). What is more, the Act does reserve the application of a certain number of provisions exclusively to the courts.²⁰⁰⁶ Others are directed to the courts *and* the Tribunal.²⁰⁰⁷ It is submitted that the legislator aimed to give the ordinary courts an important position within the Act, and that they hence play a crucial role within the redress system provided for in the Act. Moreover, denying consumers direct access to ordinary courts would also mean that they would not be able to claim for damages²⁰⁰⁸ under section 76(1)(c), read in conjunction with subsection (2)(a), since the other enforcement bodies mentioned in the Act are not allowed to award damages. The argument that only rulings of the courts are reported is only of limited value because this only applies to the higher courts. It is unlikely that a supplier who lost a case in a lower court starts a prohibitively expensive appeal

²⁰⁰³ The entities mentioned in s 69(a) to (c) do not have a specific hierarchy. See Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

²⁰⁰⁴ See s 69 *in pr.*

²⁰⁰⁵ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

²⁰⁰⁶ For instance, ss 4(2)(a), 8(3), 10(2)(b), 45(5)(c), 52, 76.

²⁰⁰⁷ For instance, ss 2(2), 4(1), 4(1)(d), 4(2), 4(2)(b), 4(3), 4(4), 70(3)(b), 74(1).

²⁰⁰⁸ Naudé 2010 *SALJ* 526.

to the High Court, or goes even further up to the Supreme Court of Appeal. Besides, also the decisions of the Tribunal are reported on its website.²⁰⁰⁹

Another argument often put forward is that ordinary courts are composed of magistrates and judges with legal training and that they are therefore best able to understand questions of contractual fairness. It is certainly true that non-lawyers are not best-suited to decide on these issues. However, at least the chairpersons of the provincial consumer courts must usually be experienced lawyers.²⁰¹⁰ In other countries, such as the United Kingdom, only the ordinary courts are empowered to adjudicate the fairness of contract terms. This is balanced by the active role of the (former) Office of Fair Trading (and partly its successors). The OFT could negotiate with suppliers against the backdrop of possible injunction applications, for instance. Its proactive role made it most of the time unnecessary for consumers to pursue challenges against unfair terms themselves.²⁰¹¹ This is not the case in South Africa though.

Considering all pros and cons, the view that a consumer may always approach a civil court directly is more convincing. Especially low-income consumers, whose claims usually involve relatively small amounts, might prefer approaching a small-claims court, which may be more accessible for them. It is not always in the consumers' best interest to insist that they first exhaust the other redress options offered by section 69. What is more, the constitutional right of access to courts under section 34 of the Constitution might be violated if direct access to a small claims court is barred.²⁰¹² Hence, a purposive interpretation of section 69(d), read with section 3(1)(h), according to which one purpose of the Act is to provide 'for an *accessible* (...) system of redress for consumers'²⁰¹³ must be adopted, according to Mupangavanhu.²⁰¹⁴ The fact that the wording of section 69(d) appears to deny consumers to access civil courts directly might be an unintended consequence of the legislator's aim to ensure quick, effective and efficient redress system.²⁰¹⁵

Section 2(10) must be read with section 4(2)(a) in terms of which the Tribunal or the courts (in the sense of the Act, i.e., ordinary courts) must develop the common law as necessary to

²⁰⁰⁹ Naudé 2010 *SALJ* 527. The Tribunal's decisions are available at <http://www.thenct.org.za>.

²⁰¹⁰ Naudé 2010 *SALJ* 527. See, e.g., s 14(2) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁰¹¹ Naudé 2010 *SALJ* 528.

²⁰¹² De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 32, Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 27.

²⁰¹³ Emphasis added.

²⁰¹⁴ Mupangavanhu 2012 *PELJ* 338.

²⁰¹⁵ Mupangavanhu 2012 *PELJ* 336.

improve the realisation and enjoyment of consumer right generally, and in particular by vulnerable persons. This provision is mandatory ('must'). It is dubious though how the courts should be able to develop the common law when applying the provisions of the Act. De Stadler maintains that this might only apply in respect of common law methods of statutory interpretation²⁰¹⁶ and that this provision should rather apply to any matter involving the common law rights of a consumer under section 2(10).²⁰¹⁷ Since there seems to be an inter-relation between sections 2(1) and 4(2)(a), this appears to be the only explanation as to how the courts can develop the common law when applying the Act.

The wording of this provision only applies to the courts as the Tribunal has no power to develop the common law.²⁰¹⁸ The Tribunal is only mentioned at the beginning of section 4(2) because subsection (b) is also applicable to the Tribunal.

3. Miscellaneous provisions contained in section 2

3.1 Signatures

Section 2(3) provides that if a provision of the Act requires a document to be signed or initialled by a party, that signing or initialling may be effected in any manner recognised by law, including the use of an advanced electronic signature, or an electronic signature. Electronic and advanced electronic signatures are both defined in the Electronic Communications and Transactions Act (ECTA).²⁰¹⁹ According to section 1 ECTA, an electronic signature is 'data attached to, incorporated in, or logically associated with other data which is intended by the user to serve as a signature'.²⁰²⁰ Under section 1, read with section 37 ECTA, an advanced electronic signature is one that is produced as a result of a process that has been accredited by

²⁰¹⁶ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 33.

²⁰¹⁷ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

²⁰¹⁸ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 10.

²⁰¹⁹ 25 of 2002.

²⁰²⁰ This definition was largely inspired by art 2 of the UNCITRAL Model Law on Electronic Signatures, 2001, read with art 7 of the UNCITRAL Model Law of Electronic Commerce, 1996. Both the UNCITRAL Model Laws of 1996 and 2001 and the ECTA embody the principle of functional equivalence, i.e., electronic communications (and signatures) have the same legal effect and protection as physical communications and signatures. The South African definition contains a subjective element though since the data must be intended by the user to serve as a signature. This requirement corresponds to traditional physical signatures which also need the parties' intention and complies thus with the principle of media neutrality. What is more, s 13(3)(a) ECTA provides another requirement contained in the aforementioned two Model Laws: 'Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if (a) a method is used to identify the person and to indicate the person's approval of the information communicated; (...)'. See Eiselen 2014 *PELJ* 2811 and 2813-2814. See also Eiselen 2002 *VJ* 306 and Eiselen *FS Kritzer* 107, 124.

the Accreditation Authority.²⁰²¹ In South Africa, an advanced electronic signature requires a digital certificate²⁰²² and has a higher level of security than a 'simple' electronic signature.²⁰²³

The legislator's intention to accept (advanced) electronic signatures is, *inter alia*, to provide for the facilitation and regulation of electronic communications and transactions, to provide for the development of a national e-strategy for the Republic and to promote universal access to electronic communications and transactions and the use of electronic transactions.²⁰²⁴

This is in line with the principle of functional equivalence according to which formal requirements are also met by electronic means.²⁰²⁵ According to the definition contained in section 1 ECTA, "'electronic signature' means data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature'.

Section 13 ECTA distinguishes signatures required by law and those merely required by the parties to the transaction. In cases where a signature is required by law, that signature must meet the requirements of an advanced electronic signature.²⁰²⁶ Where the parties require an electronic signature, and they have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message, if the data message sufficiently identifies the person and indicates his or her approval.²⁰²⁷ This topic has already been discussed more in detail.²⁰²⁸

In terms of section 2(4), suppliers have to take reasonable measures to prevent the electronic signatures of their consumers from being used for any purpose other than the signing or initialling of the particular document that the consumer intended to sign or initial. It is submitted that 'reasonable measures' are those which prevent the supplier's server from being

²⁰²¹ So far, the LAW Trusted Third Party Services (Pty) Ltd ('LAWtrust') and the South African Post Office have been accredited in 2011 and 2013, respectively. See Eiselen 2014 *PELJ* 2816.

²⁰²² 'Advanced electronic signatures' at <https://www.lawtrust.co.za/e-signatures/advance-electronic-signatures/> (no longer available).

²⁰²³ Other countries, such as Germany or Switzerland, have introduced a higher standard than an advanced electronic signature, referred to as 'qualified electronic signature'. Technically, a qualified electronic signature is implemented through an advanced electronic signature that utilises a digital certificate, which has been encrypted through a security signature-creating device. The following features are common for advanced electronic signatures in most countries: 1. The signatory can be uniquely identified and linked to the signature, 2. the signatory must have sole control of the private key that was used to create the electronic signature, 3. the signature must be capable of identifying if its accompanying data has been tampered with after the message was signed, and 4. in the event that the accompanying data has been changed, the signature must be invalidated. See Law *Oxford Dictionary of Law* s.v. 'Electronic signature'.

²⁰²⁴ See long title of the ECTA.

²⁰²⁵ Van der Merwe *et al ICT Law* 23.

²⁰²⁶ Section 13(1) ECTA.

²⁰²⁷ Section 13(3) ECTA. See Van der Merwe *et al ICT Law* 25.

²⁰²⁸ See ch 2 para 4.2 a).

hacked by third parties, or that the electronic signature is 'copied' for other purposes. This provision does not require a supplier to prevent any loss, damage or defective processing of the consumer's signature, though. Sections 50 and 51 ECTA provide for the protection of personal information. A person's signature cannot be qualified as 'personal information' under section 1 ECTA though.²⁰²⁹ Sections 52 to 58 ECTA provide for the protection of databases to the extent that the Minister has declared them 'critical'. This includes data that is essential to the daily functioning of an information society. Furthermore, critical databases include data the interruption or destruction of which could have widespread effects and consequently result in or generate grave consequences to an information society. At a governmental level, an interruption or destruction of critical databases could hamper and/or delay the delivery of services.²⁰³⁰ Even though a signature can be qualified as 'data' in the sense of section 1 ECTA,²⁰³¹ and all signatures collected by the supplier in electronic form could be qualified as a 'database',²⁰³² such a database is not 'critical' in the sense of the ECTA because critical databases are collections of critical data in an electronic form kept in a site from where the data may be accessed, reproduced or extracted.²⁰³³ It is thus improbable that a supplier's server and the data which it contains is 'critical' in terms of the ECTA.²⁰³⁴

It should be noted that the use of a rubber stamp with the supplier's name is regarded as a sufficient signature to bind the company,²⁰³⁵ provided the stamp was used with authority. Composite signatures, i.e., an impression of a stamp with the company's name and a dotted line

²⁰²⁹ 'Personal information' is defined in s 1 ECTA as follows: 'information about an identifiable individual including, but not limited to (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual; (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved; (c) any identifying number, symbol, or other particular assigned to the individual; (d) the address, fingerprints or blood type of the individual; (e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual; (f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (g) the views or opinions of another individual about the individual; (h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual, but excludes information about an individual who has been dead for more than 20 years.'

²⁰³⁰ Chapter 5 Part II Principle A of Procl R1 in GG 21951 of 1 January 2001.

²⁰³¹ Section 1 ECTA (definitions): 'data' means electronic representations of information in any form.

²⁰³² The ECTA does not define 'database' but only 'critical database'. See s 1 ECTA.

²⁰³³ Definition of 'critical database' in s 1 ECTA.

²⁰³⁴ See Njotini 2013 *PELJ* 456.

²⁰³⁵ *Associated Engineers Co Ltd v Goldblatt* 1938 WLD 139, *Jones v John Barr & Co /Pty Ltd* 1967 (3) SA 292 (W).

under it, with the word 'director' or a similar function at the right-hand end of the dotted line, are only complete when the person in question has signed on the dotted line.²⁰³⁶ If the dotted line and the word 'director' is above the company's name, this will most probably be interpreted as merely descriptive. In this case, the signatory, and not the company, is bound to the contract.²⁰³⁷ If the rubber stamp does not contain a word such as 'director', and it bears the signature of an individual without qualification (i.e., *simpliciter*), the signature does not indicate that he or she is the mere scribe.²⁰³⁸ Consequently, in cases where the dotted line bears no signature, the use of the 'signature stamp' binds the company.²⁰³⁹ The unqualified signature of an individual, no matter where it has been put with regard to the company's stamp, indicates that the company and the signatory are parties to the contract.²⁰⁴⁰ The same applies to machine-printed company names.²⁰⁴¹ The signatory can avoid personal liability if he or she puts the word 'for' before the company's name (meaning 'acting for'), or adds the letters 'pp' (*per procuracionem*) or 'qq' (*qualitate qua*).²⁰⁴² If the company's name does however not appear on the document at all, these additions will not relieve the signatory of personal responsibility because there is no indication of the party on whose behalf the individual signed the document.²⁰⁴³ The company's liability is engaged though when its name is printed at the top of the document.²⁰⁴⁴ Where a descriptive word, such as 'seller', appears after an unqualified signature, the given individual might have signed for and on behalf of a company if the latter is identified as the seller in the body of the document.²⁰⁴⁵

3.2 Business days

Section 2(6) sets out how time periods measured in business days between two events have to be calculated.²⁰⁴⁶ According to this provision, when a particular number of business days is

²⁰³⁶ *Nicolaides v Henwood, Son, Soutter & Co* 1938 TPD 390. However, the company may put forward that this kind of stamp without signature is its signature. See *Meyer v Roberts* 1971 (1) SA 328 (O) 331.

²⁰³⁷ *Nicolaides v Henwood, Son, Soutter & Co* 1938 TPD at 395-396.

²⁰³⁸ *Moon & Co Ltd v Eureka Stores (Pty) Ltd* 1949 (4) SA 40 (T) at 43-44.

²⁰³⁹ Christie and Bradfield *Law of Contract* 211.

²⁰⁴⁰ *Associated Engineers Co Ltd v Goldblatt* 1938 WLD 139; *Hein v Hofmeyr* 1958 (1) SA 29 (W); *Puzey and Diss Motors Ltd v Litherland* 1959 (4) SA 177 (SR) and 1961 (2) SA 177 (SR); *De Beer v Diesel and Electrical Engineering Co* 1960 (3) SA 89 (T) at 92-93; *Trust Bank of Africa Ltd v Dugmore* 1972 (3) SA 926 (D); *Burger v I Lopus & Sons (Pvt) Ltd* 1973 (2) SA 37 (RA).

²⁰⁴¹ *Akasia Finance v Da Souza* 1993 (2) SA 337 (W) at 340J-341A.

²⁰⁴² *Hersch v Nel* 1948 (3) SA 686 (A) 703; *Natridge Finance (Pty) Ltd v Pillay* 1971 (4) SA 412 (D); *Hutchinson v Hylton Holdings* 1993 (2) SA 391 (O). For a cheque, it is sufficient if the individual who signed on the reverse side 'for and on behalf of...' also signed on the face for and on behalf of the drawer company. See *Sappi Manufacturing (Pty) Ltd v Standard Bank of South Africa Ltd* 1997 (1) SA 457 (A) at 462C-H.

²⁰⁴³ *Kruger v Rheeder* 1972 (2) SA 391 (O).

²⁰⁴⁴ *De Beer v Diesel and Electrical Engineering Co* 1960 (3) SA 89 (T).

²⁰⁴⁵ *Major v Business Corners (Pty) Ltd* 1940 WLD 84.

²⁰⁴⁶ This provision correlates with s 2(5) NCA.

provided for between the happening of one event and another, the number of days must be calculated by (a) excluding the day on which the first such event occurs, (b) including the day on or by which the second event is to occur, and (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.

Example: Under section 14(2)(b)(i)(bb), despite any provision of the consumer agreement to the contrary, a consumer may cancel a fixed-term agreement at any other time than upon the expiry of its fixed term, by giving the supplier 20 business days' notice.

Provided that a consumer gave notice on 7 March 2016, and that a normal week comprises 5 business days (except Saturdays and Sundays), the beginning of the notice started on 8 March as the first day on which the first event occurs is excluded. Adding 20 business days, the last event took place on 4 April. However, in South Africa, the 21, 25 and 28 March 2016 were public holidays which all fell on weekdays.²⁰⁴⁷ Therefore, one has to add 3 business days after the 4 April, which leads to 7 April. Thus, the last event took place on 7 April 2016.

On the other hand, section 4 of the Interpretation Act²⁰⁴⁸ applies to the calculation of a number of days in general, and not only of business days. The calculation itself is also different in that the Consumer Protection Act excludes any public holiday and Sunday *during* the entire period of time but also any Saturday. The Interpretation Act, on the other hand, only refers to public holidays and Sundays and excludes only public holidays and Sundays that happen to fall *at the end* of the given period, and not in-between.

4. Interpretation of agreements

After having discussed the rules for the interpretation of the Act, the interpretation of agreements remains to be discussed.

Under section 4(4), the Tribunal or court must construe any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by the Act to be produced by a supplier, to the benefit of the consumer. The classical approach of interpretation of contracts is not abandoned by this approach²⁰⁴⁹ but rather a first step. In order to understand

²⁰⁴⁷ Human Rights Day (Monday 21st), Good Friday (Friday 25th) and Family Day (Monday 28th), respectively.

²⁰⁴⁸ 33 of 1957. **Section 4 of the Interpretation Act:** 'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

²⁰⁴⁹ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

the policy pursued by the Act, a short presentation of the classical interpretational rules seems compelling before discussing the approach of the Act.

4.1 The classical approach

a) Primary rules of interpretation

The primary purpose of the classical approach in the field of interpretation of contracts is to determine the parties' common intention and give effect to it, and not what only one or the other had in mind.²⁰⁵⁰ The parties' intention is relevant because of the principle of freedom of contract.²⁰⁵¹ In practice, many disputes arise because the parties disagree on what the terms of their agreements mean.²⁰⁵² Then, the courts have to ascertain the common intention of the parties by applying the so-called 'primary rules of interpretation' in order to interpret the meaning of the words used in the given agreement.²⁰⁵³ The classical approach generally consists of four steps.²⁰⁵⁴ The objective of the first step is to find out the grammatical and ordinary meaning of the words of the agreement.²⁰⁵⁵ This rationale is based on the assumption that the use of certain words or phrases of a language is based on a convention and that the parties to a contract, who know the conventional meaning of the words contained therein, will use them accordingly in order to be understood.²⁰⁵⁶ The language of an agreement offers a 'firmer footing' for the assertion of the parties' common intention at the time when they contracted than the assertion of their actual intention locked up in their minds, or what they maintain being their intention when a dispute arises.²⁰⁵⁷ Hence, 'the intention so gathered is presumed in law to be the common intention of the parties'.²⁰⁵⁸ Difficulties arise where the

²⁰⁵⁰ Hutchison *et al* *Law of Contract* 255, *Joubert v Enslin* 1910 AD 6 at 37.

²⁰⁵¹ Brox and Walker *BGB-AT* 60.

²⁰⁵² Hutchison *et al* *Law of Contract* 255.

²⁰⁵³ Christie and Bradfield *Law of Contract* 199.

²⁰⁵⁴ South African courts prefer this approach rather than following Pothier's and Van der Linden's first rule of interpretation, according to which '[i]n agreements we should consider what the general intention of the contracting parties rather than follow the literal meaning of the words (is)'. See Pothier *Treatise* s 91, Van der Linden *Institutes* 14 4.

²⁰⁵⁵ This is known as Lord Wensleydale's golden rule from *Grey v Pearson* (1857) 10 ER 1216 at 1236, according to which '(...) the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.' In this regard, see *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947 (4) SA 521 (A) at 543; *N&B Clothing Manufacturers (Pty) Ltd v British Trading Insurance Co Ltd* 1966 (2) SA 522 (W) at 525C; *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 556D; *Western Credit Bank Ltd v Van der Merwe* 1970 (3) SA 461 (C) at 463H.

²⁰⁵⁶ Hutchison *et al* *Law of Contract* 256. See also *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 (A) at 624G-625B; *Hirt & Carter (Pty) Ltd v Mansfield* 2008 (3) SA 512 (D) at para [63]-[70]; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) at para [13].

²⁰⁵⁷ Christie and Bradfield *Law of Contract* 215. See *Hansen, Schrader & Co v De Gasperi* 1903 TH 100 at 103.

²⁰⁵⁸ Centlivres JA in *Lanfear v Du Toit* 1943 AD 59 at 72.

parties attribute different meanings to the same word or phrase.²⁰⁵⁹ In addition, the meaning of words changes over time or in different circumstances. The 'ordinary meaning' thus describes the meaning of a word or phrase in the given contractual context. When reading the contract as a whole, this might be the everyday meaning, or a more technical one.²⁰⁶⁰ Hence, a word or phrase should never be interpreted in isolation (*in vacuo*),²⁰⁶¹ and its meaning must be ascertained in the light of the context in which the word or phrase in question has been used.²⁰⁶² If the construction of the words of an agreement leads to an absurd, repugnant or inconsistent result with the rest of the contract, the judge may modify the sense of the words only to an extent as to avoid that absurdity or inconsistency. Otherwise, the court must not amend the agreement.²⁰⁶³ Inconsistencies are frequent in agreements where various documents, such as contracts and plans, form a single contract. In these cases, the parties are well-advised to agree on the priority of the documents. In the absence of such a provision, the principle by which the words which probably had the parties' closer attention should prevail, applies.²⁰⁶⁴ This principle can also find application in conjunction against superfluity.²⁰⁶⁵

In a second step, the textual context in which the word or phrase is placed is examined.²⁰⁶⁶ This is the context in which a word or phrase is used, considering also the contract as a whole, including the nature and purpose of the agreement.²⁰⁶⁷ In any event, as the parties rather aim at their agreement's validity, the words contained therein should be interpreted to give effect to

²⁰⁵⁹ This is the case, for instance, where the parties usually use the same word in different circumstances or domains. One party might use a term in its all-day meaning, whereas the other uses it in its meaning that it has acquired by trade usage or law. For instance, in every-day language 'owner' and 'possessor' have the same meaning, whereas their meaning is different in legal terminology.

²⁰⁶⁰ Christie and Bradfield *Law of Contract* 216. Jansen JA's statement in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B, in words adopted in *List v Jungers* 1979 (3) 106 (A) 119A-B are very instructive in this regard.

²⁰⁶¹ Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

²⁰⁶² *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-727A, Hefer JA remarked: 'Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of the words. (...) But judicial interpretation cannot be undertaken (...) by excessive peering at the language to be interpreted without sufficient attention to the contextual scene.' In *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) at 196E-F, Nicholas stated in connection to the interpretation of a patent specification: 'A dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. And, where a word has more than one meaning, the dictionary does not, indeed it cannot, prescribe priorities of meaning.'

²⁰⁶³ *Scottish Union & National Insurance Co Ltd v Native Recruiting Corp'n Ltd* 1934 AD 458 at 465-466. See also *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) [7]-[12].

²⁰⁶⁴ *Badenhorst & Van Rensburg* 1985 (2) SA 321 (T) 3361-T; *Trevel Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) at 15B-C.

²⁰⁶⁵ *B&E International (Pty) Ltd v Enviroserv Waste Management (Pty) Ltd* 2000 (4) SA 152 (SE) at 158J-159F.

²⁰⁶⁶ *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

²⁰⁶⁷ *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768. Schreiner JA referred to this as 'linguistic treatment' in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454-455.

the contract.²⁰⁶⁸ Naturally, the first and second steps cannot be separated because the grammatical or literal meaning of words can only be assessed in their context. The meaning of the abbreviation 'CFA', for instance, can only be assessed by considering the textual context. In one contract, these letters can mean 'Chief Financial Advisor', or in another 'Chartered Financial Accountant'. Moreover, in an insurance contract, it could mean 'Conditional Fee Arrangements'.²⁰⁶⁹ The parties could also give another meaning to this abbreviation (e.g., for a product) which is only apparent in its context.

If the first and second steps, which concern intra-textual elements, do not provide a satisfactory interpretational result, in a third step, extra-textual elements, i.e., the extended context of a contract, or the background circumstances, are taken into account in order to draw useful conclusions as regards the intended meaning from the nature of the contract, its purpose and background.²⁰⁷⁰ According to Joubert JA in *Coopers & Lybrand v Bryant*,²⁰⁷¹ background circumstances are 'matters probably present to the minds of the parties when they contracted'. Malan AJA mentions in *Engelbrecht v Senwes Ltd*²⁰⁷² that those 'are part of the context and explain the "genesis of the transaction" or its "factual matrix"'.

In order to limit the extrinsic evidence so that the purposes of reducing the agreement in writing are not undermined, the parol evidence rule plays an important role because it constitutes a middle way between the textual and the extra-textual context. The parol evidence rule states that where the parties intended to lay down their agreement entirely and finally in writing, evidence to contradict, vary, add to or subtract from the terms of the writing is inadmissible.²⁰⁷³ The purpose of this rule is to ensure that a party cannot contradict, add or modify the written contract by reference to extrinsic evidence and in that way redefine the contractual terms.²⁰⁷⁴ The rule applies only in cases where the parties intended the written contract to be the exclusive

²⁰⁶⁸ *Hutchison et al Law of Contract* 257. *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) at 479.

²⁰⁶⁹ For more meanings of 'CFA', see 'CFA' at <https://acronyms.thefreedictionary.com/CFA>.

²⁰⁷⁰ *Hutchison et al Law of Contract* 257.

²⁰⁷¹ 1995 (3) SA 761 (A) at 767E-768E.

²⁰⁷² 2007 (3) SA 29 (SCA) at para [7].

²⁰⁷³ *Union Government v Vianini Ferr Concrete Pipes (Pty) Ltd* 1941 AD 47; *Johnston v Leal* 1980 (3) SA 927 (A) 938; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA); *Auckland Park Theological Seminary v University of Johannesburg* (1160/2018) [2020] ZASCA 24 (25 March 2020); *Kooij and Others v Middleground Trading 251 CC and Another* (1249/18) [2020] ZASCA 45 (23 April 2020). The parol evidence rule was first stated in *Lowrey v Steedman* 1914 AD 532 at 543: 'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.'

²⁰⁷⁴ *Johnston v Leal* 1980 (3) SA 927 (A) at 943B.

memorial of their agreement.²⁰⁷⁵ It does nevertheless not automatically apply by the mere fact that a contract has been established in writing. First, it has to be ascertained whether the document is truly a reduction to writing of the parties' intention. Therefore, extrinsic evidence may be necessary because the true nature of the given document may not appear from the document itself.²⁰⁷⁶ The parol evidence rule has two aspects of which the distinction is often somehow artificial,²⁰⁷⁷ but helpful in order to understand its role in the context of interpretational matters. The integrational aspect²⁰⁷⁸ determines what evidence is admissible to prove the contents of the contract (integration rule). In contrast, the interpretation rule determines what evidence is admissible in proving the meaning of the words the parties used to express those terms. If the parties declared that they wanted to lay down their final agreement in writing entirely, they are not allowed to alter the terms of their contract by reference to evidence that contradicts these terms. Hence, such extrinsic evidence is regarded as legally irrelevant.²⁰⁷⁹ The parol evidence rule does not apply though where the court has to determine whether the parties intended to draw up an exclusive memorial of their agreement, or where their agreement is partly oral.²⁰⁸⁰ Furthermore, it is not applicable in cases of fraud,²⁰⁸¹ misrepresentation,²⁰⁸² mistake,²⁰⁸³ undue influence, duress²⁰⁸⁴ or illegality because the contract's validity itself has to be determined in these cases.²⁰⁸⁵ The same applies to cases where one party claims that the contract is a sham agreement or not an agreement at all.²⁰⁸⁶ Subsequent

²⁰⁷⁵ *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) at para [14].

²⁰⁷⁶ Christie and Bradfield *Law of Contract* 202. In *Schneider v Raikin* 1955 (1) SA 19 (W) at 21E, Rammsbottom J puts it at follows: 'The question of the admissibility of the evidence as to the agreement cannot be decided until evidence of the circumstances has been given.' Innes CJ stated in *Beaton v Baldachin Bros* 1920 AD 312 at 315: '(...) a party to such a writing, which it is sought to use against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was given for another purpose.'

²⁰⁷⁷ A judge cannot determine whether a term is part of an agreement without considering the meaning of the given term, for instance.

²⁰⁷⁸ See *Venter v Birchholtz* 1972 (1) SA 276 (A) at 282; *Johnston v Leal* 1980 (3) SA 927 (A) at 983. In *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) 26, Botha JA refers to Wigmore *Evidence* 3rd ed vol 9 s 2425 as follows: '(...) When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.'

²⁰⁷⁹ As an evidentiary rule, the parol evidence rule follows the fundamental principle according to which irrelevant evidence is inadmissible. See Hutchison *et al Law of Contract* 258, Christie and Bradfield *Law of Contract* 201.

²⁰⁸⁰ *Stiglingh v Theron* 1907 TS 150 at 151. The parties can exclude extrinsic evidence in the case of a partly oral agreement by a non-variation clause.

²⁰⁸¹ *Dawson v Cape Times Ltd* 1926 CPD 144; *Rosettenville Moter Exchange v Grootenboer* 1956 (2) SA 624 (T); *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 408-409; *Slabbert, Verster & Malherbe (Bloemfontein) Bpk v De Wet* 1963 (1) SA 835 (O) at 839-840; *Sentrale Kunsmiss Korp (Edms) Bpk v Van Heerden* 1972 (2) SA 729 (W) at 733-734.

²⁰⁸² *Sentrale Kunsmiss Korp (Edms) Bpk v Van Heerden* 1972 (2) SA 729 (W).

²⁰⁸³ *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T).

²⁰⁸⁴ Christie and Bradfield *Law of Contract* 201.

²⁰⁸⁵ Hutchison *et al Law of Contract* 258 and 259.

²⁰⁸⁶ Christie and Bradfield *Law of Contract* 203, Hutchison *et al Law of Contract* 259. See, for example, *Joubert v Van Hees* 1908 TS 935 at 941-942.

oral agreements can be excluded by a non-variation clause which is binding in the absence of fraud.²⁰⁸⁷

The interpretational aspect of the parol evidence rule determines the evidence for the establishment of the meaning of the provisions of an agreement. In terms of the interpretation rule, evidence of matters outside the contract is irrelevant if the meaning of an agreement can be ascertained with sufficient certainty from the written words.²⁰⁸⁸ The interpretation of a contract normally requires a reference to extraneous facts. In order to draw a line, the courts traditionally distinguished between background and surrounding circumstances.²⁰⁸⁹ Background circumstances were admissible, and surrounding circumstances were admissible only in cases of ambiguity. This distinction between these two categories was blurred and seemed to hamper more than help though. It appeared that the definitions between background and surrounding circumstances varied.²⁰⁹⁰ Already, the approach in different stages was quite theoretical, which is why the courts did not apply it with 'military precision'.²⁰⁹¹ This is why the Supreme Court of Appeal suggested that the court would abandon this distinction as soon as it had an opportunity to do so.²⁰⁹²

Actually, in the last decade, there has been a development, and the courts no longer apply this distinction.²⁰⁹³ Instead, they allow all evidence in order to determine the meaning of a word or

²⁰⁸⁷ See discussion on non-variation clauses, ch 2 para 4.2 a).

²⁰⁸⁸ Hutchison *et al* *Law of Contract* 259.

²⁰⁸⁹ Hutchison *et al* *Law of Contract* 260.

²⁰⁹⁰ Smalberger JA, for instance, remarked in *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 (A) at 624H: 'Apparently, "background" circumstances are something different from "surrounding" circumstances.' Also Harms DP noted in *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) at para [39] that the terms 'background circumstances' and 'surrounding circumstances' are 'vague and confusing'. In *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454, Schreiner JA defined 'surrounding circumstances' as those that were 'probably present to the minds of the parties when they contracted'. In *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767-768, these were considered 'background circumstances', though. In *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at para [13], the aforementioned 'matters probably present to the minds of the parties when they contracted' were considered those matters of which the parties were *actually* aware (sic), rather than those of which they were only *probably* aware. In *Seven Eleven Corporation of South Africa (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA), background circumstances were regarded as 'facts known to all parties and that are not in contention'. 'Background circumstances' were defined in *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA) as those that explain the 'factual matrix' of the contract.

²⁰⁹¹ Christie and Bradfield *Law of Contract* 213. Christie puts it very figuratively by saying: 'The four steps of this technique (...) must not be paced out in succession with military precision, but must be danced with some pirouetting and an entrechat or two.'

²⁰⁹² *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA). Wallis 2010 SALJ 674-675.

²⁰⁹³ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165. See also *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Boerne v Harris* 1949 (1) SA 793 (A), *Johnston v Leal* 1980 (3) SA 927 (A).

phrase because the relevance of evidence cannot be determined before the end of a case, which defies the purpose of the parol evidence rule.²⁰⁹⁴ The distinction between background and surrounding circumstances could probably only survive so long, according to Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd*,²⁰⁹⁵ because trial courts widely ignored it.

The imprecise definition of background and surrounding circumstances made it difficult for a judge not to consider also extrinsic evidence, such as previous negotiations and correspondence between the parties, their subsequent conduct, or direct evidence of their own intentions.²⁰⁹⁶

The statement of Schreiner JA in *Delmas Milling Co Ltd v Du Plessis*²⁰⁹⁷ that surrounding circumstances specifically excluded 'actual negotiations and similar statements' is out of touch with reality. It is impossible for a party to give evidence of his or her negotiations with another party without indicating what he or she intended the negotiations to achieve.²⁰⁹⁸ The consideration of extrinsic evidence remains inadmissible to the extent that it would have been inadmissible under the regime that distinguished between background and surrounding circumstances though. This is mainly because of policy reasons. The parol evidence rule 'seeks to protect judges against intractable disputes of fact regarding subjective states of minds and the concomitant risks of fraud and perjury' that will be present if the parties were allowed to present extrinsic evidence freely. What is more, the unfettered permission of extrinsic evidence would lead to longer trials and higher costs.²⁰⁹⁹ However, often extrinsic documents, such as correspondence, are clear enough to read the parties' intentions, without digging in their respective state of mind at the time when the contract was concluded.²¹⁰⁰ What is more, the enquiry into the parties' subjective intentions is in keeping with one of the most fundamental

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, Wallis JA summarises the development as follows at para [12]: 'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. *The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'*. Accordingly it is no longer helpful to refer to the earlier approach'. In the summary, one can concisely read: '[I]nterpretation a unitary process commencing with the words and construing them in the light of all relevant circumstances – no distinction to be drawn between background and surrounding circumstances.' Emphasis added.

²⁰⁹⁴ *Hutchison et al Law of Contract* 260. In *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at para [2] and *Hangar and Others v Robertson* [2017] JOL 37735 SCA (6) it was decided that in interpreting a contract, a court must determine the intention of the parties as reflected by the terms of the contract.

²⁰⁹⁵ 2009 (4) SA 399 (SCA).

²⁰⁹⁶ *Hutchison et al Law of Contract* 261, *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767-768.

²⁰⁹⁷ 1955 (3) SA 447 (A).

²⁰⁹⁸ *Hutchison et al Law of Contract* 262.

²⁰⁹⁹ *Lubbe and Murray Contract* 463.

²¹⁰⁰ For the contrary view, see *Hutchison et al Law of Contract* 265.

rules of South African law of contract, namely that a contract is only concluded if there is consensus between the parties.²¹⁰¹

A party is able to circumvent the parol evidence rule by alleging a tacit term. These are terms which the parties neglected to include in their agreement even though they intended to do so, or terms that are so essential to the commercial viability of the agreement that they would have inserted the terms in question had they thought about them.²¹⁰² Terms that contradict the written content of a contract may not be proved. Whenever a party can allege a tacit term modifying a written term, all types of evidence that are excluded by the parol evidence rule are allowed though.²¹⁰³ Another possibility to circumvent the parol evidence rule is an application for rectification. Rectification is given where a party alleges that it had mistakenly inserted a term or failed to include one in a written contract.²¹⁰⁴ The litigant then must persuade the court that the agreement fails to reflect the parties' common intention because of error or mistake and must provide the court with a formulation that reflects this common intention. In these cases too, all evidence becomes admissible.²¹⁰⁵

b) Secondary rules of interpretation

Usually, rules of interpretation are classified in various canons of construction, i.e., guidelines or 'classical rules of interpretation'. These are not limited, and there is no special order in which a court has to apply them. An exception are the rules as mentioned earlier (ordinary grammatical meaning, textual and extra-textual context) which should be applied first when interpreting an agreement.²¹⁰⁶ If the primary rules of interpretation do not lead to a satisfactory result, the secondary rules of interpretation come into play. The *eiusdem generis rule* and the *noscitur ad sociis* rule belong to this category. They overlap though with the primary rule of interpretation that words must be interpreted in the context of the agreement in question as a whole. Other rules belonging to the secondary rules state, e.g., that where a contract consists partly of print and partly of inserted typed or handwritten words which are not consistent with the printed text, the written or typed insertions prevail as the written insertions are more likely to reflect the parties' intentions. The operative part of an agreement, provided it is sufficiently clear, prevails over the preamble, which also can be used to clarify the terms of a contract. The

²¹⁰¹ Hutchison *et al* *Law of Contract* 273.

²¹⁰² Hutchison *et al* *Law of Contract* 265.

²¹⁰³ Hutchison *et al* *Law of Contract* 265.

²¹⁰⁴ See, for example, *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 70F-G.

²¹⁰⁵ Hutchison *et al* *Law of Contract* 266.

²¹⁰⁶ Hutchison *et al* *Law of Contract* 267.

ut res magis valeat quam pereat rule provides that where a term is ambiguous, it should be given a meaning which would make it effective rather than one that makes it legally ineffective.²¹⁰⁷ The rule that it can be assumed that the parties to a contract intended their agreement to be legal rather than illegal is similar to the last-mentioned rule.²¹⁰⁸ When a term is so ambiguous that it may be interpreted as being either constitutional or unconstitutional, one should favour an interpretation that considers the term as constitutional.²¹⁰⁹ Where a fair result must be achieved when interpreting a contract, the principle that contracts are governed by *bona fides* is applied, and the parties' intention is determined on the basis that they negotiated in good faith.²¹¹⁰

c) Tertiary rules of interpretation

Finally, tertiary rules of interpretation apply as a last resort. These maxims do not attempt to find the actual or presumed intention of the parties but aim to provide a fair outcome.²¹¹¹ The *contra proferentem* and the *quod minimum* rules belong to this category. The *contra proferentem* rule states that ambiguous terms of an agreement must be interpreted against the party who proposed them.²¹¹² In contrast, the *quod minimum* rule provides that words which are capable of more than one meaning must be narrowly interpreted in order to encumber the debtor or promisor as little as possible.²¹¹³

A term may however not be construed *contra proferentem* if it is clear and unambiguous. In the event where a term, e.g., an exemption clause, is ambiguous, the courts will seek to minimise its effect. This is done by reducing its scope or the exempted legal grounds for responsibility for the damaged caused.²¹¹⁴ In any event, the court must not adopt a strained or forced meaning in order to import some kind of ambiguity into a provision.²¹¹⁵ Where a clause is unambiguous, the court must give effect to it, even if the consequences are harsh,²¹¹⁶ save

²¹⁰⁷ Hutchison *et al* *Law of Contract* 267.

²¹⁰⁸ See, for instance, *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 429-430.

²¹⁰⁹ Hutchison *et al* *Law of Contract* 268.

²¹¹⁰ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340I.

²¹¹¹ Van der Merwe *et al* *Contract General Principles* 304.

²¹¹² Hutchison *et al* *Law of Contract* 268. This will be often an insurance company or a public utility. See *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38E. In *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA), for example, the court interpreted the term 'driving' narrowly, stating that although the terms and conditions of the adventure tour company expressly excluded Drifter's liability from time of departure to time of return, due to the nature of tours offered by the company (adventure tours), this exclusion could hardly cover driving on a public road, but rather in 'exciting terrain' (at 88J-89A).

²¹¹³ Hutchison *et al* *Law of Contract* 268.

²¹¹⁴ *ER24 Holdings v Smith* 2007 (6) SA 147 (SCA).

²¹¹⁵ *Walker v Redhouse* 2007 (3) SA 514 (SCA).

²¹¹⁶ Hutchison *et al* *Law of Contract* 271. In *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA), the court ruled that the exemption clause by which the appellant was 'absolutely unable to accept liability

where the 'provision is so gratuitously harsh and oppressive that public policy could not tolerate it.'²¹¹⁷

What is more, if the court cannot find the true meaning of the contract, it will declare it void for vagueness.²¹¹⁸

By and large, the South African approach to contractual construction seems to move from a more objective stance (parol evidence rule) to a more subjective perspective (the parties' intention). Evidence that formerly was considered surrounding circumstances first moved to the category of background circumstances, which means that they became always admissible, and not only in exceptional cases.²¹¹⁹ What is more, the category of surrounding circumstances now also includes evidence of negotiations. The somewhat artificial distinction between surrounding and background circumstances became more and more blurred. As a result, the courts now admit extra-textual context in order to assess the parties' intention. Thus, it can be said that the rules of interpretation of contracts are slowly being aligned with one of the most fundamental rules of the law of contract which is that the basis of an agreement is the meeting of the parties' minds.²¹²⁰

4.2 The approach of the Act

Naudé is of the view that interpretational control takes place after content control.²¹²¹ She suggests that '[o]nce contract terms pass this additional hurdle [of content control], rules on interpretation would cause terms to be interpreted against the party on whose behalf they were drafted'. It is arguable though if the reverse approach in which interpretational control takes place before content control would not be more efficient.

Before assessing whether a clause in a standard contract bears up against the catalogue of forbidden or 'sensitive' clauses in terms of section 51, regulation 44, or the general clause of

or responsibility for injury or damage of any nature whatsoever (...) suffered by any person who enters the premises and/or uses the amenities provided', was not unambiguous, and that an interpretation of the phrase 'to accept liability' in the sense of 'not to admit' liability' was 'far-fetched'. Therefore, according to the court, the exemption clause in question was valid. This stance was confirmed in more recent cases: *First National Bank of South Africa Ltd v Rosenblum* 2001 (4) SA 189 (SCA); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA); *Walker v Redhouse* 2007 (3) SA 514 (SCA); *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA); *Viv's Tippers (Edms) Bpk v Pha Pharma Staff Services (Edms) Bpk h/a Pha Pharma Security* 2010 (4) SA 455 (SCA) at 462-463; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

²¹¹⁷ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 286F-G; *Swinsburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD) at 312 (*obiter*).

²¹¹⁸ Christie and Bradfield *Law of Contract* 227, Hutchison *et al Law of Contract* 269.

²¹¹⁹ Hutchison *et al Law of Contract* 272.

²¹²⁰ Hutchison *et al Law of Contract* 273.

²¹²¹ Naudé 2009 *SALJ* 506

section 48, it is reasonable to ascertain its actual meaning first. If this order is reversed, one risks either to undertake a lengthy discussion on whether or not a clause is unfair, before even knowing exactly its meaning. In most cases, the interpretation will cause no particular problems because many clauses are unambiguously formulated. Although standard terms are generally sophisticated provisions that have been drafted by experts, formulations contained therein might be unclear or ambiguous, or the contract concluded on the basis of standard business terms is incomplete.²¹²² However, apparently unambiguous declarations must be interpreted too by considering all surrounding circumstances (i.e., the context). If A sells '100 pianos' to B, and from the negotiations one can conclude that A and B deal with weapons which they name after music instruments for confidentiality reasons (whereby 'pianos' stand for 'machine guns'), the seemingly 'unambiguous' declaration of '100 pianos' must be interpreted as '100 machine guns'.²¹²³ In these cases, the performance of content control before the enquiry of the meaning of the clause would make no sense and would even be absurd in the earlier mentioned machine-guns example.

Furthermore, it is recommended that the interpretation of a term and the control of its contents have to be strictly separated so that one is not undertaken within the other. This approach is 'economic' because it saves unnecessary and unstructured arguments. In other words, the interpretation control 'prepares' the content control.²¹²⁴ This is also the approach of the German legislator who was in favour of an 'open content control'. 'Open content control' means that the reasons of the inadequacy of standard terms must be unfolded within the content control, and not 'concealed' within the interpretational control, which then would serve as a 'correction' of standard terms.²¹²⁵ For the reasons mentioned above, Naudé's view with regard to the respective order of the content and interpretational controls has to be rejected.

As consumer agreements are mostly drafted by or on behalf of the supplier, it is not very likely that the provisions contained therein will be in favour of the consumer in terms of fairness.²¹²⁶ Section 4(4) provides that '[t]o the extent consistent with advancing the purposes and policies of t[he] Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by t[he] Act to be produced by a supplier, *to the benefit of the consumer* (a) so that any ambiguity that allows for more than

²¹²² Stoffels *AGB-Recht* 131.

²¹²³ Example from Brox and Walker *BGB-AT* 61.

²¹²⁴ See Stoffels *AGB-Recht* 131. See also BGH *NJW* 1999, 1108; 1633 (1634).

²¹²⁵ BGH *NJW* 1999, 1633 (1634).

²¹²⁶ Van Eeden and Barnard *Consumer Protection Law* 40 and 41.

one reasonable interpretation of a part of such a document is resolved *to the benefit of the consumer*, and (b) so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to (i) the content of the document, (ii) the manner and form in which the document was prepared and presented, and (iii) the circumstances of the transaction or agreement.'²¹²⁷

Although section 4 provides that 'any standard form, contract or other document' must be interpreted in the manner set out in this section, it is submitted that the Tribunal or court has to construe the individual clauses of the given agreement rather than the contract as a whole. This must be done against the backdrop of the entire contract, its object and the interaction between individual clauses. Section 4 expresses this indirectly by the formulations 'interpretation of a part of such a document' (subsection (a)) and 'any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document' (subsection (b)). The latter can only be set out in individual clauses, and not in an agreement as a whole.²¹²⁸

Section 4(4)(a) must be read in the light of the *contra proferentem* rule. According to this rule, contractual provisions, if capable of more than one meaning, must be interpreted against the party who proposed them.²¹²⁹ The rationale of this rule is that the party who formulated or imposed the rule should suffer from an adverse construction as it had the opportunity to articulate the terms clearly.²¹³⁰ The same rationale can be found in the *quod minimum* rule in terms of which ambiguous words must be interpreted narrowly, to encumber the debtor or promisor (i.e., the consumer) as little as possible.²¹³¹ These rules normally serve as a last resort,²¹³² since they do not take into consideration the parties' actual intentions. In standard

²¹²⁷ Emphasis added.

²¹²⁸ In the BGB, this is expressed in the heading of § 305c 'Surprising and ambiguous clauses'.

²¹²⁹ Hutchison *et al* *Law of Contract* 268.

²¹³⁰ Hutchison *et al* *Law of Contract* 268, De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17. This is often the case, e.g., with insurance companies or public utilities. As to insurance companies, see *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38E. A good example where the Supreme Court of Appeal applied the *contra proferentem* rule is *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA). In this case, the court held that the term 'driving' in the terms and conditions of a tour operator where any liability in connection with a loss experienced was excluded 'due to the nature of hiking (...), driving and the general third-world conditions on our tour/ventures', must be interpreted narrowly. The court held (at 88J-89A) that the condition quoted above was not intended to cover liability for negligent driving on a public road, but was rather aimed at indemnifying the company for the kind of risks encountered in off-road driving in 'exciting terrain'.

²¹³¹ Hutchison *et al* *Law of Contract* 268.

²¹³² According to the ordinary classification of interpretational rules, these rules are tertiary rules of interpretation 'which are applied as a last resort, without any pretence at attempting to find the real intention of the parties'. See Van der Merwe *et al* *Contract General Principles* (2007) 304.

form contracts, this consideration is irrelevant because the clauses included in such agreements are rarely negotiated or even read by the consumer.²¹³³

The same approach is applied in the so-called 'rule of ambiguity' of § 305c(2) BGB, according to which any doubts in the interpretation of standard business terms are resolved against the user (supplier).²¹³⁴ If the content of a clause cannot be clearly determined, the supplier bears the risk. This means that the supplier has the responsibility for the content of its standard terms.²¹³⁵ § 305c(2) sets out an interpretational rule which prepares the content control, but which cannot serve as a standard for the content control.²¹³⁶

German courts tend to restrict the application of the ambiguity rule of § 305c(2) as otherwise too many problematic clauses would already be mitigated at this stage in favour of the consumer, without the possibility to assess their adverse effect within the content control.²¹³⁷ Therefore, a cautious application of this rule is advised.²¹³⁸ Hence, the courts apply § 305c(2) only where despite the application of all other interpretational methods an irremovable doubt still remains, and where at least two legally justifiable interpretational possibilities persist.²¹³⁹ The South African legislator rightly expressed this idea in section 4(4)(a) in that 'any ambiguity that allows for *more than one reasonable interpretation* (...) is resolved to the benefit of the consumer.'²¹⁴⁰

Section 4(4)(b) goes even beyond the usual scope of the *contra proferentem* maxim in that a standard form, contract or document must be interpreted to the benefit of the consumer and that this interpretation must be effected so that any restriction of the consumer's rights contained in such document 'is limited to the extent that a reasonable person would ordinarily contemplate or expect'. This obviously applies to unexpected or surprising terms. According to this provision, such unexpected terms could thus be construed as *pro non scripto*. De Stadler argues that there is no need for the application of such an interpretative rule because sections 48 and 51 as well as regulation 44(3) already provide for a sufficient fairness standard.²¹⁴¹ The

²¹³³ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17.

²¹³⁴ This provision corresponds to art 5 2nd sent. of the Unfair Terms Directive.

²¹³⁵ Stoffels *AGB-Recht* 136.

²¹³⁶ Report of the Law Commission BT-Drs. 7/5422 at 5, Roth *WM* 1991, 2086. Therefore, the BGH wrongly states in BGH *NJW* 1985, 53 that a certain clause 'infringes' § 305c(2).

²¹³⁷ This problem had already been seen by Raiser (*Recht der allgemeinen Geschäftsbedingungen* at 264 *et seq*) and later by the government in BT-Drs. 7/3919 at 15 and 60.

²¹³⁸ Stein *AGBG* § 5 para 14.

²¹³⁹ BGH *NJW-RR* 1995, 1303 (1304), BGH *NJW* 1997, 3434 (3435); 2002, 3232 (3233); 2007, 504 (506), BAG *NZA* 2006, 923 (926). See also Palandt/*Heinrichs* § 305c para 18.

²¹⁴⁰ Emphasis added.

²¹⁴¹ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

introduction of paragraph (b) would therefore unnecessarily complicate the fairness enquiry and make it difficult for suppliers, but also for consumers and lawyers, to predict whether a term complies with the Act. Instead, unexpected limitations of rights should be treated as unfair.²¹⁴² With regard to the aforementioned suggestion that interpretational and content control must strictly be separated, and that interpretational control must be undertaken before content control, De Stadler's argument demonstrates that only where both 'controls' are intermingled, unnecessary complications arise.

Section 4(4)(b)(i) to (iii) contains three factors which have to be considered when determining whether a reasonable person would ordinarily expect to find the limitation of rights contained in a particular document. These are (i) the content of the document, (ii) the manner and form in which the document was prepared and presented, and (iii) the circumstances of the transaction or agreement. De Stadler maintains that not only this provision creates problems with regard to its construction, but also that it is disputable whether a document which fulfils the fairness standard under sections 48 *et seq.* can still restrict the consumer's rights in a fashion that a reasonable person would ordinarily not expect.²¹⁴³ For De Stadler it is hence conceivable that section 4(4)(b) serves as a last resort and operates to the consumer's benefit. For suppliers, however, it would be challenging to know exactly how to comply with the Act.²¹⁴⁴ De Stadler's arguments are based on the assumption that standard agreements or their clauses must be interpreted after having assessed whether their content is fair. It is my submission though that section 4(4)(b) is a reference to the classical approach and the primary rules of interpretation. The fact that the court must take into account the content of the given document, the manner and form in which it was prepared and the circumstances of the agreement merely refers to the textual context of the agreement and extra-textual elements, such as the background circumstances. In this sense, section 4(4)(b) is a reminder that the interpretation of standard terms is no free-floating and unstructured enterprise but a principled approach.

It is furthermore submitted that section 4(4)(b) introduces a different standard of consumer protection. At first sight, it is not clear what a 'reasonable person' means and what this person 'would ordinarily contemplate or expect'. It is suggested that a reasonable person in terms of this provision cannot be a vulnerable consumer under section 3(1)(b) as those persons are often inexperienced and do not know what to expect or not to expect in a standard form contract

²¹⁴² Hutchison *et al* *Law of Contract* 453.

²¹⁴³ De Stadler asserts that such situations are imaginable, without further substantiating. See De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 19.

²¹⁴⁴ See De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 19.

(which is precisely the reason why the Act aims to protect them). For the determination of a person's reasonableness, a more objective standard should thus be applied, such as a bystander or an average consumer.

Also in German law, such an approach is applied. When interpreting standard terms, not the recipient's (individual consumer's) standpoint is relevant, i.e., how he or she had to interpret a clause. Instead, the standpoint of an average customer without legal knowledge, having due regard to the relevant public that is usually concerned with these provisions, is considered.²¹⁴⁵ This means that the interpretation does not take into account the circumstances of an individual case or the individual understanding of a party.²¹⁴⁶ Therefore, the BGH decided that the standard terms of an investment company must be interpreted in the same way for both inexperienced and shrewd investors.²¹⁴⁷

Unlike sections 48 and 49 which only consider the parties involved, section 4(4)(b) therefore widens the perspective in terms of what a *reasonable* person can or cannot expect. In spite of this fact, it would go too far to qualify this approach as abstract-universal where the circumstances of the parties involved in a particular transaction are not taken into account, but rather the transactions of the type and classes of the participants.²¹⁴⁸ After all, the circumstances of the agreement or transaction as well as the manner and form in which the document was presented have to be considered under section 4(4)(b). For example, if it is not clear if the price in a contract of sale expressed in 'Dollars' means U.S.-American, Australian or Canadian Dollars, and the seller acquired the items in Canada, one can conclude that the stipulated price is expressed in Canadian Dollars.²¹⁴⁹

There are good reasons for the modification of the interpretational standard for standard contracts. The use of pre-formulated clauses is characterised by the lack of individual particularities as they serve for a significant number of customers.²¹⁵⁰ In addition, the rationalising effect of standard terms would be jeopardised if suppliers had to fear that their

²¹⁴⁵ BGH *NJW* 2002, 285 (286); 2007, 504 (505); 2008, 2172 (2173).

²¹⁴⁶ BGHZ 33, 216 (218); 84, 268 (272), BGH *NJW* 1992, 2629; 2001, 2165 (2166), BAG *NZA* 2006, 324 (327), UBH/*Ulmer and Schäfer* § 305c para 73 *et seq*, Roth *WM* 1991, 2126.

²¹⁴⁷ BGH *NJW* 1980, 1947.

²¹⁴⁸ BGHZ 22, 91 (98); 17, 1 (3).

²¹⁴⁹ Example from Brox and Walker *BGB-AT* 60.

²¹⁵⁰ Roth *WM* 1991, 2126.

terms and conditions would not be applied in a unified manner because of differing interpretations.²¹⁵¹

5. Conclusion

Section 2 constitutes the pivotal provision for the interpretation of the Act and promotes a purposive approach which aims to give effect to the purposes of the Act. Contrary to the classical approach of construction (of statutes and contracts), purposive interpretation is more flexible and starts with the search of the legislator's intention by taking into consideration extrinsic factors. Only where a statute's language is sufficiently explicit, there is no need for this approach, although it should not be lost out of sight. The Act's ultimate purpose is the consumer's protection. Even though the consumer is the weaker party, the supplier's and its counterpart's interests are not always competing. If the interpretational result would lead to higher prices and ultimately market failure, this would go against the spirit of the Act. This is why section 4(2)(b)(i) provides that the courts must promote not only the purposes of the Act but also its spirit.

Despite some inconsistencies, the definitions contained in section 1 and elsewhere in the Act offer a valuable tool for the interpretation of the Act.

Section 2(2) provides for an original approach by which foreign and international law may be considered with regard to interpretation. Such an undertaking has to be carried out very carefully as foreign law has been enacted in a specific context which cannot always be transposed into South Africa's socio-economic pattern. It can be beneficial to 'tap' into foreign sources though, especially when considering that South Africa does not have much experience with consumer protection matters. EU law and the rulings of the ECJ are also to be considered international law in terms of the Act. On the other hand, former foreign law does not reflect the current standard of consumer protection legislation and should thus not be considered 'appropriate' under section 2(2). The same rationale is expressed in section 2(2)(c) for domestic decisions.

The cross-implementation of the decisions of ombuds and arbitrators under section 2(2)(c) raises concern because of the lacking hierarchy between these bodies and possible contradictory results. The *stare decisis* principle is not directly compromised though since the

²¹⁵¹ UBH/Ulmer and Schäfer § 306c para 75.

lower courts will not apply decisions of arbitrators and ombuds that contradict precedence. Where a specific matter has not been decided yet by a court of justice, there is however no reason for a court not to adopt decisions of other decision-making bodies.

Section 2(8) deals with conflicts between Chapter 5 of the Act and other statutes. In this context, the Act introduces the term 'hazardous chemical products'. However, the legislator did not intend to distinguish these products from 'hazardous chemical substances' (HCS), the commonly used legislative term. With regard to section 2(9)(b), it seems that in the case of hazardous chemical products, only the provisions of the Act relating to consumer redress apply, and not the alternative provisions, even if they offer better protection.

Section 2(10) is a 'saving clause' providing that consumers are not precluded from exercising any common law rights. This provision must be read with section 69(d). It is submitted that a consumer can directly access an ordinary court, and need not exhaust all other remedies first. Besides, only ordinary courts can award damages, and small-claims courts are less expensive. The wording of section 69(d) seems to be an unintended consequence of the legislator's objective to ensure a quick, effective and efficient access to redress.

Section 2 also contains some miscellaneous provisions for (electronic) signatures. The provisions of the ECTA have to be considered to this effect. The courts have developed a long line of jurisprudence as to when a signature is valid, e.g., in combination with a rubber stamp. Subsection (6) deals with the calculation of time periods measured in business days.

The classical approach of interpretation of contracts aims to seek the parties' common intention. In this context, the grammatical and ordinary meaning of the words, the given textual context and eventually extra-textual elements, such as the background circumstances, had to be taken into account (primary rules of interpretation). The latter are curtailed by the parol evidence rule, which does not apply in specific instances though (e.g., fraud). Nonetheless, the courts do not apply the former distinction between permissible background and surrounding circumstances anymore, and interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. If the primary rules of interpretation lead to no satisfactory result, the secondary rules apply, such as the *eiusdem generis* or the *noscitur ad sociis* rules. The tertiary rules of interpretation serve as a last resort since their objective is not to seek the parties' actual or presumed intention but a fair outcome. The *contra proferentem* and the *quod minimum* rules belong to this category. Finally, if a court cannot find the true meaning of an agreement, it will declare the contract void for vagueness.

When interpreting standard clauses, the interpretational control should take place before the content control. This is a more economic approach and has the advantage that the actual fairness enquiry takes place within the content control and that the interpretational control serves as a 'correction' of standard terms. Both controls thus have to be strictly separated and executed in the previously mentioned order. This is also the approach of the German legislator.

Consumers are often faced with situations where they have no real choice because the suppliers' standard terms widely replace any negotiation. As these documents are likely to be drafted by the supplier, they must be interpreted to the benefit of the consumer (section 4(4)). What is more, any limitation, restriction, exclusion or deprivation of a consumer's legal rights contained therein is only valid if a reasonable person would ordinarily expect such a term, considering the content of the document, the manner and form in which it was presented and the circumstances of the transaction. The ambiguity rule of section 4(4)(a) corresponds to § 305c(2) BGB. German courts restrict its application though in order to ensure that not too many problematic clauses are mitigated in the interpretational control.

According to De Stadler, sections 48 and 51 as well as regulation 44(3) already provide for a sufficient fairness standard, so that section 4(4)(b) unnecessarily diffuses this standard. Hence, unexpected limitations of rights should be treated as unfair. This view cannot be supported though if the interpretational control takes place before the content control and both are strictly separated. In addition, the standard of section 4(4)(b) begs the question, according to De Stadler, if a document which is fair under sections 48 *et seq.* can still represent a restriction of consumer rights that a reasonable person would ordinarily not expect. She argues that in such a case, section 4(4)(b) could be to the benefit of the consumer, which makes it unpredictable for suppliers to know exactly how to comply with the Act. Here again, this problem does not arise if the interpretational control and the content control are carried out in the above-mentioned order.

Section 4(4)(b) introduces a different standard of consumer protection. A 'reasonable person' in terms of this provision means that an objective standard should be applied, such as a bystander or an average consumer. In contrast, sections 48 and 49 consider the parties involved. The objectivation has the advantage that the rationalisation effect of standard terms is not jeopardised because they are interpreted in a unified manner.

CHAPTER 5 - ENFORCEMENT OF CONSUMER RIGHTS

1. Introduction

Consumer protection is only efficient if an efficient system of redress exists as otherwise the objectives of the legislation are defeated.²¹⁵² Ideally, and especially in the South African socio-economic context, such a system should be cost-efficient and speedy because litigation is generally costly, complex and time-consuming.²¹⁵³ Thus, it is not sufficient to provide for the protection of vulnerable consumers, but consumers should also be empowered.²¹⁵⁴ The empowerment of consumers is essential to society because informed and empowered consumers are a powerful social and economic force in that they can improve their overall standard of living and drive innovation in industries.²¹⁵⁵ Before the Act came into being, consumer protection was provided for by the common law as well as some industry-specific legislation. The Consumer Affairs (Unfair Business Practices) Act²¹⁵⁶ was such an industry-specific piece of legislation. It had some major disadvantages, however. It did, for instance, not contain a list of practices that could be considered unfair.²¹⁵⁷ What is more, the Consumer Affairs Committee²¹⁵⁸ had no power to order redress²¹⁵⁹ so that the resolution of consumer transactions under that statute was more or less left to the common law, the courts and various self-regulatory regimes.²¹⁶⁰ Once a business practice was declared prohibited, it was primarily left to the South African Police Services and the Public Prosecutor to finalise the case.²¹⁶¹ This

²¹⁵² Mupangavanhu 2012 *PELJ* 321, *Draft Green Paper on the Consumer Policy Framework* 2004 at 37, published in GenN 1957 in *GG* 26774 of 9 September 2004.

²¹⁵³ Paleker 2003 *ADR Bulletin* 48, Melville 2010 *SA Merc LJ* 55.

²¹⁵⁴ Du Preez 2009 *TSAR* 63.

²¹⁵⁵ Law Reform Commission of Ireland 2008 at <https://www.lawreform.ie>.

²¹⁵⁶ The former title of the Act was Harmful Business Practices Act 71 of 1988. This Act was renamed and certain of its provisions were amended by the Harmful Business Practices Amendment Act 23 of 1999.

²¹⁵⁷ Woker 2001 *SA Merc LJ* 316.

²¹⁵⁸ The Committee had the function to investigate business practices. It reported to the Minister of Trade and Industry and made recommendation to the Minister if it found certain business practices to be unfair. If the Minister accepted the Committees recommendations, a notice was published in the Government Gazette by which the business practice was declared unfair and the business directed to refrain from applying the unfair practices in question. Non-compliance was an offence. The problem of this Act was that it aimed to protect consumers not only from unlawful business practices but also from lawful yet unfair or harmful practices that lead to complaints by the suppliers who asserted that this piece of legislation violated their constitutional rights of freedom of trade, occupation and profession granted by s 22 of the Constitution. See Woker 2001 *SA Merc LJ* 316.

²¹⁵⁹ Woker 2010 *Obiter* 220.

²¹⁶⁰ Van Eeden and Barnard *Consumer Protection Law* 402.

²¹⁶¹ *Draft Green Paper on the Consumer Policy Framework* 2004 at 38, published in GenN 1957 in *GG* 26774 of 9 September 2004.

piece of legislation mainly dealt with market practices but not with unfairness in contracts, the sale of goods and services or product liability.²¹⁶²

Provincial legislation partly regulated consumer affairs by pieces of legislation that were based on the previously mentioned statute. Currently, all provinces have Provincial Consumer Affairs Offices.²¹⁶³ Not all provinces have provincial consumer courts though, which is why also various industry regulators attempted to provide measures of consumer protection. This disjointed and uncoordinated approach not only hampered access to justice for many consumers, but the statutes regulating consumer protection also were often unknown to consumers and suppliers alike.²¹⁶⁴

The Consumer Protection Act has repealed many of these fragmented pieces of legislation²¹⁶⁵ and aims to provide for consumer protection by one comprehensive piece of legislation. Its purpose is, *inter alia*, to achieve an accessible, transparent and efficient redress for consumers.²¹⁶⁶ As the Act does not abolish the provincial consumer protection, it operates in tandem with it as overarching national consumer protection legislation. Besides, the legislator encourages alternative dispute resolution procedures and self-regulatory activities.²¹⁶⁷ These mechanisms are expressly regulated in the Act, *inter alia* by industry codes of conduct²¹⁶⁸ and the accreditation of industry ombuds.²¹⁶⁹

Providing for various fora has indisputable advantages since the most appropriate dispute resolution mechanism depends on the circumstances of the particular complaint, such as the value of the claim, its level of complexity, the time, money and effort the consumer or supplier is willing to spend.²¹⁷⁰ It is important though that these different fora do not work in isolation and in an uncoordinated manner as it was the case before the Act became effective. Their roles must thus be clearly spelt out, and the already existing and new fora have to be streamlined²¹⁷¹ in order to avoid unnecessary confusions, duplications and ineffective mechanisms. Especially

²¹⁶² Van Eeden and Barnard *Consumer Protection Law* 402.

²¹⁶³ These were set up pursuant to Schedule 4 of the Constitution.

²¹⁶⁴ Woker 2010 *Obiter* 219.

²¹⁶⁵ See s 121 for the list of the repealed and amended laws.

²¹⁶⁶ See Preamble of the CPA.

²¹⁶⁷ Van Eeden and Barnard *Consumer Protection Law* 403.

²¹⁶⁸ Sections 82 and 93.

²¹⁶⁹ Section 82(6).

²¹⁷⁰ Centre for European Economic Law 2007 Final report: 'An analysis and evaluation of alternative means of consumer redress other than redress through judicial proceedings' (Study for the European Commission) at ec.europa.eu/consumers/archive/redress/reports.../comparative_report_en.pdf (last retrieved on 28 October 2019).

²¹⁷¹ See *Draft Green Paper on the Consumer Policy Framework* 2004 at 39, published in GenN 1957 in GG 26774 of 9 September 2004.

consumers who live in remote areas are disadvantaged where redress fora are far away. This is why accessibility, not only in terms of costs but also in terms of geography, is crucial.

One of the Act's aims is to reform the fragmented institutional framework with numerous regulators and responsible government departments.²¹⁷² In addition, the former framework was under-resourced, by and large ineffective and had limited capacity as regards expertise and staff.²¹⁷³

The present chapter will therefore not only present the now existing framework but also evaluate its efficiency and accessibility. A comprehensive presentation and discussion of all entities involved in consumer redress would be beyond the scope of this thesis. It is nonetheless unavoidable to discuss some issues in detail in order to understand the complex interactions within the redress mechanism.

After discussing the *locus standi* provisions of the Act, the various entities and the redress mechanisms will be analysed critically in order to evaluate whether they are apt to achieve the legislator's purposes set out in the Act.

2. Persons with *locus standi*

Section 4(1) enumerates the persons who are entitled to approach a court, the Tribunal or the Commission alleging that a consumer's rights under the Act have been infringed, impaired or threatened, or that prohibited conduct²¹⁷⁴ has occurred or is occurring. The Act sets out extensive *locus standi* provisions and therefore enhances access to redress, especially for low-income persons since class actions facilitate their access to redress in terms of affordability.²¹⁷⁵ The extensive *locus standi* provisions in section 4(1) are in line with the purpose of the Act in that section 3(1)(h) provides 'for an accessible, consistent, harmonised, effective and efficient system of redress for consumers'.²¹⁷⁶ Furthermore, '[c]lass actions are to the benefit of the individual consumers who do not have the ability or financial means to institute action against a supplier'.²¹⁷⁷ Jacobs, Stoop and Van Niekerk argue that class actions may have significant and adverse implications for suppliers in terms of their finances and public image. Hence,

²¹⁷² Draft Green Paper on the Consumer Policy Framework 2004 at 37, published in GenN 1957 in GG 26774 of 9 September 2004.

²¹⁷³ Draft Green Paper on the Consumer Policy Framework 2004 at 38, published in GenN 1957 in GG 26774 of 9 September 2004

²¹⁷⁴ See definition of 'prohibited conduct' in s 1.

²¹⁷⁵ Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 4.

²¹⁷⁶ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

²¹⁷⁷ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 306.

suppliers should have sufficient insurance.²¹⁷⁸ Van Eeden correctly maintains, by referring to *Eskom Holdings Limited v Halstead-Cleak*,²¹⁷⁹ that the persons on whose behalf a person mentioned in section 4(1) as being entitled to approach the given entities must be a consumer.²¹⁸⁰

Obviously, a person acting on his or her own behalf, or a person who is authorised to act on behalf of a consumer who is not able to act for him- or herself (a minor, a trust or a juristic person), have *locus standi*.²¹⁸¹

In addition, section 4(1)(c) provides for the standing of a member or representative of a class of affected persons. Class actions are typically used in order to recover claims *vis-à-vis* few defendants but numerous plaintiffs having similar claims against the defendants.²¹⁸² Although the members of the given class are not parties in the formal sense, the judgment is binding on all class members, even those who are not parties to the litigation. Members who are not a party to the action can institute a plea of *res judicata* in order to assert their rights.²¹⁸³ Class actions serve procedural economy as they protect the courts from having to rule on numerous claims referring to the same cause of action,²¹⁸⁴ and facilitate access to the courts, especially by people living in remote areas.²¹⁸⁵

Unlike section 38(c) of the Constitution, which provides standing regarding infringements of rights set out in the Bill of Rights,²¹⁸⁶ section 4(1) focuses on the infringement of consumer rights. Regardless of the different views of various authorities of whether section 38 of the Constitution introduces a general class action or only a class action that is restricted to constitutional issues,²¹⁸⁷ Wallis JA held that it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate

²¹⁷⁸ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 306. See also De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

²¹⁷⁹ *Eskom Holdings Limited v Halstead-Cleak* [2017] JOL 37573 (SCA).

²¹⁸⁰ Van Eeden and Barnard *Consumer Protection Law* 416.

²¹⁸¹ Section 4(1)(a) and (b).

²¹⁸² Van Eeden and Barnard *Consumer Protection Law* 532, with further references.

²¹⁸³ *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* 2008 (2) SA 592 (C) at paras [16] and [17].

²¹⁸⁴ *Nkala and Others v Harmony Gold Mining Company Ltd and Others (Treatment Action Campaign NPC and Another as Amici Curiae)* [2016] 3 All SA 233 (GJ) at para [98].

²¹⁸⁵ *Nkala and Others v Harmony Gold Mining Company Ltd and Others (Treatment Action Campaign NPC and Another as Amici Curiae)* [2016] 3 All SA 233 (GJ).

²¹⁸⁶ Prior to the Constitution, class actions were unknown in South Africa. Class actions are now also possible in terms of s 4(1)(c) CPA, 157(1) of the Companies Act 71 of 2008 and s 32 of the National Environmental Management Act 107 of 1998.

²¹⁸⁷ See Kok 2003 *THRHR* 158, Hurter 2008 *De Jure* 293, Van Eeden and Barnard *Consumer Protection Law* 535.

circumstances, merely because of the claimant's inability to identify the infringement of a right protected under the Bill of Rights.²¹⁸⁸ In any event, it raises some concern that there are no procedural provisions for class actions, neither in the Constitution nor in the Act, despite the introduction of class actions in both pieces of legislation. Even though the legislator, which recognised the need for legislation in this field, produced a report in 1998 and included a draft bill,²¹⁸⁹ the latter has not yet been promulgated.²¹⁹⁰ Therefore, one has to rely on the courts for now to fill this void.²¹⁹¹ In various cases, the courts have somehow addressed this issue and tried to resolve it by underscoring that courts have an inherent power to protect and regulate their own process.²¹⁹² In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*,²¹⁹³ the court formulated a procedure for class actions in terms of infringements of a right in the Bill of Rights²¹⁹⁴ by referring to *Firststrand Bank Limited v Chaucer Publications (Pty) Limited*.²¹⁹⁵ It stated that the following procedural aspects must be considered in order to institute a class action:²¹⁹⁶

- (a) Leave must be sought from the High Court to embark on a representative basis prior to actually institute a class action;
- (b) The determination of a common interest sufficient to justify a class action takes place before the institution of the proceedings;
- (c) The representing party must give sufficient notice to all the affected parties so that they may associate or dissociate themselves from the proposed litigation.

In *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others*,²¹⁹⁷ a case that dealt with damages suffered by consumers as a result of price-fixing by bread producers, the Supreme Court of Appeal held that class actions should not be limited to

²¹⁸⁸ *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* 2008 (2) SA 592 (C) at para [21].

²¹⁸⁹ Public Interest and Class Actions Bill.

²¹⁹⁰ SALRC *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88) (1998).

²¹⁹¹ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 4. According to de Vos, for the sake of uniformity and legal certainty, the procedure of class actions should be established through legislation and not by the courts. He is of the view that judge-made procedural law in terms of class actions is not the appropriate way forward, and that South Africa is lagging dismally behind other jurisdictions in this field. See De Vos 2012 TSAR 755 and 756.

²¹⁹² See s 173 of the Constitution.

²¹⁹³ 2001 (4) SA 1184 (SCA).

²¹⁹⁴ In doing so, the SCA drew, *inter alia*, from **Federal Rule 23(a) of the American Federal Rules of Civil Procedure** which provides for the following prerequisites for a class action: '(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defences or the representative parties are typical of the claims or defences of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.'

²¹⁹⁵ 2008 (2) SA 592 (C).

²¹⁹⁶ At para [26].

²¹⁹⁷ 2013 (2) SA 213 (SCA) - hereafter *Children's Resource Centre Trust*.

constitutional claims and laid down the following requirements for an application for prior certification, which is necessary for the institution for such a class action:

- (a) The class must be defined;²¹⁹⁸
- (b) A cause of action raising a triable issue must be identified (e.g., by way of a draft particulars of claim and in the affidavits filed in support of the application);²¹⁹⁹
- (c) The claims must give rise to a common issue of fact or law, but need to be identical;²²⁰⁰ and
- (d) The court must be satisfied that the representative is suitable.²²⁰¹

In *Mukkaddam and Others v Pioneer Foods (Pty) Ltd*,²²⁰² the Constitutional Court overturned a previous decision of the Supreme Court of Appeal to refuse the certification of a class action. It held that the requirements for certification that the SCA had laid down in *Children's Resource Centre Trust* are merely 'factors to be taken into account in determining where the interests of justice lie in a particular case'.²²⁰³ If one or another factor is absent, the certification may still succeed because the interests of justice require so. Besides, a court may also consider other relevant factors when applying the interests of justice standard.²²⁰⁴

In view of these requirements, it becomes clear that legislation is necessary with regard to harmonisation, substantiation and legal certainty. The requirements established by the courts are too vague in order to ensure a harmonised approach to class actions. Questions pertaining to the conditions for a leave of the High Court, or the question of when the common interest is sufficient to justify a class action must be answered by legislation in order to ensure legal certainty and uniformity. De Vos argues that particularly in mass class actions with thousands of plaintiffs, the judges 'would need Solomon's wisdom to guide [themselves] through the possible minefields ahead'.²²⁰⁵ As suggested by the Law Commission, class actions should thus be regulated by means of the introduction of a Public Interest and Class Actions Act.²²⁰⁶

²¹⁹⁸ At para [29].

²¹⁹⁹ At para [35]. This means that there must be a *prima facie* case.

²²⁰⁰ At para [44].

²²⁰¹ At para [46]. There must be no conflict of interest and he or she has the capacity to conduct the litigation properly.

²²⁰² 2013 (5) SA 89 (CC).

²²⁰³ At para [35].

²²⁰⁴ At para [47].

²²⁰⁵ De Vos 2012 TSAR 755.

²²⁰⁶ SALRC *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88) (1998) at 111 *et seq.*

Under section 4(1)(c), a person acting as a member of, or in the interest of, a group or class of affected persons also has *locus standi*. From sections 78, 71(2)(b)(iii) and 10(1), which all speak of 'accredited consumer groups', one can conclude that such a consumer group must be accredited in order to have standing, despite the wording of section 4(1)(c). Naudé suggests that section 78 could be construed by the courts as *lex specialis* to section 4(1), considering the previously mentioned provisions that require accreditation for consumer groups.²²⁰⁷

Section 4(1)(d) provides that a person acting in the public interest, with leave of the Tribunal or court, has standing. This mirrors section 39(d) of the Constitution.

In terms of section 4(1)(e), an association acting in the interest of its members also has *locus standi*. This extensive formulation begs the question which kind of association could be meant by this provision because under section 78(1)(a), only accredited consumer protection groups have standing. One could argue that also consumer protection groups that are not accredited can institute class actions.²²⁰⁸ On the other hand, section 78 might be *lex specialis* so that all consumer protection groups will have to be accredited before they are allowed to bring an action.²²⁰⁹ Furthermore, section 71(2)(b)(iii) provides that the Commission may directly initiate a complaint at the request of an *accredited* consumer protection group. Section 10(1) sets out that *accredited* consumer protection groups may institute proceedings in the equality court or file a complaint with the Commission regarding discriminatory marketing. Naudé argues that if accreditation were processed speedily, it would not make much difference because non-accredited organisations could easily obtain accreditation in order to bring a general use challenge.²²¹⁰ The accreditation of consumer protection groups is analogous to the registration of trade unions in terms of the Labour Relations Act.²²¹¹ It is submitted that, irrespective of the time required for accreditation, the functioning or malfunctioning of an administration and the time needed for processing accreditation cannot determine the interpretation of legal provisions. What is more, although regulation 38(8) of the Act provides that the Commission must consider the application and objection to it timeously, it is unlikely that the procedure of accreditation can be done speedily as the Commission has to consider the aspects set out in regulation 38(2). Some of them require some time, such as the applicant's ability to sustainably provide a service to historically disadvantaged consumers in remote areas (item (c)), the

²²⁰⁷ Naudé 2010 *SALJ* 515.

²²⁰⁸ Naudé 2010 *SALJ* 522.

²²⁰⁹ Naudé 2010 *SALJ* 523.

²²¹⁰ Naudé 2010 *SALJ* 523.

²²¹¹ 66 of 1995. See ss 52 and 127 *et seq.* Labour Relations Act. Van Eeden *Consumer Protection Law* (2013) 418.

efficiency and effectiveness of the applicant (item (d)), its infrastructure and support mechanisms (item (e), its policy on conflicts of interest (item (g). Moreover, the Commission must publish a notice in the Gazette and any newspaper as well as on its own website (subregulation (5)). More importantly, it must give the opportunity to object the application and invite the applicant and other interested persons to make oral submissions in support of or opposition to the application (subregulations (5)(d) and (7)).

In terms of consumer access to redress, it is unfortunate that the Commission's website²²¹² is still not fully operational to date and that a search for consumer protection groups does not yield any result, which infringes regulation 38(12)(b).

It is suggested that Naudé's view to require accreditation is only correct in terms of *consumer protection* groups. In terms of section 1, these are entities promoting the interests or protection of consumers as contemplated in section 77.²²¹³ Other associations, not primarily concerned with consumer protection matters, are not contemplated in section 1. Hence, section 4(1)(e) could cover associations that do not focus on consumer protection, such as automobile or sports clubs. This would also be in line with the objective of section 4(1) to provide for a wide *locus standi* provision. Therefore, an automobile club, for example, could bring an action on behalf of its members against an automotive manufacturer whose vehicles are defective due to a manufacturing or design error. This view is supported by the fact that consumer protection groups might not always represent the interests of all or a specific category of consumers.²²¹⁴ It is thus suggested that section 4(1)(e) opens class actions also to consumers who are not represented by (accredited) consumer protection groups. Furthermore, there is no reason why consumers, and particularly low-income persons who are not represented by accredited consumer protection groups, should not be represented by a non-accredited association of which they are members. The broad wording of section 4(1)(e) speaks for this solution which also improves the realisation of the purposes of the Act set out in section 3. This being said, in order to ensure that consumers have their interests represented one should not put the threshold too high for such associations by requiring an interest of the intervening party in the subject matter of the litigation. Usually, an intervention in court proceedings requires such an

²²¹² <http://www.thencc.gov.za>.

²²¹³ **Section 77** enumerates activities such as (a) consumer advice and education activities and consumer-related publications, (b) research, marketing monitoring, surveillance and reporting, (c) promotion of consumer rights and advocacy of consumer interests, (d) representation of consumers in court, (e) alternative dispute resolution through mediation or conciliation, and (f) participation in national and international associations, conferences or fora concerned with consumer protection matters.

²²¹⁴ See s 78(3)(a).

interest.²²¹⁵ However, if there is no adequate representation of consumers, one should allow non-accredited associations to represent the concerned consumers.²²¹⁶ The legislator should nonetheless amend section 4(1) in order to bring clarification of whether also non-accredited consumer protection groups have *locus standi*.²²¹⁷

The German Unterlassungsklagengesetz (UKlaG) provides in its § 3 which bodies are eligible in terms of filing institutional actions (abstract challenges). Qualified entities must be inscribed in the list of the European Commission or the German list in order to be 'certified'. For this, they must have legal personality, and their functions must at least include the promotion of consumers' interests by education and advice on a non-commercial and non-temporary basis, without this being necessarily their central role. Furthermore, there are minimum requirements as regards the number of members. Examples are automobile clubs, tenant associations or the chambers of trade and industry and chambers of crafts and labour.²²¹⁸ Unlike consumer protection groups as defined by the Act in section 1, read in conjunction with section 77, the Act seems not to include associations that are not primarily concerned with consumer protection. Hence, 'accreditation' in terms of the Act and 'certification' under the UKlaG are not congruent with respect to the associations concerned.

The wording of section 4(1) suggests that a consumer's rights must have been infringed. This means that the legislator only provides for an *ex post facto* redress and not for a preventative or proactive control mechanism. A proactive approach would however be essential in a country like South Africa with a large number of vulnerable consumers who cannot afford litigation, or who simply do not know that their rights are being or have been infringed. Preventive control is independent from an individual contract or consumer and is exercised by consumer organisations with preventative powers.²²¹⁹ Such proactive control by consumer organisations and administrative watchdog entities would hence be very effective, as shown by international experience.²²²⁰ In German law, institutional actions aim to prevent the use of invalid clauses.

²²¹⁵ See, e.g., *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk), *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm).

²²¹⁶ Van Heerden 'Section 78' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

²²¹⁷ Van Heerden 'Section 78' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

²²¹⁸ See discussion in Part II ch 6 para 2.3.5 a).

²²¹⁹ Naudé 2010 *SALJ* 517.

²²²⁰ **Article 7 of the Council Directive 93/13/EEC of 5 April 1993** on unfair terms in consumer contracts requires adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by 'provisions whereby persons or organisations, having a legitimate interest under national law in protection consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

It is therefore not necessary that a given clause has been incorporated into the agreement, and it is sufficient that the intention of incorporating the standard provisions into contracts in the future is apparent.²²²¹ This broad interpretation corresponds to article 7(2) of the Unfair Terms Directive according to which the abstract control must be designed for 'contractual terms *drawn up* for general use'.²²²² Therefore, a commercial offer or the invitation to make an offer including standard business terms,²²²³ or an invoice on which standard terms are printed, without the latter being incorporated,²²²⁴ can be challenged by the eligible entities.

The effect of such a proactive approach would be enhanced if the competent organisation or body not only assesses a particular term but also extends its scrutiny to other terms of the contract that it considers potentially unfair.²²²⁵ Since the involvement of an individual contract is not necessary, Naudé refers to 'abstract', '*ex ante*' or 'general use' challenges in this context.²²²⁶ The fact that those entities have the power to negotiate with suppliers is often sufficient to change their unfair terms, and litigation is mostly not necessary. The threat of legal action can be an effective tool.²²²⁷ Hence, the legislator should amend the Act accordingly.

German consumer protection associations usually send a 'warning' to standard terms users. Such a warning contains, *inter alia*, a deadline to comply with the association's complaint and a threat to take legal action. This is often sufficient to avoid litigation as most suppliers comply with the warning they received.

The combination of obtaining undertakings to cease unfair practices or to apply for an injunction, as practised in the United Kingdom²²²⁸ and in Germany,²²²⁹ seems to be the most effective tool.²²³⁰

It is important to note that the work of consumer protection groups will largely depend on their funding. Their work is very resource-intensive because it requires well-trained caseworkers

²²²¹ Palandt/*Bassenge* § 1 UKlaG para 7, UBH/*Witt* § 1 UKlaG para 24.

²²²² WLP/*Pfeiffer* Art 7 RiLi para 7. Emphasis added.

²²²³ MüKo ZPO/*Micklitz* § 1 UKlaG para 20.

²²²⁴ LG Munich *BB* 1979, 1789.

²²²⁵ UK DTI Consumer and Competition Policy Directorate Commission Review of Council Directive 93/13(EEC on Unfair Terms in Consumer Contracts (Consultation Paper) (2000) paras 8.5-8.8.

²²²⁶ Naudé 2010 *SALJ* 518. The Unterlassungsklagengesetz (UKlaG) refers to '*Verbandsklage*' which will be referred to as 'institutional action' in the German part of this thesis.

²²²⁷ Naudé 2010 *SALJ* 518. See UK DTI Consumer and Competition Policy Directorate Commission Review of Council Directive 93/13(EEC on Unfair Terms in Consumer Contracts (Consultation Paper) (2000).

²²²⁸ Unfair Terms Regulations of 1999, Regulations 10-16 read with Schedule 1 of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083.

²²²⁹ See discussion of this topic in Part II ch 6 para 2.3, *passim*.

²²³⁰ Unfair Terms Regulations of 1999, Regulations 10-16 read with Schedule 1 of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083.

and administrative staff and entails other costs of operation. In addition, there are much fewer consumer organisations in South Africa than in most European countries. A reason for this is undoubtedly that the idea of consumer protection as well as the Consumer Protection Act, which brought a new approach to this issue, are relatively new in South Africa. Another reason might be that the vast majority of South Africans are no big consumers due to their small income. It is thus imaginable that consumer protection groups will gradually gain more interest and influence in the changing South African consumer landscape. The Act should provide for provisions regulating the procedure to be followed by accredited consumer protection organisations when instituting abstract challenges in order to prepare them better.²²³¹ Moreover, the Act should make clear how consumer protection groups are financed. Regulation 38(15) of the Act provides that an accredited consumer protection group may not charge a consumer any fee other than out of pocket expenses. It is hardly imaginable though how these groups can work efficiently and independently by relying on state funding or funding by interest groups such as the industry.

Unfortunately, German consumer protection organisations are chronically under-funded too.²²³²

3. The consumer protection entities, their functions and the redress mechanism

3.1 General remarks

The order set out in section 69 is quite random and contains an implied hierarchy. Nonetheless, the following discussion will start with the National Consumer Commission, the primary body tasked with the enforcement of the Act. The very complicated interactions between the various entities will be discussed after their presentation.

3.2 The National Consumer Commission

The National Consumer Commission (NCC) is the body primarily tasked with the enforcement of the Act. Its role however extends far beyond this function as it also has an administrative function, monitors market conduct and practices and fosters the education of consumers and suppliers alike. What is more, it must promote the coordination of activities of other regulators.²²³³ The NCC is a regulatory body that has been established under section 85, i.e., it is an organ of state within the public administration. The designation 'National Consumer

²²³¹ Naudé 2010 *SALJ* 531.

²²³² Stoffels *AGB-Recht* 481. *Wendland* in: Staudinger/Eckpfeiler E para 20 is of the view that the biggest obstacle for an effective work of consumer associations is their weak financial resources.

²²³³ *Draft Green Paper on the Consumer Policy Framework* 2004 at 40, published in GenN 1957 in *GG* 26774 of 9 September 2004.

Commission' is somehow misleading since it does not have the same features and tasks like a commission under the Commissions Act.²²³⁴ Its enforcement function is set out in section 99, whereas its other functions are regulated in sections 92 to 98. The Commission is a juristic person with jurisdiction throughout the Republic.²²³⁵ It must exercise its functions in the most cost-efficient and effective manner, and in accordance with the values and principles mentioned in section 195 of the Constitution.²²³⁶ It carries out its functions in terms of the provisions of the Act²²³⁷ but also in terms of the National Consumer Commission Rules²²³⁸ and the Final Enforcement Guidelines.²²³⁹ It has also published a Service Charter²²⁴⁰ that provides information on its functions and service standards.

a) General functions of the Commission

Besides the enforcement function of the Commission, its other, more general functions are manifold. Therefore, only a short overview shall be given here.

In terms of section 92(1), the Commission is responsible to carry out the functions and exercise the powers assigned to it by or in terms of the Act or any other national legislation. It may develop and promote the voluntary use of codes of practice in respect of the use of plain language in documents, a standardised or uniform means of presenting and communicating the information contemplated in sections 23 to 28,²²⁴¹ alternative dispute resolution under section 70, or any other matter to achieve the purposes of the Act.²²⁴² It also has the task to promote legislative reform by identifying national or provincial legislation, or other public regulation, that affects the welfare of consumers and is inconsistent with the purposes of the Act. It also consults with relevant provincial consumer protection authorities and organs of state within the national sphere of government, as well as with consumer protection groups, alternative dispute

²²³⁴ 8 of 1947. A commission under this Act is an *ad hoc* body of temporary nature the findings of which usually culminate in a report that will be in the public domain.

²²³⁵ Section 85(1).

²²³⁶ Section 85(2)(c). Section 196 of the Constitution governs the basic values and principles governing public administration. These are, *inter alia*, a high standard of professional ethic, efficient, economic and effective use of resources, development-orientation, impartial, and fair provision of service, accountability, transparency.

²²³⁷ Sections 85-106.

²²³⁸ Published under GN 489 in GG 34348 of 3 June 2011.

²²³⁹ Published under GenN 492 in GG 34484 of 25 July 2011.

²²⁴⁰ National Consumer Commission Service Charter published in GenN 492 in GG 35435 of 15 June 2012.

²²⁴¹ These concern the disclosure of price of goods or services (s 23), product labelling and trade descriptions (s 24), the disclosure of reconditioned or grey market goods (s 25), sales records (s 26), the disclosure by intermediaries (s 27) and the identification of deliverers, installers and others (s 28).

²²⁴² Section 93(1)(a)-(d).

resolution agents and suppliers. Moreover, it reports from time to time to the Minister with recommendations for achieving the transformation and reform of law set out in section 94.²²⁴³

The Commission also monitors the effectiveness of entities, such as the relevant provincial consumer protection authorities, organs of state, regulatory authorities, consumer protection groups, and ombuds, relative to the purposes and policies of the Act.²²⁴⁴ It also has a research function concerning the nature and dynamics of the consumer market, and promotes public awareness of consumer protection.²²⁴⁵ Furthermore, it can apply to a court for a declaratory order on the interpretation or application of any provision of the Act, or publish any orders or findings of the Tribunal or a court in respect of an infringement of the Act.²²⁴⁶

While the publication of findings in respect of a violation of the provisions of the Act has a deterrent effect, it is submitted that also decisions with regard to agreements that do not infringe the provisions of the Act might be useful as they can serve as a guidance for other suppliers. The decisions can only be published in the form of non-binding opinions on the interpretation of any provision of the Act in terms of section 96(b)(i). This possibility is somehow restrictive as a finding of the Tribunal or a court might also concern other issues than interpretational ones. Section 96(b)(iii) should thus be amended in that the Commission can publish any findings of the Tribunal or a court that are useful in terms of the application of the Act.

In addition to any other advice or reporting requirements, the Commission is also responsible to advise the Minister on consumer protection matters and on the determination of national norms and standards regarding this field. It also reports annually on market practices and the implications for consumer choice and competition in the consumer market, for instance.²²⁴⁷ It has to be underlined that the Minister has no direct power to bring legislative changes on the provincial level because consumer protection is subject to concurrent jurisdiction.²²⁴⁸ The concurrent jurisdiction in this field might be an obstacle to effective consumer protection because many transactions are made across provincial borders.

²²⁴³ Section 94(a)-(c).

²²⁴⁴ Section 95(2)(a).

²²⁴⁵ Section 96. This function is similar to the function of the UK Office of Fair Trading.

²²⁴⁶ Section 96(b)(ii) and (iii).

²²⁴⁷ Section 98(a)-(e).

²²⁴⁸ See Schedule 4 Part A of the Constitution.

In terms of section 83, the Minister must consult with the responsible Member of any relevant provincial Executive Council to co-ordinate and harmonise the functions to be performed by the Commission and one or more provincial consumer protection authorities.

To date, the Commission published²²⁴⁹ the rules regulating its functions or operations as well as its draft guidelines which set out its core values.²²⁵⁰

b) Enforcement function of the Commission

The Commission's primary function is the enforcement of the Act. These functions are set out in section 99. Due to its failure to employ the correct procedure before issuing compliance notices, the Commission's enforcement functions have unfortunately been hampered.²²⁵¹ The central role of the Commission follows international practice. It is closely linked to the Tribunal as under section 74, the Tribunal or a court may confirm an agreement between the Commission and a respondent as a consent order, for instance. Its enforcement functions can be divided into a prosecutorial and an investigative part.²²⁵²

aa) Promotion of informal resolution of disputes

Under section 99(a), the Commission is responsible for enforcing the Act by promoting informal resolution of any dispute arising in terms of the Act between a consumer and a supplier. It is however not responsible for intervening in or directly adjudicating any such dispute. That the legislator did not oblige the Commission to intervene in disputes and to play a more direct role in the eradication of unfair contract terms on the basis of individual complaints is unfortunate.²²⁵³ The Commission as a national entity could have the ultimate responsibility to exercise preventative powers over unfair contract terms. This could have

²²⁴⁹ The NCC website (www.thencc.gov.za) contains many useful information. Unfortunately, it is not possible to file a complaint online. However, a complaint form can be downloaded. Some links are not operational yet.

²²⁵⁰ Those include respect, confidentiality, consistency, responsiveness and timeliness. See *Lake 2011 De Rebus* 46.

²²⁵¹ Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 8 note 9. See for instance *City of Johannesburg v National Consumer Commission* NCT/2667/2011/101(1)(P); *Vodacom Service Provider (Pty) Ltd, Vodacom (Pty) Ltd v National Consumer Commission* NCT/2793/2011/101(P); *Multichoice Africa (Pty) Ltd v National Consumer Commission* NCT/3220/2011/101(1)(a)(P). In *Murray, Cloete et al v The National Consumer Commission et al* NCT/4454/2012/101(1)(P) CPA and *Auction Alliance v The National Consumer Commission and Others* Case No 7798/2012 (WCC), the NCT quoted the SCA after the Commission had issued media statements prior to the issuing of a compliance notice and the completion of an investigation, stating that a certain party had engaged in a 'mock auction' although an allegation to this effect did not form part of the compliance notice. The NCA, quoting the SCA, stated that it would not allow persons or businesses to be subjected to an abuse of power and that the Commission is also subject to the Constitution and the law and must accordingly mend its ways in certain respects. The acts of the Commission involve a gross violation to the appellants' rights to privacy under the Constitution and his rights of resort to a court.

²²⁵² Van Eeden and Barnard *Consumer Protection Law* 403.

²²⁵³ Naudé 2010 *SALJ* 523.

several advantages, such as a consistent and predictable enforcement policy for suppliers operating in more than one province, as well as more consistency and legal certainty.²²⁵⁴ It is suggested that, with a view to the fact that consumer protection is subject to concurrent legislation, such preventive powers would achieve more harmonised outcomes.

As already discussed, section 69 contains an implied hierarchy. Thus, a consumer should first approach an alternative dispute resolution agent before approaching the Commission. The Commission may promote informal dispute resolution by first referring the matter to an ADR agent according to section 72(1)(b). When the Commission acts on its own initiative in terms of section 71(2) though, the courts will likely construe the Act in that the Commission is not obliged to first seize an ADR agent before it is allowed to act on the matter.²²⁵⁵

Another possibility is that the Commission attends to mediation and conciliation of disputes in cases where a complaint has been filed with it. This can be done by telephonic or written mediation or face-to-face conciliation.²²⁵⁶ In certain instances, extraordinary conciliation measures may be employed.²²⁵⁷ The Commission's current practice is to refer mediation of industry-specific matters to industry regulators.²²⁵⁸

bb) Reception of complaints

Section 99(b) provides that the Commission receives complaints concerning alleged prohibited conduct or offences, and deals with those complaints according to Part B of Chapter 3.²²⁵⁹

Van Eeden correctly contends that the Commission must make sure that complaints received from consumers are sufficiently precise and contain the relevant legal and factual information in order to be able to ascertain the complaint. This applies even though consumers are laypersons and are often illiterate. The Commission must assist them on how to formulate their complaints, if necessary.²²⁶⁰ This prevents not only abusive complaints, but the Commission can also advise consumers to drop their complaint if there is no basis for a successful outcome.

²²⁵⁴ Naudé 2010 *SALJ* 524.

²²⁵⁵ Naudé 2010 *SALJ* 524.

²²⁵⁶ Guideline 3 Part B of the Final Enforcement Guidelines published under GenN 492 in GG 34484 of 25 July 2011.

²²⁵⁷ Guideline 3.1.4 of the Final Enforcement Guidelines published under GenN 492 in GG 34484 of 25 July 2011. This can be done in cases where questions about impartiality of the Commission may impede the success of a mediation process, or because of the complexity of the case, or when face-to-face conciliations are not appropriate, e.g., in a mass complaint, or as an *ultima ratio*, where the respondent fails to co-operate.

²²⁵⁸ E.g., the Consumer Goods and Services Ombud. See Van Heerden 'Section 99' in Naudé and Eiselen (eds) *CPA Commentary* para 2.

²²⁵⁹ Part B of Chapter 3 deals with Commission investigations.

²²⁶⁰ Van Eeden *Consumer Protection Law* (2013) 397.

It is submitted that given the shortage of the Commissions resources, this might also be beneficial in terms of eliminating obviously unsuccessful claims. This only works if the Commission's assessments of the outlook as regards the success of a complaint are well-founded though, which conditions that its staff is legally trained.

The Commission's assistance in the formulation of complaints corresponds to § 139(3) ZPO,²²⁶¹ by which the court may indicate to a party any inconsistencies. German courts do not 'replace' the parties' lawyers though in that they help to reformulate statements. If an application is, and remains, incomplete after the court's indication, the action is inadmissible.²²⁶²

It would have been strategic to establish a national consumer helpline as mentioned in the *Draft Green Paper on the Consumer Policy Framework 2004*.²²⁶³ It could be located at the NCC that co-ordinates and monitors a host of services so that consumer complaints could be channelled to the relevant redress agency. The hotline could give advisory support in order to filter out obviously unsuccessful complaints, which would relieve the other redress fora.

cc) Monitoring of the consumer market and consumer groups

The Commission is responsible for enforcing the Act in terms of section 99(c) by monitoring the consumer market to ensure that prohibited conduct and offences are prevented, or detected or prosecuted.²²⁶⁴ It must also monitor the effectiveness of accredited consumer groups, industry codes and alternative dispute resolution schemes, service delivery to consumers by organs of state, and any regulatory authority exercising jurisdiction over consumer matters within a particular industry or sector.²²⁶⁵

dd) Investigation and evaluation of prohibited conduct

In terms of section 99(d), the Commission must investigate and evaluate alleged prohibited conduct and offences. Prohibited conduct is defined in section 1 as an act or omission in contravention of the Act. It is submitted that only offences under the Act are covered by section 99(d). These are breach of confidence,²²⁶⁶ hindering the administration of the Act,²²⁶⁷ offences relating to Commission and Tribunal, such as improperly influence the Tribunal or a regulator,

²²⁶¹ ZPO = Zivilprozessordnung (Code of Civil Procedure). § 139(3) ZPO: 'The court is to draw the parties' attention to its concerns regarding any items it is to take into account *ex officio*.'

²²⁶² *Erman/Roloff* § 8 UKlaG para 1, *Palandt/Bassenge* § 8 UKlaG para 1.

²²⁶³ At 37, published in GenN 1957 in *GG* 26774 of 9 September 2004.

²²⁶⁴ Section 99(c)(i).

²²⁶⁵ Section 99(c)(ii).

²²⁶⁶ Section 107.

²²⁶⁷ Section 108.

providing false information, interruption of the proceedings or misbehaviour,²²⁶⁸ and offences relating to prohibited conduct.²²⁶⁹ In order to give effect to the provisions with regard to offences, it is submitted that both the supplier and the consumer can commit an offence. This view corresponds to the wording of the provisions in question that use the words 'any person' or 'a person' instead of 'consumer' and/or 'supplier',

The Commission has wide investigative powers. It is empowered to issue summonses for purposes of interrogation or delivery of certain documents, books and objects.²²⁷⁰ Van Eeden is correct when stating that 'the power to issue a summons constitutes an authority of the holder of that power to exercise substantial state power', and that by conferring such an authority on an individual, Parliament entrusts to that person a commensurate responsibility to exercise its power with respect for the rule of law and the rights of the respondents.²²⁷¹ This is also true for inspectors' extensive power to search as they have the powers of a peace officer as defined in section 1 of the Criminal Procedure Act (section 88(2)(c)).²²⁷² Inspectors are appointed in terms of section 88(1). What is more, the NCC has powers to enter and search persons or premises.²²⁷³ The Commission's investigative powers are similar to those of the National Credit Regulator in terms of the National Credit Act²²⁷⁴ and the Competition Commission under the Competition Act.²²⁷⁵ Hence, one can expect that the Commission will be guided by the manner in which these bodies deal with their respective investigative powers.²²⁷⁶

Obviously, accredited consumer protection organisations do not have the same powers as those are responsibilities under public administration. Naudé correctly contends that not only the Commission but also accredited consumer organisations should be empowered to obtain a

²²⁶⁸ Section 109.

²²⁶⁹ Section 110.

²²⁷⁰ Section 102 read with s 72(1)(d).

²²⁷¹ Van Eeden and Barnard *Consumer Protection Law* 426.

²²⁷² Act 51 of 1977. Section 88(2)(c) of the Criminal Procedures Act. See also ss 88(2)(c), 103 and 104 CPA.

²²⁷³ Section 104 read with s 103. A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances (s 103(4)). It is therefore submitted that a warrant to enter and search may be executed on weekends. This view is supported by s 103(6)(b) in terms of which a person executing the warrant must, if neither the owner, or person in control, of the premises to be searched is present, affix a copy of that warrant to the premises in a prominent and visible place. Furthermore, under s 105(9), the Commission may compensate anyone who suffers damage because of a forced entry during a search when on one responsible for the premises was present. It is further submitted a person executing a warrant on weekends may only do so if there is an imminent danger that otherwise evidence will be destroyed. Section 105(8), which is normally applicable for the use of force when someone inside the premises is believed to destroy or dispose of an article or document that is object of the search, could be applied by analogy in these cases.

²²⁷⁴ 34 of 2005.

²²⁷⁵ 89 of 1998.

²²⁷⁶ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 8.

supplier's terms of conditions.²²⁷⁷ As those are no 'internal' documents, such as accounting documents, strategic papers, or confidential documents²²⁷⁸ or those containing privileged information,²²⁷⁹ this would doubtlessly enhance and facilitate the work of consumer organisations. In practice, this issue seems not to be very relevant though because at least big companies offer access to their terms and conditions on their websites.

ee) Issuing and enforcement of compliance notices

Section 99(e) provides that the Commission may issue and enforce compliance notices in order to enforce the Act. If the compliance notice has been complied with, the Commission is required to issue a compliance certificate.²²⁸⁰

When issuing a compliance notice, the Commission may, in appropriate circumstances, disregard the corporate identity of the parties so that a supplier cannot circumvent the application of the Act by arranging its entities providing services accordingly.²²⁸¹ Once a compliance notice has been issued, the Commission cannot investigate the matter further as it is *functus officio*.²²⁸² A compliance notice has the purpose 'to ensure that a party who is not complying with the Act is informed of its non-compliance and is given an opportunity to mend its ways and ensure that in the future (...) it does comply with the Act.'²²⁸³ Before issuing a compliance notice, the Commission must consult with the regulatory authority that issued a licence to the regulated entity in question.²²⁸⁴ As the Commission must have 'reasonable belief' that the supplier has engaged in prohibited conduct, Van Eeden correctly asserts that the Commission exchanges its investigative role for a determinative action.²²⁸⁵

The German UKlaG provides for a 'warning' that can be issued by an eligible body (consumer association) in order to warn the standard terms user prior to initiating court proceedings and give him the opportunity to resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty. The warning set out in § 5 UKlaG, read with § 12(1)

²²⁷⁷ Naudé 2010 *SALJ* 529.

²²⁷⁸ Section 106.

²²⁷⁹ Section 105(5).

²²⁸⁰ Section 100(5).

²²⁸¹ *Mobile Telephone Networks (Pty) Ltd v The National Consumer Commission* NCT/2738/2011(1)(P) at para [28].

²²⁸² Van Eeden and Barnard *Consumer Protection Law* 434.

²²⁸³ *Murray, Cloete et al v The National Consumer Commission et al* NCT/4454/2012/101(1)(P) CPA; *Auction Alliance v The National Consumer Commission and Others* Case No 7798/2012 (WCC); *CJ Digital SMS Marketing CC v The National Consumer Commission* (NCT/3584/2011/101) [2012] ZANCT 22 (1 October 2012).

²²⁸⁴ Section 100(2).

²²⁸⁵ Van Eeden and Barnard *Consumer Protection Law* 437.

UWG²²⁸⁶ corresponds to the 'prior consultation' in Directive 98/22/EC. Such a warning is dispensable though if it is in vain or unreasonable, e.g., where the infringement is so significant that the claimant cannot be expected to issue a warning before going to court.²²⁸⁷

If a person does not agree with the compliance notice the Commission has issued, it may apply to the Tribunal to review that notice within 15 business days after receiving that notice, or such longer period as may be allowed by the Tribunal on good cause shown.²²⁸⁸ The Tribunal may, after considering any representations by the applicant and any other relevant information, confirm, modify or cancel all or part of the notice.²²⁸⁹ If the Tribunal confirms or modifies all or part of the notice, the applicant must comply with that notice as confirmed or modified, within the timeframe specified in it.²²⁹⁰

When reading section 100(3), and particularly paragraphs (a) to (c), it becomes clear how essential the manner is in which the Commission conducts its investigations. In doing so, the investigators have to ascertain legal questions such as how and why a specific provision of the Act has been infringed as well as the details of the nature and extent of the non-compliance. Only after having conducted an investigation, the Commission can have reasonable grounds for believing²²⁹¹ that the supplier has committed prohibited conduct. The subjective view of the Commission is not to be qualified as 'reasonable belief'.²²⁹² There must be a reasonable belief, based on reason, and 'on objective facts, reasons or principles that the [a]pplicant was engaged in prohibited conduct'.²²⁹³ Otherwise, the compliance notice will be based on unsubstantiated allegations and assumptions, and the Commission will not be able to supply details in terms of the nature and extent of the non-compliance.²²⁹⁴

Various compliance notices have been challenged because of non-compliance with legal provisions. In some cases, the Commission had failed to complete an investigation into prohibited conduct before issuing the compliance notice.²²⁹⁵ In a case, the compliance was issued for a purpose which does not constitute prohibited conduct under the Act, namely in

²²⁸⁶ UWG = Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition).

²²⁸⁷ Palandt/Bassenge § 5 UKlaG para 7, WLP/Lindacher § 5 UKlaG para 12.

²²⁸⁸ Section 101(1).

²²⁸⁹ Section 101(2).

²²⁹⁰ Section 101(3).

²²⁹¹ Section 100(1).

²²⁹² *Vodacom Service Provider (Pty) Ltd, Vodacom (Pty) Ltd v National Consumer Commission* NCT/2793/2011/101(P) at para [58].

²²⁹³ *Vodacom Service Provider (Pty) Ltd, Vodacom (Pty) Ltd v National Consumer Commission* at para [62].

²²⁹⁴ *City of Johannesburg v National Consumer Commission* NCT/2667/2011/101(P).

²²⁹⁵ *City of Johannesburg v National Consumer Commission* NCT/2667/2011/101(P). See also *Accordian Investments (Pty) Ltd v National Consumer Commission* NCT/4061/2012/60(3)101(P).

order to force the applicant to sign a consent order.²²⁹⁶ Also, failure by the Commission to consult with the relevant regulatory authority before issuing the compliance notice led to a decision that set aside the compliance notice.²²⁹⁷ In other matters, the compliance notices were set aside because they had been issued in order to force the supplier to refund monies to the consumer, which is not a permitted request in terms of a compliance notice.²²⁹⁸

The fact that the Tribunal insisted on following the correct procedure in terms of the Act and gave detailed explanations in the cases described above will assist the Commission in the future and ensure that the correct procedure will be followed.²²⁹⁹

The question begs to be asked what role compliance notices have alongside the Commission's other tools, namely consent orders, or the referral to the Tribunal. All those instruments require the investigator's belief that the supplier had engaged in prohibited conduct. Contrary to the latter, the former exposes the recipient to criminal prosecution should he or she not comply with the notice though. Van Eeden suggests that compliance notices serve as a quick and simple enforcement instrument with regard to a clear and specific transgression. They should be used in exceptional circumstances or in very clear cases, and if there are no compelling reasons for the issuance of a consent order or a referral to the Tribunal or a consumer court.²³⁰⁰ This view is correct as otherwise, one has to ask what the purpose of a referral to the Tribunal under section 73(1)(c)(iii) and (2) is. Contrary to the Commission's practice in the cases mentioned above, it cannot simply issue compliance notices without carrying out a proper investigation beforehand, and simply transfer the burden of proof to the respondents.

In German law, a warning is not mandatory.²³⁰¹ Although the issuing of a warning has no impact on the admissibility and merits of the court action,²³⁰² it can avoid negative costs

²²⁹⁶ *Vodacom Service Provider (Pty) Ltd, Vodacom (Pty) Ltd v National Consumer Commission* NCT/2793/2011/101(P).

²²⁹⁷ *Multichoice Africa (Pty) Ltd v National Consumer Commission* NCT/3220/2011/101(1)(a)(P).

²²⁹⁸ *Audi SA (Pty) Ltd v National Consumer Commission* NCT/4058/2012/101(1)(P) CPA; *Toyota Financial Services (SA) (Pty) Ltd v National Consumer Commission* NCT/4053/2012/101(1)(P) CPA; *Accordian Investments (Pty) Ltd v National Consumer Commission* NCT/4061/2012/60(3)101(1)(P) CPA; *ADT Security (Pty) Ltd v National Consumer Commission* NCT/4114/2012/101(1)(P) CPA; *CMH Fiat Alfa Westrand v National Consumer Commission* NCT/3710/2012/101(1)(P) CPA; *Cell C (Pty) Ltd v National Consumer Commission* NCT/2737/2011/101(1)(P) CPA; *KIA Motors SA (Pty) Ltd v National Consumer Commission* NCT/3914/2012/101(1)(P) CPA; *Volkswagen South Africa v National Consumer Commission* NCT/3913/2012/101(1)(P) CPA; *Smartsurf Wireless (Pty) Ltd v National Consumer Commission* NCT/4833/2012/101(1)(P) CPA; *Wingfield Motors (Pty) Ltd v National Consumer Commission* NCT/3882/2012/101(1)(P) CPA.

²²⁹⁹ Van Heerden 'Section 99 in Naudé and Eiselen (eds) *CPA Commentary* para 6.

²³⁰⁰ Van Eeden and Barnard *Consumer Protection Law* 438.

²³⁰¹ UBH/Witt § 5 UKlaG para 1.

²³⁰² MüKo ZPO/Micklitz § 5 UKlaG para 9, Maxeiner 2003 *J. Yale Int. Law* 158.

implications.²³⁰³ Most incriminated standard clauses where consumer associations are involved are modified by compliance by the user after an issued warning, and not by court action.²³⁰⁴ Besides, in most cases, the statutes of the eligible bodies (consumer associations) provide for such prior warnings.²³⁰⁵ Hence, a warning is issued – contrary to a compliance notice – not only in cases of apparent transgressions but almost systematically as a previous step before taking legal action, if necessary.

Similar to the Competition Commission and its staff, the National Consumer Commission might abuse its powers. Van Eeden suggests that the existing compliance notice mechanism, coupled with a substantial criminal sanction or the threat of an administrative fine, is not an appropriate instrument for fighting alleged prohibited conduct in all cases.²³⁰⁶ It is suggested that the fact that the person receiving a compliance notice can apply to the Tribunal for a review,²³⁰⁷ and that the Tribunal²³⁰⁸ or the National Prosecuting Authority²³⁰⁹ will reconsider the facts before taking action against a supplier, provide for a sufficient safeguard mechanism in order to curb abuse committed by the Commission.²³¹⁰

A useful, less circuitous and less expensive procedure that could apply alongside compliance notices would consist in the establishment of a register of undertakings by the Commission.²³¹¹ The latter would have to keep a record of all undertakings in respect of unfair terms and publish them, e.g., on its website. Furthermore, it would be convenient if the Commission had the duty to inform any person on request about the contents of a particular undertaking and amendments made to them.²³¹²

The former AGBG provided for a register of court decisions. For data protection reasons and because of the loss of significance, its procedural successor, the UKlaG, does not contain a similar provision.²³¹³ The former AGBG register never entirely fulfilled its function because it was designed only for court decisions and could thus only be useful *ex post facto*. What is

²³⁰³ Stoffels *AGB-Recht* 492.

²³⁰⁴ UBH/*Witt* before § 1 UKlaG para 8.

²³⁰⁵ Stoffels *AGB-Recht* 492.

²³⁰⁶ Van Eeden and Barnard *Consumer Protection Law* 439.

²³⁰⁷ Section 101.

²³⁰⁸ In the case of an administrative fine. See s 100(6)(a).

²³⁰⁹ In the case of an offence in terms of section 110(2). See s 100(6)(b).

²³¹⁰ The Tribunal must consider the factors set out in s 112(3).

²³¹¹ In the UK, the Unfair Terms in Consumer Contracts Regulations 1999 do not provide for undertakings to be made court orders, but the OFT had simply to keep a record of all undertakings in respect of unfair terms which were published on its website. See para 10(3) read with para 15 UTCCR.

²³¹² Naudé 2010 *SALJ* 529.

²³¹³ BT-Drs. 14/6040 at 276.

more, the concerned actors did not – or simply could not – keep track of the register, and infringements were only discovered by chance.²³¹⁴ An 'information pool', as suggested by Stoffels,²³¹⁵ would thus be a much more efficient solution. Such a pool could apply a 'matrix approach',²³¹⁶ similar to the structure of many specialised commentaries on standard terms, and consist of a catalogue of specific terms across all type of controls and categorisation by their legal nature and business sector. This would help to identify specific terms in their context.

Much would be achieved if the Minister held the Commissioner accountable for wrongdoings within the Commission and discharge the Commissioner if those are not ceased. The annual report the Commission has to issue²³¹⁷ is only of limited value in this regard because the Commission does not have to specify the cases that have been 'corrected' by the Tribunal. On the other hand, the Tribunal's statistics and published cases are a valuable source for the evaluation of the Commission's work. In addition, the audit review that the Minister must conduct at least once every five years can be helpful, but only if it is done more regularly. The only way to prevent abuse seems to be to establish a system of accountability. Furthermore, appropriate training of the staff is a second pillar to prevent (unintended) abuse. Especially investigators have to be chosen carefully and trained so that they are able – and willing – to abide by the law.

Naudé suggests that the Commission should also be able to issue compliance notices in respect of provisions that have already been declared substantively unfair by a court relating to the supplier's interests and the terms' effect on consumers dealing typically with that supplier. This would imply that courts are prepared to declare terms unfair in an entire trade sector or industry.²³¹⁸ It is suggested that because of the *inter partes* effect of court rulings, courts do not have the power to declare terms of a supplier unfair who is not a party to a litigation.

In terms of section 96, the Commission is responsible for increasing knowledge of the nature and dynamics of the consumer market and to promote public awareness of consumer protection. This is done, *inter alia*, by implementing education and information measures to develop public awareness of the provisions of the Act, providing guidance to the public by issuing explanatory notices on its non-binding opinion on the interpretation of any provision

²³¹⁴ MüKo ZPO/Micklitz before § 1 UKlaG para 36.

²³¹⁵ Stoffels *AGB-Recht* 481.

²³¹⁶ See Maxeiner 2003 *Yale J. Int. Law* 156.

²³¹⁷ Section 91(2)

²³¹⁸ Naudé 2010 *SALJ* 530.

of the Act,²³¹⁹ or publishing any orders and findings of the Tribunal or a court in respect of an infringement of the Act.²³²⁰

The former OFT, which had published its Unfair contract terms guidance with its Annexes containing unfair terms could serve as an example to the Commission in this respect. The OFT's approach did not only deter suppliers but also served as a model for drafting fairer terms. The supplier would then have to apply to the Tribunal to have the compliance notice set aside, or, if its application is unsuccessful, to take legal action before an ordinary court for review.²³²¹

Another approach, suggested by Naudé, could consist of court orders by which suppliers have to inform the Commission, the provincial consumer protection authority and all its existing consumers of the decision. Besides, the supplier could also be obliged to publish the decision, e.g., on its website or other media, with an obligation to furnish proof of implementation.²³²²

Under § 7 UKlaG, the applicant may be authorised by the court to publish the operative part of the judgment (i.e., not the entire judgment) in the Federal Gazette and otherwise. The benefit of this provision is somewhat limited because of the very limited number of readers of the Federal Gazette or other relevant publications.²³²³ A publication in newspapers is not very efficient either because the operative part of the judgement is not always very conclusive read in isolation. Furthermore, the costs for the publication must be borne by the claimant. Consumer protection groups with limited resources might thus tend to renounce publication.

A compliance notice remains in force until it is set aside by the Tribunal, or a court upon a review of a Tribunal decision concerning the notice. If the requirements of the compliance notice have been satisfied, the Commission issues a compliance certificate.²³²⁴

Since warnings under the UKlaG are no administrative acts but rather a pre-trial step issued by eligible bodies, they can be set aside only by the issuing entity itself. Although the chambers of trade and industry and the chambers of crafts and labour are eligible bodies in terms of § 3

²³¹⁹ Section 96(b)(i).

²³²⁰ Section 96(b)(iii).

²³²¹ Section 100(4)(a).

²³²² Naudé 2010 *SALJ* 545.

²³²³ Staudinger/*Schlosser* § 7 UKlaG para 2, WLP/*Lindacher* § 7 UKlaG para 4, Stoffels *AGB-Recht* 503.

²³²⁴ Section 100(4) and (5).

UKlaG and corporations under public law,²³²⁵ the warnings they issue are not administrative but civil-law acts.²³²⁶

ff) Negotiation and conclusion of undertakings and consent orders

Section 99(f) provides that the Commission enforces the Act by negotiating and concluding undertakings and consent orders contemplated in section 74. In terms of section 74(1), if the Commission has investigated a matter, and the Commission and the respondent agree to the proposed terms of the appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that agreement as a consent order.²³²⁷

Consent orders are an essential dispute resolution tool and have the advantage that they avoid civil actions in cases where a complainant agrees to a damages award.²³²⁸

In German law, the eligible entities' warnings systematically contain an invitation to the standard terms user or recommender to issue a declaration to cease the use or recommendation of the given standard provision. Warnings require that the person refrain from using or recommending the standard terms in question. This also includes the referral to standard business terms by the user that are contained in contracts that have already been concluded.²³²⁹

In order to avoid the costs in terms of § 93 ZPO, it is customary and reasonable²³³⁰ to include in the warning the invitation of the promise to make by the user or the recommender of the standard terms to pay a contractual penalty in case of further infringements. In addition, by requiring such a promise, the claimant has a leverage against the user or recommender. Usually, the eligible body – and not the court – determines the given amount.²³³¹

²³²⁵ § 3(1) Gesetz zur vorläufigen Regelung des Rechts der Industrie- und Handelskammern of 18 December 1956 (BGBl. 1956 I 920), as amended and § 90(1) HwO.

²³²⁶ See https://www.hannover.ihk.de/fileadmin/_migrated/content_uploads/Merkblatt_Abmahnung-was_nun_2012_01.pdf.

²³²⁷ The consent order is issued on Form T1.138(1) in the Regulations pertaining to the Rules of the Tribunal (Regulations for matters relating to the functions of the Tribunal and Rules for the Conduct of matters before the National Consumer Tribunal, 2007, published under GN 789 in GG 30225 of 28 August 2007, as amended by GenN 428 in GG 34405 of 29 June 2011).

²³²⁸ Van Heerden 'Section 99 in Naudé and Eiselen (eds) *CPA Commentary* para 7.

²³²⁹ WLP/Lindacher § 5 UKlaG para 18.

²³³⁰ The indication is not necessary however in order to avoid the negative consequences of § 93 ZPO, since they occur automatically.

²³³¹ UBH/Witt § 5 UKlaG para 5. Lindacher is of the view that the determination of the amount to be paid should be made by the court, as the latter is neutral. He does not exclude though that the eligible bodies in terms of § 3 UKlaG or even third parties may determine this amount (WLP/Lindacher § 5 UKlaG para 18).

gg) Referral to the Competition Commission, the Tribunal and the National Prosecuting Authority

Under section 99(g), the Commission is empowered to refer to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act.²³³²

These matters fall within the jurisdiction of the Competition Commission.²³³³ For tying arrangements,²³³⁴ the NCC has concurrent jurisdiction with the Competition Commission as these may constitute both anti-competitive²³³⁵ and prohibited conduct.²³³⁶

Section 99(h) provides that the Commission may refer matters to the Tribunal, and appear before the Tribunal, as permitted or required by the Act. When referring matters to the Tribunal, the Commission appears as the applicant.²³³⁷

The Commission may also refer alleged offences in terms of the Act to the National Prosecuting Authority according to section 99(i).²³³⁸ This is because the Commission does not have prosecuting authority for criminal offences.²³³⁹ In *Levitt v National Consumer Commission*,²³⁴⁰ it was decided that the Commission has no power to conduct any investigation into the common-law crime of fraud. Besides its extensive investigative powers that include the issuing of summonses, it can lead searches by an inspector or police officers (sections 103 and 104).

c) Legal representation

The right to be represented in court by a legal practitioner is an inalienable right in criminal proceedings. In terms of section 35(2)(b) of the Constitution, everyone who is detained, including every sentenced prisoner, has the right to choose and to consult with a legal practitioner, and to be informed of this right promptly. This is not the case in administrative and tribunal proceedings, however.²³⁴¹ The Commissions is vested with vast investigative and

²³³² 89 of 1998.

²³³³ See ss 19 and 21 of the Competition Act.

²³³⁴ Tying arrangements are those whereby a seller conditions the sale of one product (the tying product) on the purchase of another product (the tied product) or on the purchaser's agreement not to purchase the tied product from any other seller. Tying arrangements are suspicious because sellers may be exploiting their control over tying products to force consumers into purchasing products that they may not want, or that they may have preferred to obtain elsewhere on different terms. See Van Heerden 'Section 99 in Naudé and Eiselen (eds) *CPA Commentary* para 8 note 5.

²³³⁵ Section 8(d)(iii) of the Competition Act.

²³³⁶ Section 13 read with s 1 (definition of 'prohibited conduct').

²³³⁷ Van Heerden 'Section 99 in Naudé and Eiselen (eds) *CPA Commentary* para 9.

²³³⁸ This provision has to be read in conjunction with the provisions relating to offences. See ss 107-110, 112.

²³³⁹ Mupangavanhu 2012 *PELJ* 323.

²³⁴⁰ (7088/12) [2012] ZAWCHC 93 (18 June 2012).

²³⁴¹ See *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175 (D) at 180G-H.

prosecutorial powers in terms of interrogation and search, which can be qualified as *quasi* police powers.²³⁴² In addition, failure to comply with a compliance notice is an offence.²³⁴³ In terms of section 105(3) however, a person who enters and searches premises before questioning anyone must advise that person of the right to be assisted at the time by an advocate, and allow that person to exercise that right. This provision, coupled with the standard practice for a person appearing in response to a summons for interrogation before the Competition Commission to be accompanied by a legal representative,²³⁴⁴ can be construed in that such a practice should also apply before the Commission.²³⁴⁵ This view is convincing, particularly with regard to possible infringements of section 14 of the Constitution that might apply when the company of a supplier is privately owned.

d) Finances

Under section 90(1), the Commission is financed from money appropriated by Parliament, any fees payable to the Commission in terms of the Act, income derived from its investment and deposit of surplus money, and money accruing from any other source. While subsection (2) clearly defines and narrows the Commission's investments and deposits,²³⁴⁶ the phrase 'money accruing from any other source' is not further defined. It is submitted that such a provision might lead to undue influence exerted by professional associations representing suppliers or other interested persons or groups (lobbying). This might compromise the Commission's neutrality. The legislator should therefore restrict these other sources in order to warrant the Commission's neutrality.

e) Role of the Commission

Complaints resolution is not an authorised function of the Commission, but it is vested with investigative functions that lead eventually to complaint resolution.²³⁴⁷ Complaint resolution is the function of the alternative dispute resolution agents, consumer courts, the Tribunal and the civil courts. Hence, the Commission does not play an active role in terms of dispute resolution. Providing for a consistent, accessible and efficient system of consensual resolution of disputes

²³⁴² Van Eeden *Consumer Protection Law* (2013) 448.

²³⁴³ Section 110(2).

²³⁴⁴ Sutherland and Kemp *Competition Law* para 11.3.5.6.

²³⁴⁵ Van Eeden *Consumer Protection Law* (2013) 448.

²³⁴⁶ The Commission may invest or deposit its money that is not immediately required for contingencies or to meet current expenditures on a call or short-term fixed deposit with any registered bank or financial institution in the Republic, or in an investment account with the Corporation for Public Deposits established in terms of s 2 of the Corporation for Public Deposits Act 46 of 1984.

²³⁴⁷ Van Eeden and Barnard *Consumer Protection Law* 424.

arising from consumer transactions,²³⁴⁸ and for an accessible, consistent, harmonised, effective and efficient system of redress for consumers²³⁴⁹ are objectives of the Act. Nonetheless, the Act clearly indicates that the Commission does not have the function of active dispute resolution. In terms of section 99(a), the Commission is responsible for enforcing the Act, by promoting informal resolution of any dispute arising in terms of the Act between a consumer and a supplier, *but is not responsible to intervene in or directly adjudicate any such dispute*. The wording of this provision clearly shows that dispute and complaints resolution activities are not part of the Commission's functions.²³⁵⁰ What is more, section 72(1)(b), read with section 70, set out the Commission's powers after having received a complaint. These do not contain any active role in terms of dispute resolution. Thus, the Commission's role is restricted to the promotion of informal dispute resolution by supporting the parties. In addition, the Commission is not specified as an institution in terms of section 70(1)(a) to (d) where a consumer may seek to resolve any dispute in respect of a transaction or agreement with a supplier. Van Eeden correctly maintains that the distinction drawn by the Act with respect to enforcement and conciliation/dispute resolution wise and should be adhered to.²³⁵¹ The Commission's functions are already extensive, and its prosecutive functions should not be mixed with any adjudicative functions.

In terms of section 71(1), any person may file a complaint concerning a matter set out in section 69(1) [*sic*] (c)(ii) or (2)(b) [*sic*]²³⁵² in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with the Act. The extensive formulation 'any person' means that not only a consumer as a victim of alleged prohibited conduct may file a complaint, or a consumer protection group. Included are also persons with knowledge about such conduct, without being directly involved in any marketing or supply of goods or services with the given supplier, and even competitors.²³⁵³ Section 71(1) thus widens the *locus standi* provision of section 4(1) with regard to the Commission. This is surprising because in civil law, normally only persons that have a legal or other interest can institute an action. Such an interest exists if the party is directly subject to an adverse effect by the statute or action in question, or the party is not directly harmed by the conditions by which it is petitioning the court for relief but asks for it because the harm involved has some reasonable relation to its situation. In some cases,

²³⁴⁸ Section 3(1)(g).

²³⁴⁹ Section 3(1)(h).

²³⁵⁰ Van Eeden and Barnard *Consumer Protection Law* 446.

²³⁵¹ Van Eeden *Consumer Protection Law* (2013) 425.

²³⁵² This is an editorial error. See further below.

²³⁵³ Van Eeden and Barnard *Consumer Protection Law* 416.

the party is granted automatic standing by act of law, which is the case here.²³⁵⁴ It is submitted that with the broadening of the standing the legislator aims to enable anyone to denounce prohibited conduct by suppliers in order to facilitate its eradication. This could also have a deterring effect on suppliers, knowing that not only consumers can approach the court when involved with prohibited conduct, but also persons knowing 'accidentally' of such conduct.

The reference in section 71(1) to section 69(1)(c)(ii) or (2)(b) is wrong because these provisions – which existed in the Draft Bill – do not exist in the Act. It appears that they have been absorbed into the current section 70. The legislator probably intended that any provision in an industry code providing that in the event of the inability to resolve a dispute the ombud must make a ruling in favour of one of the parties is superseded by the requirement of section 70. This means that the agent must then terminate the process by notice to the parties, and the party who referred the matter to the agent has then the right to refer the matter to the Commission.²³⁵⁵ The legislator should correct the wording of section 71(1) accordingly.

The Commission may also directly initiate a complaint on its own motion under section 71(2).

A third possibility is that the Commission 'may' initiate a complaint when directed to do so by the Minister in terms of section 86(b), or on the request of a provincial consumer protection authority, another regulatory authority, or an accredited consumer protection group. It is submitted that the Commission has no discretion when being directed by the Minister to initiate a complaint, as indicated by the word 'direct'. The word 'may' in section 71(2) *in pr.* must thus be read as 'must'.

After the matter has been referred to the NCC, it will then either issue a notice of non-referral,²³⁵⁶ refer the complaint to another regulatory authority, or investigate the matter.²³⁵⁷

The Commission can issue a notice of non-referral if the complaint appears to be frivolous or vexatious, does not allege any facts which, if true, would constitute grounds for a remedy under the Act, or is prevented in terms of section 116,²³⁵⁸ from being referred to the Tribunal.²³⁵⁹

²³⁵⁴ See, e.g., *Law Dictionary of Law* s.v. 'locus standi'. Under some environmental laws in the United States, a party may sue someone causing pollution to certain waterways without a federal permit, even if the party suing is not harmed by the pollution being generated.

²³⁵⁵ Van Heerden 'Section 71 in Naudé and Eiselen (eds) *CPA Commentary* para 4.

²³⁵⁶ Section 72(1)(a).

²³⁵⁷ Section 72(1)(d). In terms of section 1, a regulatory authority is an organ of state or entity established in terms of the national or provincial legislation responsible for regulating an industry, or sector of an industry.

²³⁵⁸ Limitation of bringing action.

²³⁵⁹ Section 72(1)(a)(i), (ii) and (iii).

It may also refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court to assist the parties to attempt to resolve the dispute under section 70 unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner.²³⁶⁰ The referral to another regulatory authority for investigation under section 72(1)(c) makes only sense where no ADR agent has previously dealt with the matter, or where the dispute resolution process has been terminated prematurely.²³⁶¹

The Commission may also direct an inspector to investigate the complaint as quickly as practicable, in any other case.²³⁶² After the conclusion of its investigation under section 72(1)(d), it may issue a notice of non-referral to the complainant under section 73(1)(a), in response to a complaint, other than on the grounds contemplated in section 116. In such case, the complainant may refer the matter directly to the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principal place of business in the Republic, or the Tribunal, with leave of the Tribunal.²³⁶³ The respondent may apply to the Tribunal for an order that the matter be referred to the Tribunal. The provisions of section 73(4) apply to such an application.²³⁶⁴ Under section 73(4), if an application has been made to the Tribunal, the Tribunal may order that the matter be referred to it instead of the consumer court if the balance of convenience or interests of justice so require.

If the Commission alleges that a person has committed an offence in terms of the Act, it may refer the matter to the National Prosecuting Authority.²³⁶⁵

If the Commission is of the view that a person has engaged in prohibited conduct, it may refer the matter, according to section 73(1)(c)(i), to the equality court,²³⁶⁶ if the complaint involves a matter concerning discriminatory conduct.²³⁶⁷ Van Heerden and Barnard correctly argue that in equality-related cases, it is unnecessary and too time-consuming to approach the Commission first as it has no jurisdiction over these matters.²³⁶⁸ It is recommended that in matters that also comprise other consumer-related issues besides discrimination, the Commission should be contacted first. It can then 'split' the matter into a discriminatory part

²³⁶⁰ Section 72(1)(b).

²³⁶¹ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 33 note 5 at 69-17 (the numeration of the footnotes in this chapter is not logical).

²³⁶² Section 72(1)(d).

²³⁶³ Section 75(1)(a) and (b).

²³⁶⁴ Section 75(2).

²³⁶⁵ Section 73(1)(b).

²³⁶⁶ See s 10.

²³⁶⁷ Part A of Chapter 2.

²³⁶⁸ Van Heerden/Barnard 2011 *JICLT* 135.

(which it will refer to the equality court) and another part concerning prohibited conduct that it will handle itself. This has the advantage that consumers do not have to decide which entity they have to address.

Where the Commission is of the view that prohibited conduct has occurred, it may propose a draft consent order if an agreement is reached with the respondent.²³⁶⁹ If the Commission and the respondent agree to the proposed terms of the draft consent order, the Tribunal or a court, without hearing any evidence, may then confirm that agreement as a consent order.²³⁷⁰ The Tribunal or the court is not obliged though to make such a consent order.²³⁷¹ It may also indicate any changes that must be made in the draft order before it will make the order,²³⁷² or refuse to make the order.²³⁷³ With the consent of a complainant, a consent order confirmed by the Tribunal or the court may include an award of damages to the complainant.²³⁷⁴

Under section 73(1)(c)(iii), read with subsection (2), the Commission may also refer the matter to the consumer court of the province in which the supplier has its principal place of business, if there is a consumer court in that province, and the Commission believes that the issue raised by the complaint can be dealt with expeditiously and fully by such a referral.²³⁷⁵ The consumer court hearing the matter must conduct its proceedings in a manner consistent with the requirements applicable to hearings of the Tribunal and may make any order that the Tribunal could have made after hearing that matter.²³⁷⁶ An order of a consumer court made after hearing a matter referred to under section 73 has the same force and effect as if the Tribunal had made it.²³⁷⁷ It is submitted that this means that there is no hierarchy between the provincial consumer courts and the Tribunal. The legislator probably intended to put in charge the provincial entities and discharge the Tribunal, while providing at the same time for the possibility to apply for a referral to the Tribunal. A referral to the consumer court only computes if the consumer court had not dealt with the matter before.²³⁷⁸

²³⁶⁹ Section 73((1)(c)(ii).

²³⁷⁰ Section 74(1).

²³⁷¹ Section 74(2)(a).

²³⁷² Section 74(2)(b).

²³⁷³ Section 74(2)(c).

²³⁷⁴ Section 74(3).

²³⁷⁵ Section 72(2)(a).

²³⁷⁶ Section 73((5)(a) and (b).

²³⁷⁷ Section 73(6).

²³⁷⁸ Of the same opinion: Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 33 note 3 at 69-18 (the numeration of the footnotes in this chapter is not logical).

The Commission may also refer to the Tribunal in such case.²³⁷⁹ If the Commission refers the matter to a consumer court, any party to that referral may apply to the Tribunal for an order that the matter is referred to the Tribunal.²³⁸⁰ The Tribunal may order then that the matter be referred to it instead of the consumer court if the balance of convenience²³⁸¹ or interests of justice so require.²³⁸²

Finally, the Commission may issue a compliance notice under section 100.²³⁸³ If the person to whom the compliance notice has been issued fails to comply with the notice, the Commission may either apply to the Tribunal for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution as an offence under section 110(2).²³⁸⁴

Although it is not a requirement of section 73(1)(c)(o) to (iii) that the Commission's belief in respect of prohibited conduct be reasonable, reasonableness is a fundamental requirement in administrative law.²³⁸⁵ It would therefore be reasonable to expect that the facts established and conclusions drawn during and after the investigation be documented in a report.²³⁸⁶

Van Eeden correctly maintains that if the Commission has not chosen to investigate the complaint by an inspector under section 72(1)(d), but has instead decided to take any of the actions in terms of section 72(1)(a) to (c), it is precluded from investigating the complaint, unless a further complaint is filed. In this regard, the importance of a thorough investigation of each complaint by the Commission is underlined. Where the NCC chose not to investigate after the first consumer complaint and referred the matter to another entity, and then decides, after having received another complaint from another consumer concerning the same supplier and the same matter, to investigate, the other entities and the Commission's findings might be very different. This is increasingly so where the Commission did not investigate properly. Especially vulnerable consumers tend to lay down arms after having received an 'official' decision. They are more likely to accept a decision, even if it might be wrong. The problem of different

²³⁷⁹ Section 73(2)(b).

²³⁸⁰ Section 73(3).

²³⁸¹ In terms of the balance of convenience, the relief given to the plaintiff is balanced against the injury that will be done to the defendant. See 'What is Balance of Convenience?' at <http://thelawdictionary.org/balance-of-convenience>.

²³⁸² Section 73(4).

²³⁸³ Section 73((1)(c)(iv).

²³⁸⁴ If the Commission has applied to the Tribunal for the imposition of an administrative fine, such a prosecution in terms of section 110(2) is not possible.

²³⁸⁵ **Section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000:** 'A court or tribunal has the power to judicially review an administrative action if (...) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.'

²³⁸⁶ Van Eeden and Barnard *Consumer Protection Law* 430.

outcomes also exists when the Commission refers the matter to other entities, such as an ADR agent,²³⁸⁷ or when proposing a draft consent order.²³⁸⁸ Hence, a clear policy of the Commission and its smooth, professional and law-abiding functioning is not only crucial for its credibility, but also for a harmonised redress system in terms of section 3(1)(h). This applies even though the Commission does not have a direct role in dispute resolution.

3.3 The National Consumer Tribunal

a) General remarks

The National Consumer Tribunal (NCT) is an *ad hoc* body that was established in terms of section 26 of the National Credit Act.²³⁸⁹ It has, as opposed to the Commission, adjudicative functions.²³⁹⁰ Like the Commission, it is a juristic person with jurisdiction throughout the Republic. While the Commission can be regarded as a 'watchdog', the Tribunal is a regulatory body.²³⁹¹ It is a tribunal of record,²³⁹² which means that the Registrar has to compile a record of the proceedings.²³⁹³ Since the Tribunal has jurisdiction over matters concerning the National Credit Act and the Consumer Protection Act, it can be expected that it will deal with the different cases in a similar fashion, e.g., in respect of compliance notices, consent agreements and administrative fines.²³⁹⁴ Its procedure is governed by the Regulations for Matters relating to the Functions of the Tribunal and Rules for the Conduct of Matters before the National Consumer Tribunal, 2007.²³⁹⁵ The Tribunal also has a Service Charter²³⁹⁶ in which its commitment to serve the public is set out.

Neither the Consumer Protection Act nor the National Credit Act describe the legal nature of the Tribunal. A comparison with the Commission is therefore helpful. The members of the Commission, i.e., the Commissioner and Deputy Commissioner, are appointed by the

²³⁸⁷ Section 72(1)(b).

²³⁸⁸ Section 73(1)(c) read with s 74.

²³⁸⁹ 34 of 2005.

²³⁹⁰ Van Eeden and Barnard *Consumer Protection Law* 403.

²³⁹¹ Mupangavanhu 2012 *PELJ* 325.

²³⁹² Section 26(1)(a)-(c) NCA. A court of record or a tribunal of record is a legal term referring to a court or tribunal in which a clerk takes down a record of proceedings. See *Law Dictionary of Law* s.v. 'court of record'. Tribunal records may be inspected by arrangement with the Registrar. See rule 36, GN 789 in GG 30225 of 28 August 2007.

²³⁹³ Van Eeden and Barnard *Consumer Protection Law* 467.

²³⁹⁴ Having cost-efficiency concerns in mind, the legislator expanded the Tribunal's function to other areas of consumer protection. Hence, the Tribunal can also hear matters of general consumer protection. See Vessio *LLD thesis* 125 note 779, GenN 1957 in GG 26774 of 9 September 2004 at 44.

²³⁹⁵ Hereafter the 'Rules of the Tribunal'. These were published in GN 789 of 28 August 2007.

²³⁹⁶ See www.thenct.org.za.

Minister,²³⁹⁷ whereas the members of the Tribunal are appointed by the President.²³⁹⁸ The Commission must thus be located within the administrative branch of government. This begs the question of whether the Tribunal is an organ of state according to the definition contained in section 239 of the Constitution, which expressly does not include courts or judicial officers. However, an organ of state is, in addition to any department of state or administration in the national, provincial or local sphere of government, and any other functionary or institution exercising a power of performing a function in terms of the Constitution or a provincial constitution, any other functionary or institution exercising a public power or performing a public function in terms of any legislation. Hence, the Tribunal is an organ of state. According to Van Eeden, it is a 'specialist administrative tribunal', and its functions and activities constitute 'administrative action' in terms of section 1 of the Promotion of Administrative Justice Act.²³⁹⁹ This view is supported by the fact that administrative action is subject to a right of review, which is expressly provided for by section 148(2)(a) of the National Credit Act.

The members of the Tribunal, viewed collectively, must represent a broad cross-section of the population of the Republic and must comprise sufficient persons with legal training and experience to satisfy the requirements of section 31(2)(a) of the National Credit Act.²⁴⁰⁰ Pursuant to section 31(2)(a) of the same Act, the Chairperson must ensure that at least one member of the panel is a person who has suitable legal qualifications and experience.

The wording of section 28(1)(a) is vague because it is not clear what 'sufficient persons with legal training' means. Neither the meaning of 'sufficient' nor the meaning of 'legal training' is clear. The latter could include legal studies at a university or a more practical legal background, such as it is the case for clerks. With a view to the fact that the Chairperson must assign each matter referred to the Tribunal to a member of the Tribunal, to the extent that the National Credit Act provides for a matter to be considered by a single member of the Tribunal,²⁴⁰¹ it is possible that a matter is decided by a person without any legal training.²⁴⁰² This risk is curtailed

²³⁹⁷ Section 87(1) and (6) CPA.

²³⁹⁸ Section 26(2) NCA.

²³⁹⁹ Promotion of Administrative Justice Act 3 of 2000. Van Eeden *Consumer Protection Law* (2013) 444.

²⁴⁰⁰ Section 28(1) NCA.

²⁴⁰¹ Section 31(1)(a) NCA.

²⁴⁰² The assignment of a single member of the Tribunal takes place, in accordance with section 31(1)(a) NCA, in terms of an application in terms of sections 73(3) (CPA) (order that the matter be referred to the Tribunal instead of the consumer court), an application for leave as contemplated in section 75(1)(b), an application in terms of section 75(2) (direct referral to a consumer court and application for an order that the matter be referred to the Tribunal), an application in terms of section 106 (claim that information is confidential), or an application for an extension of time, to the extent that the Tribunal has authority to grant such an extension in terms of the CPA. See s 75(5) CPA.

though by section 31(2)(a). According to this provision, the Chairperson, when assigning a matter to a panel under section 31(1)(b), must ensure that at least one member of the panel is a person with suitable qualifications and experience.

Moreover, a member of the Tribunal may only serve a maximum of two consecutive terms of five years each.²⁴⁰³ This limitation seems to have more disadvantages than advantages. The members of the Tribunal are mostly laypersons who usually need some time to develop specialised legal skills, especially with regard to the variety of matters the Tribunal deals with and the steadily changing area of consumer protection. The valuable knowledge and skills developed during the one or two terms are lost for the Tribunal after expiration of the term(s). It is further my submission that the limitation of terms should be rather applied to governmental functions, in order to avoid or limit abuse, but not to a specialised administrative body.

With a view to the fact that the Tribunal both hears matters concerning the National Credit Act and the Consumer Protection Act, it is also suggested that the establishment of two specialised chambers would be a step towards more professionalism. The subjects of these two statutes, although quite similar in their structure, are too different to be treated by the same members. This applies even more with regard to the limitation to two consecutive terms of the members.

The procedure applicable to and the powers of the Tribunal are set out in the Consumer Protection Act as well as in the National Credit Act. After an investigation by the Commission and agreement between the Commission and the respondent on the proposed terms of an appropriate order, the Tribunal may confirm that agreement as a consent order, without hearing any evidence, in terms of section 74(1). After hearing a motion for a consent order, the Tribunal must make an order as agreed to and proposed by the Commission and the respondent, indicate any changes to be made in the draft order before it will make the order, or refuse to make the order.²⁴⁰⁴ A consent order can only be confirmed in respect of a person or association of persons who were submitted to an investigation²⁴⁰⁵ and always requires that an agreement has been reached. Without an agreement, the matter should be referred to the Tribunal for a hearing into

²⁴⁰³ Section 29(1) and (2) NCA.

²⁴⁰⁴ Section 74(2)(a)-(c).

²⁴⁰⁵ Van Eeden *Consumer Protection Law* (2013) 407. See *Murray, Cloete et al v The National Consumer Commission et al* NCT/4454/2012/101(1)(P) CPA.

prohibited conduct in order to enable the complainant to institute an action in the civil courts for damages.²⁴⁰⁶

An extensive presentation and discussion of the proceedings applicable to the Tribunal would go beyond the scope of this thesis. It should be noted that the word 'appeal' in section 148(1) of the National Credit Act must be interpreted broadly to include a review of a decision. It would make no sense to give a full panel of the Tribunal appeal jurisdiction in respect of a decision reached by a single member of the Tribunal, but no review jurisdiction, and to reserve the possibility of a review to the High Court.²⁴⁰⁷

An order made by the Tribunal has the status of an order of the High Court.²⁴⁰⁸ At first sight, one might think that this creates problems as regards the separation of powers because the Tribunal is strictly speaking not part of the judiciary but an administrative body. Usually, decisions reached by an administration do not have the status of court decisions. It is submitted that the rationale of section 152 of the National Credit Act is to clarify that orders of the NCT are binding *vis-à-vis* the bodies mentioned in this provision. Section 148 of the same Act provides that orders made by the Tribunal are subject to an appeal before the High Court. Hence, the separation of powers between the executive branch and the judiciary is not affected.

The Tribunal may vary or rescind its decision or order (a) erroneously sought or granted in the absence of a party affected by it, (b) in which there is ambiguity, or a manifest error or omission, (c) or made or granted as a result of a mistake common to all the parties to the proceedings.²⁴⁰⁹

On the other hand, with a view to the doctrine of separation of powers, administrative bodies, such as the Tribunal, are usually not endowed with interdictory powers, but rather with powers to grant or withhold specific permissions. In terms of section 114(1), not only the court but also the Tribunal may grant interim relief. By bestowing this power, the Tribunal may also issue interdicts. An 'interdict' is an order made by a court prohibiting or compelling the doing of a

²⁴⁰⁶ *CJ Digital SMS Marketing CC v The National Consumer Commission* (NCT/3584/2011/101) [2012] ZANCT 22 (1 October 2012).

²⁴⁰⁷ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 14. **Section 148 NCA:** '(1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal. (2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may (a) apply to the High Court to review the decision of the Tribunal in that matter; or (b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138.' (Section 138 NCA deals with consent orders).

²⁴⁰⁸ Section 152 NCA.

²⁴⁰⁹ Section 165 NCA.

particular act in order to protect a legally enforceable right that is threatened by continuing or anticipated harm.²⁴¹⁰ In cases where the Commission refers or does not refer the matter to the Tribunal and opts for a compliance notice instead, the Commission has effectively barred the applicant from accessing interim relief, a potential claim for damages and other legal remedies.²⁴¹¹ With a view to the prerequisites set out in section 114(1)(a) to (d), it is suggested that the legislator's decision to endow the Tribunal with the power to grant interim relief was done with good reasons. This is because a complainant seeking low-cost redress who avoids approaching the ordinary courts can be granted this measure inexpensively.

b) Redress by the Tribunal

A complainant cannot directly approach the Tribunal as it is no 'point of first entry' for redress. A matter can only be referred to it by the Commission under section 73(2)(b) or by application of the respondent under section 75(2).²⁴¹² Even in the context of an application for interim relief according to section 114, the Tribunal can only be approached for relief once the complaint has been referred to it by the Commission or by a consumer after the Commission has issued a notice of non-referral in respect of the complaint.²⁴¹³ Van Eeden seems to suggest that the Tribunal may be directly approached by the persons indicated in section 4(1)(a) to (e).²⁴¹⁴ Despite the wording of section 69(a) according to which '[a] person contemplated in section 4(1) may seek to enforce any right (...) by referring the matter *directly* to the Tribunal if such a direct referral is permitted by this Act in the case of the particular dispute',²⁴¹⁵ it is submitted that such a direct referral is contrary to the redress mechanism of the Act. The Act clearly favours ADR or dispute settlements by provincial consumer courts (where they exist) before a matter is referred to the Tribunal by the Commission after it has investigated the complaint. This 'filtering' function of the Commission ensures that the Tribunal is not flooded with potentially unsubstantiated demands and safeguards the Tribunal, which is an *ad hoc* body with limited capacities, from congestion. It is submitted that such a *direct* referral to the Tribunal under 69(a) must be understood in the context of section 75(1)(b) according to which the

²⁴¹⁰ Van Eeden and Barnard *Consumer Protection Law* 460.

²⁴¹¹ *Nayyara Distribution Enterprise CC v Ealryworks 266 (Pty) Ltd t/a/ Gloria Jeans Coffees SA* NCT/4450/2012/114 (1) (P) CPA at para [19].

²⁴¹² Mupangavanhu is of the opinion that a consumer may directly refer a matter to the Tribunal in terms of section 69(a). Such a 'direct referral' is only possible though with leave of the Tribunal to refer a matter to it directly in response to a notice of non-referral by the Commission in terms of s 75(1)(b). See Mupangavanhu 2012 *PELJ* 325.

²⁴¹³ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 33.

²⁴¹⁴ Van Eeden and Barnard *Consumer Protection Law* 449, Van Eeden *Consumer Protection Law* (2013) 426 and 427. At 437 (2013 ed), he states that such a direct referral is only possible where the Commission has issued a notice of non-referral and the consumer then applies for leave to refer the matter directly to the Tribunal.

²⁴¹⁵ Emphasis added.

complainant may, after the Commission has issued a notice of non-referral, refer the matter *directly* to the Tribunal, with leave of the Tribunal. The word 'directly' must therefore not be understood literally, but as 'after having received a notice of non-referral in terms of section 75(1)'. A person not acting on his or her own behalf who intends to approach the Tribunal in terms of the *locus standi* provisions of section 4(1)(b), (c), (d) or (e) must first apply to the Tribunal for leave to approach the Tribunal on this basis.²⁴¹⁶

The Tribunal may hear matters that have been referred by the Commission under section 73(2)(b), or where a complainant has obtained leave from the Tribunal under section 75(1)(b) to refer the matter to it directly in response to a notice of non-referral by the Commission other than a notice of non-referral in terms of section 116,²⁴¹⁷ or where a matter has been transferred by a consumer court to the Tribunal according to section 73(3) or 75((2).

The Tribunal may make a consent order in terms of section 74, as discussed above. It may also make any applicable order contemplated in the Act or section 150 or 151 of the National Credit Act, read with the changes required by the context.²⁴¹⁸ This includes orders declaring conduct to be prohibited under the Act,²⁴¹⁹ interdicting any prohibited conduct,²⁴²⁰ imposing an administrative fine under section 151, with or without the addition of any other order under section 150,²⁴²¹ or confirming a consent agreement in terms of the Act as an order of the Tribunal.²⁴²² In addition, the Tribunal may issue an order confirming, modifying or cancelling all or part of a compliance notice after considering any representations by the applicant and any other relevant information,²⁴²³ condoning any non-compliance with its rules and procedures on good cause shown,²⁴²⁴ granting interim relief in terms of section 114 of the Consumer Protection Act, and granting relief under section 60(3) of the Act in respect of a notice according to section 60(2) by the Commission regarding an investigation or recall programme with respect to unsafe goods, or reviewing a compliance notice.

²⁴¹⁶ Rule 4A(1) of the Tribunal Rules for Conduct which refers to s 4(b), (c) (d) or (e) CPA.

²⁴¹⁷ Section 116 sets out the limitations of bringing action.

²⁴¹⁸ Section 75(4).

²⁴¹⁹ Section 150(a) NCA.

²⁴²⁰ Section 150(b) NCA.

²⁴²¹ Section 150(c) NCA.

²⁴²² Section 150(d) NCA.

²⁴²³ See *Murray, Cloete et al v The National Consumer Commission et al* NCT/4454/2012/101(1)(P) CPA and *Auction Alliance v The National Consumer Commission and Others* Case No 7798/2012 (WCC).

²⁴²⁴ Section 150(e) NCA.

What is more, the Tribunal may impose an administrative fine in respect of prohibited conduct.²⁴²⁵ Contrary to criminal prosecution, administrative fines have the advantage that they can be imposed relatively quickly and depend on less strict demands. They are nonetheless efficient because they carry significant reputational and financial consequences for the accused person's business.²⁴²⁶

In the case of a notice of non-referral by the Commission, in response to a complaint, other than the grounds contemplated in section 116, the complainant may refer the matter directly to the Tribunal, with leave of the Tribunal.²⁴²⁷ Then, the Tribunal must conduct a hearing in accordance with the requirements of the Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal and may make any applicable order contemplated in the Consumer Protection Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context.²⁴²⁸

This means that, when applying the Act, the Tribunal may consider appropriate foreign and international law, international conventions or declarations in terms of section 2(2).²⁴²⁹ It also must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by vulnerable persons,²⁴³⁰ and promote the spirit and purposes of the Act.²⁴³¹ What is more, the Tribunal must²⁴³² make appropriate orders to give practical effect to the consumer's right of access to redress, included, but not limited to any order provided for in the Act, and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the Act.²⁴³³ As the Act does not define words like 'appropriate' and 'practical effect', the interpretation of them is left to the discretion of the presiding officer in the given dispute.²⁴³⁴

²⁴²⁵ Section 112(2)(a) and (b).

²⁴²⁶ Van Eeden *Consumer Protection Law (2013)* 415.

²⁴²⁷ Section 75(1)(b).

²⁴²⁸ Section 75(4)(a) and (b).

²⁴²⁹ Section 2(2) NCA is more restrictive than s 2(2) CPA in that the Tribunal may only consider foreign and international law, but not international conventions, declarations etc.

²⁴³⁰ Section 4(2)(a).

²⁴³¹ Section 4(2)(b)(i).

²⁴³² The word 'must' indicates that the Tribunal has no discretion. See Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 25.

²⁴³³ Section 4(2)(b)(ii).

²⁴³⁴ Mupangavanhu 2012 *PELJ* 326.

A complaint in terms of the Act may not be referred or made to the Tribunal more than three years after the act or omission that is the cause of the complaint, or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.²⁴³⁵

In German law, the limitation period for individual and institutional actions is also three years (§ 195 BGB).²⁴³⁶ If a user reuses its standard terms or the latter are recommended again, the limitation period starts from the beginning.²⁴³⁷

In addition, a complaint may not be referred to the Tribunal against any person that is, or has been, a respondent in proceedings under another section of the Act relating substantially to the same conduct.²⁴³⁸

The standard of proof in any proceedings before the Tribunal in terms of the Act is on a balance of probabilities.²⁴³⁹

3.4 Consumer courts

a) General remarks

A 'consumer court' is defined in section 1 as a body of that name, or a consumer tribunal, that has been established under applicable provincial consumer legislation. This means that there are no national consumer courts, and that ordinary courts are not included in this definition. 'Courts' in terms of the Act thus means common-law courts. Consumer courts are rather administrative bodies.²⁴⁴⁰

It seems that the jurisdiction of consumer courts to hear direct referrals by a consumer extends beyond the traditional rules of geographic jurisdiction, which require a matter to be instituted in the court where the respondent resides. According to the principle *actor sequitur forum rei*,²⁴⁴¹ the plaintiff (or applicant) has to follow the defendant (or respondent) to his or her forum and institute legal proceedings there. However, when reading section 69(c)(ii) in terms of which a person with *locus standi* under section 4(1) may seek to enforce any right under the Act by applying to the consumer court of the province with jurisdiction over the matter, in

²⁴³⁵ Section 116(1).

²⁴³⁶ § 195 BGB: 'The standard limitation period is three years.'

²⁴³⁷ Erman/Roloff § 1 UKlaG para 12, Palandt/Bassenge § 1 UKlaG para 15.

²⁴³⁸ Section 116(2).

²⁴³⁹ Section 117. In terms of this section, this standard of proof also applies to consumer courts.

²⁴⁴⁰ Du Plessis 2010 *SA Merc LJ* 518.

²⁴⁴¹ This principle is laid down, *inter alia*, in s 28(1)(a) of the Magistrates' Courts Act 32 of 1944 and s 21 of the Superior Courts Act 10 of 2013. It states that the plaintiff must follow the forum of the thing in dispute. In view of this maxim, the remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted. See 'Actor Sequitur Forum Rei Law & Legal Definition' at <http://definitions.uslegal.com/a/actor-sequitur-forum-rei>.

conjunction with section 75(1)(a), pursuant to which the consumer may refer a matter directly to a consumer court where the Commission issues a notice of non-referral after an investigation, it becomes clear that the consumer court in the province within which the complainant resides or in which the respondent has its principal place of business has jurisdiction.²⁴⁴² Interestingly, the complainant has a jurisdictional choice, which may also cross provincial boundaries. The provinces govern provincial jurisdiction though. The provinces should therefore draft their legislation accordingly.²⁴⁴³

According to Schedule 4 Part A of the Constitution, consumer protection matters are matters of concurrent jurisdiction. Certain provinces have adopted provincial consumer protection legislation based on the Consumer Affairs (Unfair Business Practices) Act.²⁴⁴⁴ The Gauteng Consumer Affairs Court, for instance, has been established in 1999 on the basis of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.²⁴⁴⁵ Pursuant to item 7 of Schedule 2 of the Consumer Protection Act, the Minister, by notice in the Gazette, may delegate the relevant Member of the Executive Council (MEC) any or all of the functions of the Commission to be exercised within that province and in accordance with the Act, until provincial legislation has been enacted in a province establishing a provincial consumer protection authority. In all nine provinces, Consumer Affairs Offices have been established to provide consumers with advice and information though. A provincial consumer protection authority is defined in section 1 as a body established within the provincial sphere of government, and designated by the responsible MEC of a province to have general authority to deal with consumer protection matters within that province.

Under section 84, a provincial consumer protection authority has jurisdiction within its province to (a) issue compliance notices in terms of the Act on behalf of the Commission to any person carrying on business exclusively within that province, (b) facilitate the mediation or conciliation of a dispute arising in terms of the Act between or among persons resident, or

²⁴⁴² Du Plessis 2008 *SA Merc LJ* 86.

²⁴⁴³ Du Plessis 2008 *SA Merc LJ* 87.

²⁴⁴⁴ 71 of 1988.

²⁴⁴⁵ In other provinces, consumer affairs and the establishment of consumer courts are regulated by the following statutes: Western Cape Province Consumer Affairs (Unfair Business Practices) Act 10 of 2002, Mpumalanga Consumer Affairs Act 6 of 1998, North-West Province Consumer Affairs (Unfair Business Practices) Act 4 of 1996 (suspension of certain provisions of the North West Consumer Affairs Act 13 of 1995), Northern Cape Province Consumer Affairs (Unfair Business Practices) Act 7 of 1996, Eastern Cape Province Consumer Affairs (Unfair Business Practices) Act 5 of 1998, Free State Consumer Affairs (Unfair Business Practices) Act 14 of 1998 and Northern Province Consumer Affairs (Unfair Business Practices) Act 8 of 1996, as amended by the Consumer Affairs (Unfair Business Practices) Act 2 of 2003, Limpopo Consumer Affairs (Unfair Business Practices) Act 8 of 1996. Kwa-Zulu Natal Consumer Protection Act 4 of 2013.

carrying on business exclusively within that province, (c) refer a dispute contemplated in paragraph (b) to the provincial consumer court within that province, if there is one, and (d) request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the Act arising within that province. Some provinces have concurrently established consumer courts.²⁴⁴⁶ The fact that not all provinces have established consumer courts means that many South Africans have no access to them.²⁴⁴⁷ Therefore, this form of redress will be unavailable for many consumers in other parts of South Africa, and even in the more remote parts of the provinces where consumer courts have actually been established.²⁴⁴⁸ Only when all provinces will provide for consumer courts, an important step towards better service delivery for consumer redress will be done.²⁴⁴⁹

Each consumer court has its own procedural rules so that consumers have to consult those first in order to comply with them before approaching the competent court. This is not very consumer-friendly and hampers even more the access to consumer courts. Unfortunately, the provinces did not create a common legislative framework to be used as an overarching model. This approach has been successfully adopted in Germany, where 15 out of 16 federal states took the Administrative Procedure Act²⁴⁵⁰ of the Federal Republic as a sample. Some of the federal states have even copied the federal rules word for word. This approach ensures a harmonised procedure throughout the country.²⁴⁵¹ It would also facilitate the transfer of matters from one province to another, as illustrated in the case of *Coen Scheepers v N12 Diesel Engines CC*.²⁴⁵² In this case, the matter was transferred from the Consumer Affairs Court for the Free State Province²⁴⁵³ to the Office of the Consumer Protector in Gauteng. The Consumer Affairs Court held that an investigation had to be conducted by the Gauteng office and not the Free State office because both provinces were governed by different provincial laws and have separate jurisdictions. The Minister should take the opportunity provided for in section 98(d) should the Commission recommend any changes as regards uniformity in the provincial legislation concerning consumer protection so that they can develop a common framework.

²⁴⁴⁶ Currently in Gauteng, the Free State, Mpumalanga, Limpopo and the Western Cape.

²⁴⁴⁷ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 18.

²⁴⁴⁸ Van Heerden/Barnard 2011 *JICLT* 135.

²⁴⁴⁹ Du Plessis 2008 *SA Merc LJ* 87.

²⁴⁵⁰ *Verwaltungsverfahrensgesetz (VwVfG)*.

²⁴⁵¹ See Neulen *Recht A-Z* s.v. 'Verwaltungsverfahren' and Creifelds *Rechtswörterbuch* s.v. 'Verwaltungsverfahren'.

²⁴⁵² GCC 131/10/08/04.

²⁴⁵³ Case No. FSCAC 2003/8-7.

In Gauteng, for example, the Consumer Affairs Court consists of five persons. The chairperson shall be a retired judge of the Supreme Court, or pursue another legal profession, e.g., as an advocate, with not less than one years' cumulative experience in one or more such capacities. The four additional members must have special knowledge or experience of consumer advocacy, economics, industry or commerce.²⁴⁵⁴ Although the members of the court have legal experience, the fact that they do not necessarily need a law diploma, except for the chairperson, raises some concerns. The legal complexity of consumer protection legislation requires adjudicative bodies consisting solely or mainly of lawyers. Some subjects that need sound legal knowledge, experience and analysis should be given here as examples: The determination of unfairness or the wrongfulness in product liability involves a value judgment, which requires an open and structured process of reasoning, including the proven facts, the relationship between the parties and the relevant legislation.²⁴⁵⁵ These matters are often fought in an unequal struggle between suppliers, who have access to the necessary information and superior resources, and consumers that are often vulnerable.²⁴⁵⁶ What is more, the wide definition of goods²⁴⁵⁷ may involve copyright or intellectual property issues that only lawyers may assess. Furthermore, the unsatisfactory and often poor definitions as well as the innumerable problems and contradictions contained in consumer protection legislation contribute to its complexity and legal problems that require sound legal expertise. It is submitted that the possibility offered by section 18(4) of the Gauteng Consumers Affairs (Unfair Business Practices) Act in terms of which the office may be represented or assisted by an advocate, attorney, or any other person approved by the responsible Member, does not balance these shortcomings. In legal systems where a court is composed by one professional lawyer and several laypersons, experience has shown that as soon as complex legal questions arise, the lay judges rely on the professional magistrate's opinion rather than forming an independent judgement.²⁴⁵⁸

As consumer protection is a field of concurrent jurisdiction, the Act contains provisions aimed at the co-operation between the Commission and the Provinces. The Minister's power to delegate the relevant MEC functions of the Commission to be exercised within the province

²⁴⁵⁴ Section 14(2) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁵⁵ In terms of s 61(6), '[n]othing in this section limits the authority of a court to (a) assess whether any harm has been proven and adequately mitigated, (b) determine the extent and monetary value of any damages, including economic loss, or (c) apportion liability among persons who are found to be jointly and severally liable.'

²⁴⁵⁶ Du Plessis 2008 *SA Merc LJ* 78 and 79.

²⁴⁵⁷ Section 1. This definition includes any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium or a licence to use any such intangible product.

²⁴⁵⁸ In Germany: §§ 20-22 ArbGG for labour law matters, or 109 GVG for commercial matters.

until a provincial consumer protection authority has been established has already been discussed.

What is more, under section 83(5), at the direction of the Minister, the Commission must engage with any relevant provincial consumer protection authority in co-operative activities to detect and suppress prohibited conduct or offences in terms of the Act, occurring within the province or across its provincial boundaries. In terms of section 41(2) of the Constitution, the Minister must consult with the responsible Member of any relevant provincial Executive Council to co-ordinate and harmonise the functions to be performed by the Commission and one or more provincial consumer protection authorities. When necessary, he or she must facilitate the settlement of any dispute between the Commission and one or more provincial consumer protection authorities, concerning the functions to be performed by them relating to consumer protection.²⁴⁵⁹ Moreover, the Minister must consult with the responsible MEC of the given province to determine the steps to be taken to ensure the fulfilment of a statutory obligation contemplated by the Act.²⁴⁶⁰ The Commission may request a provincial consumer protection authority to submit any report or information related to the activities of that provincial consumer protection authority to the Commission.²⁴⁶¹

b) Redress by consumer courts

Instead of approaching an alternative dispute resolution agent, the consumer or another person contemplated in section 4(1) may approach a provincial consumer court with jurisdiction over the matter directly, if one exists in the given province.²⁴⁶²

The rules governing consumer courts vary from province to province. Complaints are generally received by a consumer protector²⁴⁶³ who is a 'provincial consumer protection authority' in terms of section 84. A consumer may lodge a complaint with the protector's office. The office may also institute an investigation where no complaint has been lodged.²⁴⁶⁴ The office has wide powers, such as summoning and questioning persons and requiring the production of books and other documents,²⁴⁶⁵ or entering premises and executing searches and seizures.²⁴⁶⁶ The

²⁴⁵⁹ Section 83(1)(a) and (b).

²⁴⁶⁰ Section 83(2).

²⁴⁶¹ Section 83(6). It is suggested that the formulation 'may request' leaves no discretion to the provincial consumer protection authority and that the latter must provide the Commission with such report or information.

²⁴⁶² Section 69 read with s 70. Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 19.

²⁴⁶³ See, e.g., s 6 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁶⁴ See, e.g., s 7 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁶⁵ See, e.g., s 8 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁶⁶ See, e.g., s 10 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

office may also negotiate arrangements to discontinue unfair business practices.²⁴⁶⁷ Upon completion of an investigation, the Consumer Protector may institute proceedings in the court of the area concerned against the person alleged to be responsible for the unfair business practice in question.²⁴⁶⁸ If the office decides not to institute proceedings, the Consumer Protector shall inform the complainant.²⁴⁶⁹ A person who does not comply with the Consumer Protector's requests is guilty of an offence and will be liable, if convicted, to a fine not exceeding R 200,000 or imprisonment not exceeding five years.²⁴⁷⁰

In general, consumer courts may make orders prohibiting unfair business practices,²⁴⁷¹ awarding costs against persons that have committed unfair business practices,²⁴⁷² confirming or setting aside arrangements negotiated by the Office of the Public Prosecutor²⁴⁷³ or declaring certain business practices to be unlawful.²⁴⁷⁴ In addition, they are entitled to appoint a curator to perform duties necessary to give effect to any of these orders.²⁴⁷⁵ The curator is empowered, *inter alia*, to take control over a business and realise its assets to reimburse consumers.²⁴⁷⁶

Consumer court orders must be published in the Provincial Gazette.²⁴⁷⁷ The publication serves as a record because the hearings and arrangements are recorded entirely, but also for future reference.²⁴⁷⁸ These publication requirements are more far-reaching than in § 7 of the German UKlaG that requires that only the operative part of judgement may be published.

The proceedings of the court are generally open to the public.²⁴⁷⁹ They shall be prosecuted by the office, which may be represented or assisted by an advocate, attorney, or any other person approved by the responsible Member.²⁴⁸⁰

²⁴⁶⁷ See, e.g., s 11 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁶⁸ See, e.g., s 12(1)(a) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁶⁹ See, e.g., s 12(2) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁰ See, e.g., ss 8(4), 30 and 31 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷¹ See, e.g., s 22 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷² See, e.g., s 17(1)(b) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷³ See, e.g., s 20(2)(a), (b) and (c) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁴ See, e.g., s 24 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁵ Du Plessis 2008 *SA Merc LJ* 77. See, e.g., s 23 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁶ See, e.g., s 23 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁷ Du Plessis 2008 *SA Merc LJ* 77. See, e.g., s 21(3) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁷⁸ Du Plessis 2008 *SA Merc LJ* 77.

²⁴⁷⁹ See, e.g., s 18(2) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁸⁰ See, e.g., s 18(4) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

The sanctions pronounced against persons who disregard the court's orders correspond to those for infringements of the Consumer Protector's orders.²⁴⁸¹

Even though consumer courts may make extensive orders, their enforcement and execution remain unaddressed in the relevant consumer court legislation,²⁴⁸² which makes them toothless tigers. A drawback of this phenomenon is that matters which could normally be handled by provincial consumer courts end up at national level in order to achieve adequate prosecution.²⁴⁸³ The only sanction in provincial legislation in a case where a respondent (supplier) fails to comply with a consumer court order, is that the latter can be found guilty of an offence. Then, he or she can be convicted to pay the penalties set out in the legislation.²⁴⁸⁴ The Consumer Protector may then lay a charge of contempt of court against the respondent with the South African Police Service (SAPS) which, after investigation, will hand over the matter to the National Prosecuting Authority (NPA). The case will then become a criminal matter. In the criminal matter *S v PL Mholongo*²⁴⁸⁵ which stemmed from the consumer court affair *Rakgadi Nyusawa v Patwell Funerals CC (represented by PL Mhlono)*,²⁴⁸⁶ the accused was found guilty of fraud, and a sentence of 12 months imprisonment, suspended for 12 months, was passed.²⁴⁸⁷ However, the complainant (consumer) was not granted any financial compensation because the compensation award imposed by the consumer court, based on the breach of contract, could not be enforced by the criminal court.²⁴⁸⁸

Therefore, there is an urgent need for a proper enforcement and execution procedure in this field.²⁴⁸⁹ Du Plessis suggests that the provincial legislation should be amended as follows: 'Any decision, judgment or order of the consumer court is final and binding and may be served, executed and enforced as if it were an order of the National Consumer Tribunal.'²⁴⁹⁰ The

²⁴⁸¹ See, e.g., s 31 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁸² Du Plessis 2010 *SA Merc LJ* 517.

²⁴⁸³ *Draft Green Paper on the Consumer Policy Framework* 2004 at 39, published in GenN 1957 in GG 26774 of 9 September 2004.

²⁴⁸⁴ See, for instance ss 30 and 31 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

²⁴⁸⁵ Benoni CAS 154/01/08.

²⁴⁸⁶ GCC 240/13/06/06.

²⁴⁸⁷ In this case it is astonishing that the attorney proceeded to accept a plea of guilty to a charge of fraud in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, instead of a charge of contempt to court, although no alteration of a charge from contempt of court to fraud was found in the court filed and the complainant did not lay a charge of fraud. Since the accused had ignored the order of the consumer court, there was clearly a contempt of court though.

²⁴⁸⁸ The public prosecutor could have ensured financial satisfaction though by requesting the magistrate to make a civil order for compensation in terms of s 300 of the Criminal Procedure Act. Such an order would have had the effect of a civil judgment of that court. See Du Plessis 2010 *SA Merc LJ* 523.

²⁴⁸⁹ Mupangavanhu 2012 *PELJ* 327.

²⁴⁹⁰ Du Plessis 2010 *SA Merc LJ* 527.

reasoning for this formulation can be found in section 73(2)(a). According to this provision, the Commission may refer a matter to a consumer court of the province, if there is one. In addition, under section 73(6), an order of a consumer court made after hearing a matter referred to has the same force and effect as if the Tribunal had made it. According to section 75(1)(a), when the Commission issues a notice of non-referral, the complainant may refer the matter directly to a consumer court. The consumer court must conduct its proceedings in a matter consistent with the requirements applicable to hearings of the Tribunal and may make any order that the Tribunal could have made after hearing the matter.²⁴⁹¹ Du Plessis admits though that the problem with such a formulation is that under section 152(1) of the National Credit Act, the Tribunal's decisions, judgments or orders (and effectively those of the consumer courts too) will be binding on the National Credit Regulator, provincial credit regulators, other consumer courts, alternative dispute resolution agents or the ombuds with jurisdiction, debt counsellors and magistrates' courts. The legislator's intention was not to grant such powers to provincial consumer courts though. In addition, it is improbable that the legislator wants consumer courts to be on the same level as the High Court with regard to the different appointment procedures and qualifications of the members of these two bodies.²⁴⁹²

Du Plessis therefore suggests an alternative to her amendment mentioned above in that 'any decision, judgment or order of the consumer court is final and binding and is deemed to be an order of a magistrates' court in terms of the Magistrates' Court Act²⁴⁹³ and is enforced in terms of that Act.'²⁴⁹⁴ The order of the magistrates' court might exceed the monetary jurisdiction limit of R 300,000, however.²⁴⁹⁵ To solve this problem, one could limit the monetary jurisdiction of the consumer courts to that of magistrates' courts, which would be a restriction of consumer protection though, especially in class actions where this limit might easily be reached. Another solution could be that a consumer court has to refer a matter to the Commission in cases where the magistrates' court monetary limit is reached. The Commission then would have to investigate the matter in order to determine whether the matter should be referred back to the consumer court for a hearing.²⁴⁹⁶ The order of the consumer court, after the hearing, has the same force and effect as if the Tribunal had made it.²⁴⁹⁷ According to section 152(1) of the

²⁴⁹¹ Section 73(5)(a) and (b).

²⁴⁹² See s 14 of the Gauteng Consumer Affairs (Unfair Business Practices) 'Act 7 of 1996.

²⁴⁹³ 32 of 1944.

²⁴⁹⁴ Du Plessis 2010 *SA Merc LJ* 528.

²⁴⁹⁵ Section 29 of the Magistrates' Courts Act 32 of 1944 and GN 670 in GG 33418 of 29 July 2010.

²⁴⁹⁶ Section 73(2)(b).

²⁴⁹⁷ Section 73(6).

National Credit Act, such an order may then be served, executed and enforced as if it were an order of the High Court.²⁴⁹⁸ Although this solution is preferable and has the merit of being elegant, it reveals the over-complicated redress mechanism of the Act.

As mentioned above, besides the consumer courts, there are also consumer protection authorities on the provincial level. According to section 84, a provincial consumer protection authority has jurisdiction within its province to (a) issue compliance notices in terms of the Act on behalf of the Commission, (b) facilitate the mediation or conciliation of a dispute arising in terms of the Act, (c) refer a dispute to the provincial consumer court within that province, if there is one, and (d) request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the Act.

There seems to be a tacit agreement in terms of which provincial consumer courts focus on individual complaints against regional or local businesses. In contrast, the national government's role (Commission) is to investigate and prosecute suppliers having national reach or presence.²⁴⁹⁹ It is suggested that, if such a tacit agreement exists, it should be set out expressly in a piece of legislation in order to achieve more legal certainty and coherency. Tacit agreements in the administrative sphere are no sufficient legal basis in a democracy. If no clarification is provided, there is a risk of duplication and misallocation of resources.²⁵⁰⁰

The standard of proof in any proceedings before a consumer court in terms of the Act is on a balance of probabilities.²⁵⁰¹

3.5 Alternative dispute resolution

a) Ombuds with jurisdiction and industry ombuds as ADR agents

The Consumer Protection Act and the National Credit Act both provide for alternative complaint procedures, including ombuds.²⁵⁰² The Department of Trade and Industry was of the view that there is a need for ADR mechanisms in the form of industry-funded procedures. Only where voluntary mechanisms have 'not been effective or where the industry is of such a nature that greater regulation is required should statutory mechanisms be considered.'²⁵⁰³ Contrary to

²⁴⁹⁸ Du Plessis 2010 *SA Merc LJ* 528 and 529.

²⁴⁹⁹ *Draft Green Paper on the Consumer Policy Framework* 2004 at 44, published in GenN 1957 in GG 26774 of 9 September 2004.

²⁵⁰⁰ *Draft Green Paper on the Consumer Policy Framework* 2004 at 44, published in GenN 1957 in GG 26774 of 9 September 2004.

²⁵⁰¹ Section 117. In terms of this section, this standard of proof also applies to the Tribunal.

²⁵⁰² The word 'ombud' has been coined in the Financial Advisory and Intermediary Services Act 37 of 2002.

²⁵⁰³ *Draft Green Paper on the Consumer Policy Framework* 2004 at 37 and 47, published in: GenN 1957 in GG 26774 of 9 September 2004.

litigation, alternative dispute resolution is relatively affordable and time-efficient. Hence, it increases access to justice.²⁵⁰⁴ Essential characteristics of ombuds are their credibility to their users, their accessibility and efficiency. They must be able to operate independently and free of opposition.²⁵⁰⁵ Ombuds provide faster, more affordable and less formal²⁵⁰⁶ dispute resolution than ordinary courts, which is crucial for consumer redress.²⁵⁰⁷ Despite these advantages, an ombud might not be the appropriate forum in cases that involve complicated facts, legal uncertainty or expert witnesses. In such matters, other fora, like the courts, are probably more suited.²⁵⁰⁸

Ombuds play an invaluable role in achieving speedy redress.²⁵⁰⁹ The informal dispute resolution promoted by ombuds has a filtering function as ADR relieves the courts from simple matters so that they only deal with more complicated matters.²⁵¹⁰ Besides, people who otherwise would not have access to the court system have a real prospect of a remedy, which ultimately leads to consumer empowerment.

The concept of 'ombudsmen',²⁵¹¹ of which the name derives from the Old Norse word 'umbodhsmadr',²⁵¹² is not new on the African continent. In Ethiopian culture, for instance, the ombudsman is known as the 'Keeper of the People's Tears'. Thabo Mbeki, the former South African President, noted in an address:

'Because [the office of the ombud's] role is not merely to apportion blame, but rather to protect and promote the rights of citizens, it has the possibility to draw on the wealth of wisdom found in African traditional ways of conflict resolution (...). In this regard, it is important that Ombudspersons should display, maintain and enhance African values

²⁵⁰⁴ Mupangavanhu 2012 *PELJ* 329.

²⁵⁰⁵ Melville 2010 *SA Merc LJ* 54.

²⁵⁰⁶ Although some offices in South Africa are akin to the role of an ombud, they are closer to a tribunal than that of an ombud since their procedures are quite formalised and their determinations are legally binding and subject to appeal in the court system. This is the case for the statutory Pension Fund Adjudicator and the Ombud for Financial Service Providers. See 'The Pension Funds Adjudicator' at <https://www.pfa.org.za/Pages/default.aspx> and the Office of the Ombud for Financial Services Providers *Annual Report 2004/2005* at 5 at http://www.itinews.co.za/pdf/FAIS_A_R_2005_32859.pdf (no longer available).

²⁵⁰⁷ Mupangavanhu 2012 *PELJ* 330.

²⁵⁰⁸ Melville 2010 *SA Merc LJ* 57.

²⁵⁰⁹ *Draft Green Paper on the Consumer Policy Framework* 2004 at 47, published in: GenN 1957 in GG 26774 of 9 September 2004.

²⁵¹⁰ Melville 2010 *SA Merc LJ* 63. In 2006, the insurance and banking ombuds alone finalised 16,681 cases. See FinMark Trust Landscape for Consumer Recourse in South Africa's Financial Services Sector (2007) at 6, at <http://www.finmark.org.za/landscape-for-consumer-recourse-in-south-africas-financial-services-sector>. There seems to be no updated figures available at the moment. It is not unlikely however that the numbers have increased meanwhile.

²⁵¹¹ In many countries, Germany included, ombuds are rather referred to as 'ombudsmen' or 'ombudswomen', or simply 'ombudsmen and –women'. Even in South Africa, the term 'ombudsmen' can still be found, e.g., in the Ombudsmen Association of South Africa.

²⁵¹² Melville 2010 *SA Merc LJ* 50. Among the early Germanic tribes, the ombudsman had originally the role of recovering compensation from the family of a wrongdoer on behalf of the family affected by a wrongdoing.

(...). As we work for our renaissance, this institution should see itself as one of the important agents of change on our continent.²⁵¹³

With a view to traditional dispute resolution in African cultures, it is suggested that ombuds can play an essential role in this regard, as opposed to more adversarial redress mechanisms such as courts or tribunals.

Ombuds can be divided into several categories, namely legislative ombuds (classical or parliamentary ombuds), executive ombuds, organisational ombuds and advocate ombuds.²⁵¹⁴ This list can be extended to include international ombuds and private sector ombuds as well as ombudsmen consultants.²⁵¹⁵

Classical (or legislative) ombuds can be defined as independent high-level public officials responsible to Parliament or legislature and appointed by constitutional or legislative provisions to monitor the administrative activities of the government'.²⁵¹⁶ They receive complaints from aggrieved persons against government agencies, officials and employees or acts on their own motion. They are empowered to investigate, recommend corrective action and issue reports.²⁵¹⁷ This concept has been established for the first time in 1809 in Sweden²⁵¹⁸ and is accepted as being the genesis of the modern ombud concept.²⁵¹⁹ In South Africa, for instance, the Public Protector is a classical ombud.²⁵²⁰

Executive ombuds are appointed by the executive authority, e.g., a municipality, or report directly to the head of the executive branch. They receive complaints concerning actions and

²⁵¹³ Address of the former President of South Africa, Thabo Mbeki, at the General Assembly of the African Ombudsman Association (AOA): Misty Hills Conference Centre, Muldersdrift, Johannesburg (11 April 2005) at <https://www.sahistory.org.za/archive/address-president-south-africa-thabo-mbeki-general-assembly-african-ombudsman-association>.

²⁵¹⁴ This is the classification of the American Bar Association. See 'Standards for the Establishment and Operation of Ombuds Offices' at <https://www.prearesourcecenter.org/file/551/standards-establishment-and-operations-ombuds-offices>.

²⁵¹⁵ Melville 2010 *SA Merc LJ* 52.

²⁵¹⁶ Owen *The Ombudsman* 1, Melville 2010 *SA Merc LJ* 52. In the UK, the Parliamentary Ombudsman (Parliamentary Commissioner for Administration) fulfils this role. See Law *Dictionary of Law* s.v. 'Parliamentary Ombudsman'.

²⁵¹⁷ International Bar Association, quoted in SALRC Report on Constitutional Models (Project 77) Vol. 3 at 1222.

²⁵¹⁸ Then, the office of the Parliamentary Commissioner for Justice (*Riksdagens Justitieombudsman*) was established.

²⁵¹⁹ Melville 2010 *SA Merc LJ* 50.

²⁵²⁰ Melville 2010 *SA Merc LJ* 57. The Public Protector's functions are set out in the Public Protector Act 23 of 1994, according to which he or she is empowered to investigate any form or allegation of maladministration, abuse of power, unfair and improper conduct. It may also investigate corruption with respect to public money and improper or unlawful enrichment. Should the Public Protector find evidence of the above-mentioned allegations, prosecution in a court of law may follow and may include a fine. See Van Heerden/Barnard 2011 *JICLT* 134.

failures to act of the executive entity, its officials, employees and contractors.²⁵²¹ For example, the Interim Complaints Directorate, created by the Interim Constitution of South Africa, is a specialised ombud for complaints against the police and regarded as an executive ombud.²⁵²²

Organisational ombuds are usually located in the public or private sector and created by the executive head, such as the CEO. They address problems of members, employees or contractors of the given organisation concerning its actions or policies. They generally work informally within an organisation.²⁵²³ *Advocate ombuds* evaluate claims objectively. They can advocate on behalf of individuals of aggrieved groups, however.²⁵²⁴ *Industry ombuds* are located in the financial sector and may be voluntary, statutory, or voluntary and subject to some degree of regulation by statute.²⁵²⁵

In Germany, there is no mandatory mechanism for alternative dispute resolution in consumer protection or standard business terms legislation matters.²⁵²⁶ Some industries, such as banks²⁵²⁷ and insurance companies,²⁵²⁸ offer free-of-charge dispute resolution by ombuds though. If their client is not satisfied with the ombud's decision, a legal action is still possible.²⁵²⁹

Under section 1 of the Act, "ombud with jurisdiction", in respect of any particular dispute arising out of an agreement or transaction between a consumer and a supplier who is (a) subject to the jurisdiction of an 'ombud', or a 'statutory ombud', in terms of any national legislation, means that ombud, or statutory ombud, or (b) a 'financial institution' as defined in the Financial Services Ombud Schemes Act (...),²⁵³⁰ means 'the ombud', as determined in accordance with section 13 or 14 of that Act'. Hence, the ombud has to be referred to as an ombud in the given

²⁵²¹ 'Standards for the Establishment and Operation of Ombuds Offices' at <https://www.prearesourcecenter.org/file/551/standards-establishment-and-operations-ombuds-offices>.

²⁵²² Melville 2010 *SA Merc LJ* 57. Under s 51(1) of the South African Police Service Act 68 of 1995, the Independent Complaints Directorate is appointed by the Minister for Safety and Security in consultation with the Parliamentary Committees.

²⁵²³ Melville 2010 *SA Merc LJ* 53. Examples in South Africa are ombuds dealing with complaints of ratepayers (City of Cape Town), the non-statutory ombud of the State Information Technology Agency dealing with complaints of tenderers, and the ombud of the University of Stellenbosch dealing with complaints of students. Edgars Consolidated Stores Ltd (Edcon) has appointed an ombud dealing with staff matters. See Melville 2010 *SA Merc LJ* 58.

²⁵²⁴ Melville 2010 *SA Merc LJ* 53.

²⁵²⁵ Melville 2010 *SA Merc LJ* 53.

²⁵²⁶ Creifelds *Rechtswörterbuch* s.v. 'Ombudsmann'.

²⁵²⁷ <https://bankenombudsmann.de>.

²⁵²⁸ <https://www.versicherungsombudsmann.de>.

²⁵²⁹ See discussion in Part II ch 6 para 1.2.

²⁵³⁰ Financial Services Ombud Schemes Act 37 of 2004. Section 13 of this statute, for instance, provides for instances where the Pension funds Adjudicator, the Ombud and deputy ombud for Financial Service Providers or statutory ombud, acting in the capacity set out in s 14 will have jurisdiction with regard to a complaint. Section 14 provides for the authority of the statutory ombud to entertain certain complaints.

piece of legislation. Ombuds such as defined in the Act are, according to the classical definition of the American Bar Association, close to classical (legislative) ombuds, subject to national statutory provisions as they have been created and regulated by statute. They do not monitor legislative or parliamentary activities but activities of the private sector. It is suggested that they are a hybrid between a classical ombud and an industry-specific ombud. In any event, they are statutory ombuds.²⁵³¹ An example is the ombud for Financial Service Providers who is appointed by the Financial Services Board.²⁵³² If a consumer logs a complaint against a bank that belongs to an ombud scheme recognised under the Financial Services Ombud Schemes Act,²⁵³³ the matter can be referred under section 70(1)(a) to the ombud scheme for resolution. If the supplier does not belong to such a scheme, the complaint may be dealt with by an industry ombud, accredited under section 82(6), if the supplier falls under such ombud. Industry ombuds may be provided for in industry codes and have to be approved by the Commission.²⁵³⁴

The term 'industry ombud' is not defined in the Act. Section 69(c)(i) refers to an industry ombud, accredited under section 82(6). From section 82(6) one can conclude that an industry ombud in terms of the Act is an industry-specific ombud which either is subject to a scheme of alternative dispute resolution provided for in the relevant industry code, or subject to some degree of regulation if the scheme has been accredited under the Act.²⁵³⁵

South African examples are the ombuds of insurance companies and banks dealing with client complaints,²⁵³⁶ or the Wireless Application Service Providers' Association (WASPA) Ombudsman.²⁵³⁷ This kind of ADR usually involves codes of conduct.

Surprisingly, a scheme is referred to as an ombud. Van Heerden suggests that the legislator most likely intended to incorporate a definition of an 'accredited industry ombud' into section 1 but neglected to do so.²⁵³⁸ This explanation seems plausible with a view to the fact that the definitions contained in section 1 have not been thought through from a logical perspective.²⁵³⁹ Van Heerden construes section 82(6) in that 'scheme' must be read as the ombud appointed for

²⁵³¹ Van Heerden/Barnard 2011 *JICLT* 134.

²⁵³² According to the Financial Services Board Act 97 of 1990.

²⁵³³ 37 of 2004.

²⁵³⁴ Van Heerden/Barnard 2011 *JICLT* 134.

²⁵³⁵ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 16.

²⁵³⁶ In order to avoid confusion, South African financial institution may however not employ the word 'ombud', unless they are authorised by the Council to do so. See s 18(5)(a) of the Financial Services Ombud Schemes Act 37 of 2004.

²⁵³⁷ Melville 2010 *SA Merc LJ* 58.

²⁵³⁸ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 16.

²⁵³⁹ As discussed before, s 1 contains too many cross-references and is unnecessarily complicated. Also, the term 'used goods' cannot be found elsewhere in the Act.

that particular industry in the accredited code of that industry.²⁵⁴⁰ This view is correct as it would be nonsensical to refer to a scheme as an ombud. This view is supported by section 82(6)(a) which speaks of a 'scheme of alternative dispute resolution'. It is suggested that 'scheme' in this context must be interpreted narrower than in section 82(1)(b) where it also includes industry codes.

In order to achieve credibility as a real alternative to other forms of redress, an ombud must be able to work independently, free from opposition by the industry or entity in respect of which it operates, and be adequately budgeted. Furthermore, it must be accessible, and potential users must know of its existence.²⁵⁴¹ Neutrality is another critical factor, even though some might have expectations that ombuds have a consumer advocacy role.²⁵⁴²

It is important to note that the ombud's recommendations usually are not legally binding. Because of the political pressure and the status of the office, they are usually adhered to, which makes them factually binding. The fact that the ombud's decisions usually are not binding has several advantages. An ombud should not imitate formal adjudicative bodies, such as courts. Otherwise, the ombud's decisions could be attacked on review or appeal. According to Melville, this would be contrary to the premise that an ombud is a recourse of last resort, which is typically stipulated in privative clauses.²⁵⁴³ This 'last resort' argument is however not reflected in the Act. Section 70 provides that any person with *locus standi* may file a complaint with the Commission (as discussed earlier, the reference to section 69 in section 71 has to be read as 'section 70'). What is more, section 70(2) provides that if a complaint has no reasonable probability of the parties resolving their dispute through the process provided for, the ombud may terminate the process by notice to the parties. Then, the party who referred the matter to the agent may file a complaint with the Commission under section 71. Hence, in South Africa, the ombud does not necessarily have the last word. On the other hand, the South African financial industry ombuds make legally binding decisions.²⁵⁴⁴

The procedure followed by ombuds is quite informal. Commonly, there is a phase of informal fact-finding, but mediation is increasingly common. This allows the parties to continue in a working relationship.²⁵⁴⁵ Legal assistance is neither mandatory nor encouraged. Therefore,

²⁵⁴⁰ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 18.

²⁵⁴¹ Melville 2010 *SA Merc LJ* 54.

²⁵⁴² Melville 2010 *SA Merc LJ* 56.

²⁵⁴³ Melville 2010 *SA Merc LJ* 64.

²⁵⁴⁴ Melville 2010 *SA Merc LJ* 54.

²⁵⁴⁵ Hill *The Ombudsman as Mediator* 149.

legal fees cannot be claimed by a party. The informality of the procedure and the fact that the development of legal precedence is inhibited are negative consequences.²⁵⁴⁶ Ombuds can however provide feedback to the regulators on weaknesses in the legislation, rules and guidelines so that the regulators can seek improvements.²⁵⁴⁷

In the South African context, the variety of different ombuds and the fact that the Act only recognises 'ombuds with jurisdiction' and 'industry ombuds' is a concern. Consumers cannot easily distinguish between the different types of ombuds and often do not know why some of them are accredited and others are not. The establishment of a common legal framework in which the role, the procedure and the legal consequences of this form of alternative dispute resolution is thus recommendable. Already existing statutes, such as the Financial Services Ombud Schemes Act²⁵⁴⁸ can serve as a model for such a legal intervention. This approach has been adopted in New Zealand, for instance, where the Ombudsman Act²⁵⁴⁹ provides that '[n]o person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.' This approach would ensure that the procedure set out in such a statute would conform to the standards of the Act and provide a harmonised procedural standard. The alternative in the form of self-regulation could also be an option if all ombuds meet the standards of the Ombudsman Association of South Africa, and the term 'ombud' can only be used when the entity in question meets the requirements of this association. Considering that South Africa has little experience with consumer protection, legislative intervention seems to be the better option, though.

What is more, it could be beneficial in the South African context to merge several ombuds of a particular sector, such as the financial industry, telecommunications or the insurance industry. Overlapping jurisdictions would then be eliminated and economies of scale could be achieved. Moreover, the given ombud's profile would be raised, and consumers would exactly know whom they have to approach.²⁵⁵⁰ It is furthermore submitted that this would lead to more

²⁵⁴⁶ Melville 2010 *SA Merc LJ* 55.

²⁵⁴⁷ Melville 2010 *SA Merc LJ* 56.

²⁵⁴⁸ 37 of 2004.

²⁵⁴⁹ 1975 No. 9.

²⁵⁵⁰ See 'A public service ombudsman: Government response to consultation' at <https://www.gov.uk/government/consultations/public-service-ombudsman> at 'A public service ombudsman: Government response to consultation' at <https://www.gov.uk/government/consultations/public-service-ombudsman> (no longer available).

professionalism and more consumer-friendly laws, primarily because of the ombud's feedback to the regulator of the given sector. After all, codes of conduct are only useful if they bind all or at least the majority of businesses in a sector.²⁵⁵¹ A single ombud for each sector who bases its decisions on the code of conduct for the specific sector would enhance the efficiency and credibility of this form of ADR. The argument against such a merger, according to which the accountability process is more effective with several separate entities attempting to tackle the problem at the same time²⁵⁵² is not convincing.

The ombuds' decisions are not published, and many matters are solved rather by mediation instead of adjudicative decisions. Unlike a more adversarial mechanism, settlements reached by the parties, by the intermediary of an ombud, are not necessarily appropriate for a 'mutual control'. The 'organic growth' of ombuds offices that Melville considers desirable²⁵⁵³ might hamper effective redress, duplications and uncoordinated approaches to consumer affairs. Time will tell whether a statutory intervention will be necessary for South Africa, or whether an entity such as the Ombudsman Association of South Africa will be able to 'harmonise' the existing and forthcoming structures. Where the various sectors have succeeded in establishing effective alternative dispute resolution mechanisms, a statutory intervention will not be necessary. This seems to be the case in some sectors in South Africa.²⁵⁵⁴ In other cases, it might be the only solution to achieve the purposes of the Act.

b) Other alternative dispute resolution agents

An 'alternative dispute resolution agent' is defined as '(a) an ombud with jurisdiction; (b) an industry ombud accredited in terms of section 82(6); or (c) a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud.'²⁵⁵⁵ This definition has been reproduced in section 70(1)(a) to (c). By 'excluding' the ADR agents mentioned in section 69, one comes to the conclusion that 'another alternative dispute resolution agent contemplated in section 70' (section 69(c)(iii)) only refers to a person mentioned in section 70(1)(c). Therefore, only persons or entities providing conciliation, mediation or arbitration services to

²⁵⁵¹ *Draft Green Paper on the Consumer Policy Framework* 2004 at 47, published in: GenN 1957 in GG 26774 of 9 September 2004.

²⁵⁵² Ayeni *National Ombudsman Institutions* 102.

²⁵⁵³ Melville 2010 *SA Merc LJ* 65.

²⁵⁵⁴ *Draft Green Paper on the Consumer Policy Framework* 2004 at 48, published in: GenN 1957 in GG 26774 of 9 September 2004.

²⁵⁵⁵ Section 1. This definition has been reproduced in section 70(1)(a)-(c).

assist in the resolution of consumer disputes, other than ombuds with jurisdiction, or accredited industry ombuds are concerned.²⁵⁵⁶

When reading section 70(1)(d) one could conclude that consumer courts are also alternative dispute resolution agents. In addition, section 69(c)(iii) refers to 'another alternative dispute resolution agent', after indicating 'the consumer court of the province' in subparagraph (ii). Du Plessis and Van Heerden correctly assert that these formulations are unfortunate and do not include consumer courts as ADR agents. They refer to the different beginning of section 70(1)(d) ('applying') as opposed to paragraphs (a) to (c) of the same section.²⁵⁵⁷ What is more, when reading section 70(1) entirely and by simplifying this provision, it becomes clear that this provision is divided into two different alternatives: A consumer may seek to resolve any dispute (...) *by referring the matter to an alternative dispute resolution agent (...) or applying to the consumer court of the province (...)*. Moreover, consumer courts are not mentioned in the definition of 'alternative dispute resolution agents'.²⁵⁵⁸ The fact that consumer courts are mentioned at the end of section 70(1) also speaks for this view.

c) Redress by alternative dispute resolution agents

A consumer should first approach an ADR agent mentioned in section 69 and 70, i.e., an ombud with jurisdiction, an industry ombud accredited under section 82(6), or a person or entity providing conciliation, mediation or arbitration services.

It should be noted that it derives from the wording of section 70(1) that only consumers may approach ADR agents and not the other persons contemplated in section 4(1). A person acting as a member of, or in the interest of, a group or class of affected persons, or acting in the public interest²⁵⁵⁹ is thus excluded in seeking relief with such an agent. This is contrary to the wording of section 69, which expressly provides redress for '[a] person contemplated in section 4(1)', which includes consumer protection groups. What is more, the legislator expressly encourages this form of dispute resolution.²⁵⁶⁰ The legislator's intention by excluding the other persons from standing in terms of ADR could be that ADR agents should resolve only smaller affairs. Where consumer protection groups are involved or class actions filed, the other entities' involvement is probably more efficient because of the complexity of the affairs. What is more,

²⁵⁵⁶ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 19.

²⁵⁵⁷ Du Plessis 2010 *SA Merc LJ* 524 and 525, Van Heerden 'Section 70 in Naudé and Eiselen (eds) *CPA Commentary* para 2.

²⁵⁵⁸ See s 1.

²⁵⁵⁹ See S 4(1)(c) and (d).

²⁵⁶⁰ See S 72(1)(b), for example.

in this way, precedents can be established. One cannot exclude though that the formulation of section 70(1) is an editorial error. In this case, the legislator should amend the wording of section 70(1) and replace '[a] consumer' by '[a] person contemplated in section 4(1)'.

The formulation of section 72(1)(b) and 72(1)(d) suggests that the Commission will not investigate a complaint until the parties have unsuccessfully attempted to resolve the dispute through an ADR agent, a provincial consumer protection authority, or a consumer court.²⁵⁶¹ Consequently, the Commission is required to encourage consumers to first approach the other entities before approaching the Commission.²⁵⁶²

If the ADR agent has resolved or assisted the parties in resolving their dispute, the agent may (a) record the resolution of that dispute in the form of an order, and (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.²⁵⁶³ With the consent of a complainant, a consent order that has been confirmed by these judicial bodies may include an award of damages to that complainant.²⁵⁶⁴

If the alternative dispute resolution agent concludes that there is no reasonable probability of the parties to resolve their dispute through the process provided for, the agent may terminate the process by notice to the parties. Then, the parties who referred the matter to the agent may file a complaint with the Commission under section 71.²⁵⁶⁵

The ADR agent has to adhere to the Conciliation Guidelines in terms of which the conciliation proceedings are private and confidential.²⁵⁶⁶ Besides, no person may refer to anything said at conciliation proceedings during any subsequent proceedings, except where such an issue is not likely to cause prejudice to the parties.²⁵⁶⁷ Before the holding of the conciliations, the parties generally exchange documents, in the form of the referral form and other relevant documents determined by the Conciliator.²⁵⁶⁸ The parties must not be represented by a legal representative.²⁵⁶⁹

²⁵⁶¹ Naudé 2010 *SALJ* 523.

²⁵⁶² Mupangavanhu 2012 *PELJ* 325.

²⁵⁶³ Section 70(3).

²⁵⁶⁴ Section 70(4).

²⁵⁶⁵ Section 70(2).

²⁵⁶⁶ Paragraph 5.3 of the Conciliation Guidelines.

²⁵⁶⁷ Paragraph 5.3 of the Conciliation Guidelines. The Guidelines do not provide for any safeguards that the Commission's investigator will not have access to information disclosed at conciliation. They do also not set out how and by whom the existence of prejudice is to be determined.

²⁵⁶⁸ Paragraph 5.4 of the Conciliation Guidelines.

²⁵⁶⁹ Paragraph 5.7 of the Conciliation Guidelines.

The wording of the Conciliation Guidelines suggests that they are mandatory.²⁵⁷⁰ Moreover, they contain indications that they are not consensual, even though they stress the consensual nature of the proceedings. This is because the parties must comply with the directions of the Conciliator,²⁵⁷¹ the exchange of documents and the attendance of the parties at hearings is mandatory,²⁵⁷² and there is no provision for legal representation.²⁵⁷³

The provisions contained in the Conciliation Guidelines do not provide any assurance for suppliers that anything that has been said during the proceedings will remain undisclosed, and neither party can be sure that the Conciliator is independent and unbiased. Furthermore, with a view to the substantial sanctions provided for by the Act, the restriction of legal representation is inexcusable.²⁵⁷⁴ Van Eeden correctly states that without appropriate safeguards for protecting the confidentiality of the information and securing the impartiality of conciliators and the consensual nature of the proceedings, and without permitted legal representation, suppliers participate in conciliation at their own risk.²⁵⁷⁵

3.6 Ordinary courts

a) General remarks

As mentioned earlier, the term 'courts' is not defined in the Act, unlike 'consumer courts'. Thus, this term refers to the civil courts, i.e., the High Court, the Magistrates' Court and the Small Claims Court.²⁵⁷⁶ Because of their accessibility, most consumers might prefer a Small Claims Court to settle their dispute.²⁵⁷⁷

The problems inherent to sections 69(d) and 52(2) have already been discussed in length²⁵⁷⁸ and shall only briefly be summarised here. Section 52 gives exclusive jurisdiction to the ordinary courts. This provision contradicts other provisions of the Act, such as sections 72 and 69(d). Section 69(d) unduly restricts the consumer's right to approach the ordinary courts directly, even though this might be more convenient for him or her. Van Eeden suggests that

²⁵⁷⁰ See Van Eeden *Consumer Protection Law* (2013) 422 note 348.

²⁵⁷¹ **Paragraph 16.1 of the Conciliation Guidelines** in terms of which 'the parties will co-operate with the Conciliator and, in particular, will endeavour to comply with requests by the Conciliator to submit documents, provide evidence and attend Conciliation hearings'.

²⁵⁷² Paragraphs 5.4 and 16.1 of the Conciliation Guidelines.

²⁵⁷³ Paragraph 5.7 of the Conciliation Guidelines.

²⁵⁷⁴ Van Eeden *Consumer Protection Law* (2013) 424.

²⁵⁷⁵ Van Eeden *Consumer Protection Law* (2013) 424.

²⁵⁷⁶ Van Heerden/Barnard 2011 *JICLT* 135.

²⁵⁷⁷ Mupangavanhu 2012 *PELJ* 331. The Small Claims Courts have a jurisdictional limit. They have an inquisitorial and consumer-friendly procedure that does not allow for cost orders. See Van Heerden/Barnard 2011 *JICLT* 136. The jurisdictional limit was raised to R 20,000 on 1 April 2019. See 'How to resolve your legal problem in a small claims-court' at <https://www.lawforall.co.za/2017/07/small-claims-court-guide/>.

²⁵⁷⁸ See Part I ch 2 para 1, ch 5 paras 3.2 b) aa) and 3.3 b).

section 69(d) has the effect of exhaustion of remedies referred to in this provision, and also includes exhaustion of the possibilities of appeal and review under section 148(2)(a) to (d) of the National Credit Act. Since the outcome of an application for appeal or review will constitute the legal force of the matter, he is of the view that where section 69 applies, the courts cannot be approached in the given matter.²⁵⁷⁹

The provision infringes the consumer's constitutional right of access to court though, which is an unintended consequence of the legislator's desire to ensure quick, effective and efficient redress of disputes for consumers.²⁵⁸⁰ Hence, there is a contradiction between sections 69(d) and 52. The latter provision favours ordinary courts, whereas the former promotes dispute resolution by other fora. That only the ordinary courts may declare a contract term to be unfair implies that consumers are sent to and fro because they must approach the provincial consumer courts first. What is more, relatively small claims can speedily be handled by small claims courts. Referring consumers to other bodies before they can institute action with a small claims court is inefficient in terms of procedural economy.²⁵⁸¹ This anomaly should be corrected by extending the same powers to the Tribunal.²⁵⁸²

Van Heerden suggests an interesting and conclusive solution for this conundrum. He reminds that in the Constitutional Court's decision *Chirwa v Transnet Ltd and Others*,²⁵⁸³ it was held that where the law provides for a specialised framework for the resolution of a dispute, the parties must primarily use the given mechanism. Although section 3(1)(g), read in conjunction with section 69(d), seems to favour the approach that first all other avenues of redress must have been exhausted before approaching a civil court, section 4(3) provides that if any provision of the Act can reasonably be construed to have more than one meaning, the meaning which best promotes the spirit and purposes of the Act and will best improve the realisation and enjoyment of consumer rights must be preferred. Van Heerden correctly maintains that section 69(d) is ambiguous, which is why the alternative aid of section 4(3) comes into play. Hence, if for a consumer it is more expedient to approach a small claims court first, the latter would have jurisdiction in terms of section 4(3), and the consumer would not be forced to exhaust first the other remedies.²⁵⁸⁴ This solution offers the advantage that the more efficient

²⁵⁷⁹ Van Eeden and Barnard *Consumer Protection Law* 518.

²⁵⁸⁰ Mupangavanhu 2012 *PELJ* 336.

²⁵⁸¹ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 27.

²⁵⁸² Mupangavanhu 2012 *PELJ* 337.

²⁵⁸³ 2008 (4) SA 367 (CC).

²⁵⁸⁴ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 32.

and cheapest solution always prevails. It also enhances procedural economy and saves most of the entities mentioned in section 69 from unnecessary engagement.

In this regard, note should be taken that under section 2(10), consumers are not precluded from exercising their rights afforded in terms of the common law. If consumers prefer to pursue their remedies under the common law instead of under the Act, section 69 and the redress mechanism contemplated therein find no application, and they may directly approach a civil court.²⁵⁸⁵ By referring to section 2(10), the Act does not apply though as both routes exclude each other.²⁵⁸⁶ Van Heerden's aforementioned solution (section 4(3)) has the benefit that despite approaching a civil court directly, the Act applies.

The equality court has exclusive jurisdiction with regard to unfair discrimination.²⁵⁸⁷ When a person files a complaint because of an alleged contravention of Part A of Chapter 2 (discriminatory marketing), the Commission must refer the matter to the equality court if the complaint appears to be valid.²⁵⁸⁸ Alternatively, an accredited consumer protection group or any other person contemplated in section 20(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act may directly institute proceedings before an equality court.²⁵⁸⁹

The legislator clearly did not draft section 52 with general use challenges in mind, but only proceedings with respect to transactions or agreements between suppliers and consumers.²⁵⁹⁰ This also becomes clear when going through the factors contained in section 52(2) as these are

²⁵⁸⁵ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 2.

²⁵⁸⁶ Van Eeden and Barnard *Consumer Protection Law* 404. The consumer's choice as to whether opting for the application of the common-law or the Consumer Protection Act depends on various factors. Generally, consumers have broader rights under the Act than under the common law, and the costs before the Tribunal or a consumer court are likely to be lower than before a civil court, if the consumer does not seek legal assistance. However, it is less likely that the Tribunal will grant a cost order, which means that a consumer with legal representation before the Tribunal is less likely to be able to recover its legal costs from the other party. On the other hand, the Commission's power of investigation might be advantageous for consumers in order to obtain information from suppliers. The fact that before the civil courts a higher standard of accuracy and precision is applied as compared to the Tribunal should not be disregarded though. See Van Eeden and Barnard *Consumer Protection Law* 404 and 405.

²⁵⁸⁷ Section 10.

²⁵⁸⁸ Pursuant to **section 8**, a supplier 'must not unfairly (a) exclude any person or category of persons from accessing any goods or services offered by the supplier; (b) grant any person or category of persons exclusive access to any goods or services offered by the supplier, (c) assign priority of supply of any goods or services offered by the supplier, (d) supply a different quality of goods or services, (e) charge different prices for any goods or services, (f) target particular communities, districts populations or market segments for exclusive, priority or preferential supply of any goods or services, or (g) exclude a particular community, district, population or market segment from the supply of any goods or services offered by the supplier, on the basis of one or more grounds of unfair discrimination contemplated in s 9 of the Constitution or Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.' The constitutional grounds for discrimination are, *inter alia*, age, sex, religion, colour, disability and culture. Section 9 of the Act enumerates reasonable grounds for differential treatment in specific circumstances. See Van Eeden and Barnard *Consumer Protection Law* 419.

²⁵⁸⁹ Section 10(1)(a).

²⁵⁹⁰ Section 52(1).

geared to a particular transaction between a supplier and an individual consumer.²⁵⁹¹ Section 52(3)(b)(iii) provides though that the court may also 'make any further order [it] considers just and reasonable in the circumstances, including, but not limited to, an order (...) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.' Naudé correctly points out that this allows for preventative control in the view of future contracts between a supplier and other consumers (who were not a party to the procedure). She correctly suggests that section 52 should be redrafted in order to include abstract challenges.²⁵⁹²

The legislator should also insert a provision in section 52 which gives explicitly a court the discretion to declare that its order is to be published at the supplier's cost.²⁵⁹³ This would have a deterrent and educative effect in Naudé's view. As discussed before, the publication of the operative part of German judgments is not that effective, though.²⁵⁹⁴

Under section 52(3)(b), a court could also order payment of a penalty per prohibited clause and per violation after an initial phase-out period for implementation of the order. This is not explicitly stipulated in section 52(3)(b) but included in the courts' power to make any further order the court considers just and reasonable in the circumstances.²⁵⁹⁵ Ideally, the legislator should insert this possibility in section 52(3) in order to give guidance to the courts.

As discussed above, 'warnings' issued by eligible bodies in terms of § 3 UKlaG contain the promise to be made by the other party to pay a penalty in case of further infringements. The amount of the penalty is determined by the eligible body, and not by the court.²⁵⁹⁶

According to Naudé, it is not desirable that a court order be binding on other suppliers of a trade sector. Such possibility is provided, e.g., in the UK Unfair Terms Regulations. These provide that '[a]n injunction may relate not only to use of a particular contract term drawn up

²⁵⁹¹ E.g., 'the nature of the parties' (para (b)), the 'circumstances of the transaction or agreement' (para (c)), 'the conduct of the supplier' (para (d)).

²⁵⁹² Naudé 2010 *SALJ* 531.

²⁵⁹³ Naudé 2010 *SALJ* 532. This possibility is provided for in Germany in § 7 Unterlassungsklagengesetz (UKlaG). **§ 7 UKlaG:** 'If the application is upheld, the applicant may, on request, be authorised to publish the operative part of the judgment, identifying the defendant against whom judgment was given, at the defendant's expense in the Federal Gazette and otherwise at his own expense. The court may set a time limit on this authorisation.' There is currently no official translation of the UKlaG by the Federal Ministry of Justice. In the following, the English translation of the EU Consumer Law Acquis Compendium No. 8 (IPR Verlag GmbH Munich 2005) will be cited. Where necessary, the author of this thesis has updated this translation to the current version of the UKlaG. This translation seems not to be available online anymore (17 September 2019).

²⁵⁹⁴ See above and in Part II ch 6 para 2.3.6 f).

²⁵⁹⁵ Naudé 2010 *SALJ* 532.

²⁵⁹⁶ See discussion above and in Part II ch 6 para 2.3.6 a) cc).

for general use but to any similar term or a term having like effect, used or recommended for use by any person'.²⁵⁹⁷ This view is convincing because businesses who were not a party to any proceedings before the court did not have the possibility to make submissions and may not be aware of the interdict.²⁵⁹⁸ In this context, it is submitted that the unfairness of a term cannot be evaluated without considering other factors, such as warranties, guarantees, or the price. This is also the case with § 11 UKlaG, although the court applies a general-abstract approach. The German courts' judgments only apply *inter partes* and only refer to the supplier who was a party to the lawsuit but not to other suppliers of the same sector.

Instead of making a court order binding on other suppliers, the Commission has the possibility to co-operate with trade associations, negotiate models for fair terms and conditions and eradicate unfair terms by establishing voluntary codes of practice.²⁵⁹⁹ What is more, the Minister may prescribe by means of regulation an industry code on the recommendation of the Commission.²⁶⁰⁰ The Commission, acting on its own initiative, or in response to a proposal from persons conducting business within a particular industry, may recommend a proposed industry code to the Minister.²⁶⁰¹ Such codes will be binding on all suppliers of the relevant industry as a supplier is not allowed to contravene an applicable industry code in the ordinary course of business.²⁶⁰² The fact that such an industry code comes into effect after a public consultation speaks for its coercive nature.²⁶⁰³

It is suggested that industry codes, regardless of whether they are voluntary or mandatory, providing for industry-wide standards and contract forms also have the advantage that they do not contain any surprising terms. What is more, it will be easier for consumers to shop around for a better bargain because they only have to focus on the core terms. Customers could identify such standard terms by an Approved Code logo which assists them in their choice.²⁶⁰⁴

²⁵⁹⁷ Regulation 12(4) of the UTCCR 1999.

²⁵⁹⁸ Naudé 2010 *SALJ* 533.

²⁵⁹⁹ Section 93.

²⁶⁰⁰ Section 82(2)(a).

²⁶⁰¹ Section 82(3).

²⁶⁰² Section 82(8).

²⁶⁰³ Naudé 2010 *SALJ* 543.

²⁶⁰⁴ OFT press release of 7 December 2004: 'OFT launches code approval scheme to consumers' at <http://webarchive.nationalarchives.gov.uk/20140402142426> (no longer available). Interestingly, the DTI had suggested a similar idea in terms of alternative dispute resolution in its Draft Green Paper of 2004. Consumers should be able to seek out those suppliers that successfully meet the terms of a good code of conduct or has its own reputation for equal or higher standards. See *Draft Green Paper on the Consumer Policy Framework* 2004 at 37 and 48, published in: GenN 1957 in *GG* 26774 of 9 September 2004.

A good example is the standard terms of car rental companies. Even though they all have the same object (the rental of a particular car to an individual consumer), they often contain varying clauses, which makes it difficult to compare the contracts proposed by different suppliers. This concerns, *inter alia*, matters such as insurance, excess,²⁶⁰⁵ the number of kilometres included in the price or the amount payable per kilometre exceeding this number. The argument that suppliers within an industry often have different business models, and that a standardised contract would not consider these differences, is not valid. Different business models that entail slightly different standard terms can be taken into consideration by highlighting these terms and pointing them out to the customer. These terms too can be negotiated between the Commission and the suppliers of the trade sector in question.

b) Redress by ordinary courts

Unlike the Tribunal, a person contemplated in section 4(1) may seek to enforce any rights in terms of the Act or a transaction or agreement, or otherwise resolve any dispute with a supplier, by approaching a (civil) court with jurisdiction over the matter.²⁶⁰⁶

The powers of the courts to enforce consumer rights are set out in section 76. In addition to any other order that it may make under the Act or any other law, a court, considering a matter in terms of the Act, may order a supplier to alter or discontinue any conduct that is inconsistent with the Act.²⁶⁰⁷ It also may make any order contemplated explicitly in the Act.²⁶⁰⁸ In addition, it may award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of the Act.²⁶⁰⁹ A person who suffered loss or damage because of prohibited conduct may only institute a civil claim in a court if he or she simultaneously files with the registrar or clerk of the court a notice issued by the chairperson of the Tribunal. This notice must indicate whether the Tribunal decided that the given conduct was prohibited or required by the Act. It must also contain the date and details of the Tribunal's findings.²⁶¹⁰

Van Heerden correctly remarks that due to the *ad hoc* character of the Tribunal and its limited capacity, only in cases where someone wants to approach a civil court for purposes of assessing the amount of damages or the awarding of damages, the said person should provide the court

²⁶⁰⁵ This is the amount the customer has to pay out-of-pocket when a damage to a car exceeds a certain amount.

²⁶⁰⁶ Section 69(d).

²⁶⁰⁷ Section 76(1)(a).

²⁶⁰⁸ Section 76(1)(b).

²⁶⁰⁹ Section 76(1)(c).

²⁶¹⁰ Section 115(2)(b). See Van Heerden and Barnard *JICLT* 136.

with a certificate in terms of section 115. In no case, the application of section 115 should be extended to any type of infringements of consumer rights or prohibited conduct.²⁶¹¹

Section 115(2)(b) is in keeping with section 69(d) according to which the consumer may approach a civil court only if all other remedies in terms of national legislation have been exhausted. In other words, the consumer must first approach an ADR agent (which is encouraged by the Act, e.g., in sections 71(1) and 72(1)(b)) or the Commission. The Commission then may refer the matter to either to a consumer court or the Tribunal. Only then, the consumer may approach the civil court by presenting the said notice in terms of section 115(2)(b). In this regard, it is referred to the discussion further above concerning the arguments in favour of a direct access to the civil courts.²⁶¹²

In terms of section 111(2), the Magistrates' court has jurisdiction, despite anything to the contrary contained in any other law, to impose any penalty provided for in subsection (1) of section 111. Under section 111(1), any person convicted of an offence in terms of the Act is liable in the case of a contravention of disclosure of any personal or confidential information concerning affairs in terms of the Act. The severity of the penalties set out in this provision shows that the legislator considers the disclosure of personal information as a serious offence.²⁶¹³

It is a well-established principle that courts may decide issues overlooked by the parties where this is required in the interest of justice.²⁶¹⁴ Naudé correctly argues that it would be advisable to include an explicit provision in the Act according to which the courts are empowered to raise the issue of unfairness on their own initiative.²⁶¹⁵ This is the case in Germany, where the courts assess the fairness of standard terms 'incidentally' within a so-called 'incidental control'.²⁶¹⁶

4. Conclusion

In order to ensure a cost-saving, efficient and speedy redress system for consumers, the Act has repealed many former fragmented pieces of legislation. It acts in tandem with provincial consumer protection legislation. The objective is to achieve an accessible, transparent and

²⁶¹¹ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 32.

²⁶¹² See Part I ch 4 para 2.5.

²⁶¹³ Jacobs/Stoop/Van Niekerk 2010 *PELJ* 308.

²⁶¹⁴ See *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd* 2008 (6) SA 468 (W).

²⁶¹⁵ Naudé 2009 *SALJ* 536.

²⁶¹⁶ See discussion in Part II ch 6 para 1.1.

efficient redress system for consumers, also by ADR. The existence of different fora is advantageous because the dispute can be resolved by taking the particular circumstances, the complexity and value of the claim into account. In order to achieve this, the various institutions have to work in a coordinated manner.

Section 4 provides for a comprehensive *locus standi* provision and enhances consumer protection. Class actions are possible too. Nonetheless, the Act does not contain procedural provisions for class actions. Legislation in this field is necessary in order to harmonise the procedural aspects of class actions, and for legal certainty. The Act should also provide for a procedure for general use challenges so that consumer associations are better prepared and have more legal certainty.

Unlike consumer protection groups as defined by the Act, this statute seems not to include associations that are not primarily concerned with consumer protection. Associations whose purpose is not mainly consumer protection should have standing too so that also consumers who are not members of an accredited consumer protection group are included.

South African consumer protection legislation only provides for an *ex post facto* redress, unlike German legislation which provides for a proactive approach in the form of institutional actions. This approach also has the advantage that consumer organisations can negotiate with suppliers, which often leads to the eradication of unfair terms without litigation. The wording of section 52 indicates that the legislator did not have abstract challenges in mind, but only individual proceedings between a consumer and a supplier. This provision should be redrafted to include general use challenges too. With regard to abstract challenges, German consumer associations tend to send a 'warning' to standard terms users that contains, *inter alia*, a deadline and a threat to take legal action if the user does not comply. This is a very effective and proactive instrument as most suppliers comply with such a warning and cease their unfair practices.

Although there are more consumer protection organisations in Germany than in South Africa, both countries have in common that these organisations are chronically under-funded for their resource-intensive work. The Act should include provisions for the funding of these organisations because their efficient work depends on independent resources.

The various entities that are competent for the enforcement of the Act are set out in section 69. This provision contains an implied hierarchy.

The Commission's roles are manifold. Besides enforcement, it has an administrative and other functions. The NCC is an organ of state and has jurisdiction throughout the Republic. It functions as an interface between various enforcement bodies but is not actively involved in active dispute resolution. It is thus a 'watchdog' in terms of the enforcement of the Act. If it had preventive powers over unfair contract terms, a more consistent and predictable redress policy and more harmonised outcomes could be achieved, despite the fact that consumer protection is subject to concurrent jurisdiction.

The Commission's extensive investigative powers are similar to those of other entities, such as the National Credit Regulator. It can therefore be expected that the NCC will use their approach as a guideline.

The issuing of compliance notices requires that the NCC has reasonable belief that a supplier has engaged in prohibited conduct. It must therefore base its arguments on objective facts. This requires sound legal reasoning. Compliance notices serve as a quick and straightforward enforcement tool in cases of apparent transgressions. In complex cases, the NCC refers the case to the Tribunal or a consumer court. In German law, eligible bodies systematically issue so-called 'warnings' in order to avoid negative cost implications. In most cases, standard terms users comply with such warnings in order to avoid legal actions.

Naudé suggests that suppliers should be obliged to publish the NCC decisions on their website or in other media. The experience in Germany has shown though that the publication of judgments in the Federal Gazette or other media has a very limited effect.

The Commission may also negotiate and conclude undertakings and consent orders with suppliers that the Tribunal or a court may confirm. This avoids legal actions in cases where a complainant agrees to a damages award. In German law, warnings issued by eligible bodies contain an invitation to cease the use or the recommendation of unfair standard terms as well as the invitation to the user to promise to pay a contractual penalty in case of infringement.

Because of the Commission's quasi police powers, persons who are concerned with an investigation led by the NCC should have the right to be assisted by a lawyer, which usually is not the case for administrative and tribunal proceedings. In order to avoid any influence and lobbying by professional associations representing suppliers, the legislator should curtail the 'other sources' of financing mentioned in section 90(1) in order to ensure the NCC's neutrality.

Section 71(1) broadens the *locus standi* to any person who is not directly concerned with a supplier's standard clauses. This provision has a deterring effect on suppliers and facilitates the eradication of unfair terms.

In order to avoid the problem of different outcomes, e.g., where the Commission decides not to investigate a matter but then chooses to investigate after having received a complaint by another consumer of the same supplier, a clear policy would be beneficial so that a harmonised system of redress can be established.

It is recommended to establish a national consumer helpline. It could co-ordinate and monitor complaints, filter obviously unsuccessful complaints and channel complaints to the relevant enforcement body.

The National Consumer Tribunal is an *ad hoc* body that was established in terms of the National Credit Act. It has adjudicative functions and is a tribunal of record. The requirement that the NCT must be staffed with sufficient persons with legal training is too vague, and the restriction to two consecutive terms of five years each entails that valuable specialised skills are irretrievably lost.

Since the Tribunal deals both with matters concerning the Consumer Protection Act and the National Credit Act, the establishment of two separate and specialised chambers is advisable. Although the Tribunal is an administrative body, it may grant interim relief. This ensures an affordable consumer redress because consumers are not obliged to approach ordinary courts. The Tribunal is no 'point of first entry' as the legislator favours ADR and settlements by provincial consumer courts. What is more, the 'filtering function' of the Commission ensures that the Tribunal with its limited capacity is not flooded with too many matters.

As consumer protection is a matter of concurrent jurisdiction, the provinces can establish consumer courts. These are administrative bodies whose jurisdiction extends beyond the traditional rules of geographic jurisdiction, which may cause problems.

The provinces' consumer protection legislation differs from province to province, which is very unfavourable to consumers and hampers the transfer of matters between provinces. To tackle this problem, the provinces should create a common legislative framework. This approach has been very successful in Germany. Consumer courts have wide powers, but the enforcement and execution of their orders remain unaddressed. The legislator should address the urgent need for proper enforcement and execution procedure in this field.

Alternative dispute resolution plays an essential role in the Act. The legislator encourages conducting ADR as the first possibility of consumer redress. Ombuds with jurisdiction, industry ombuds and other ADR agents ensure quick, cost-efficient and accessible redress. They have a filtering function as they relieve courts from simple matters. With a view of traditional dispute resolution in African cultures, they could be a better choice than more adversarial redress mechanisms.

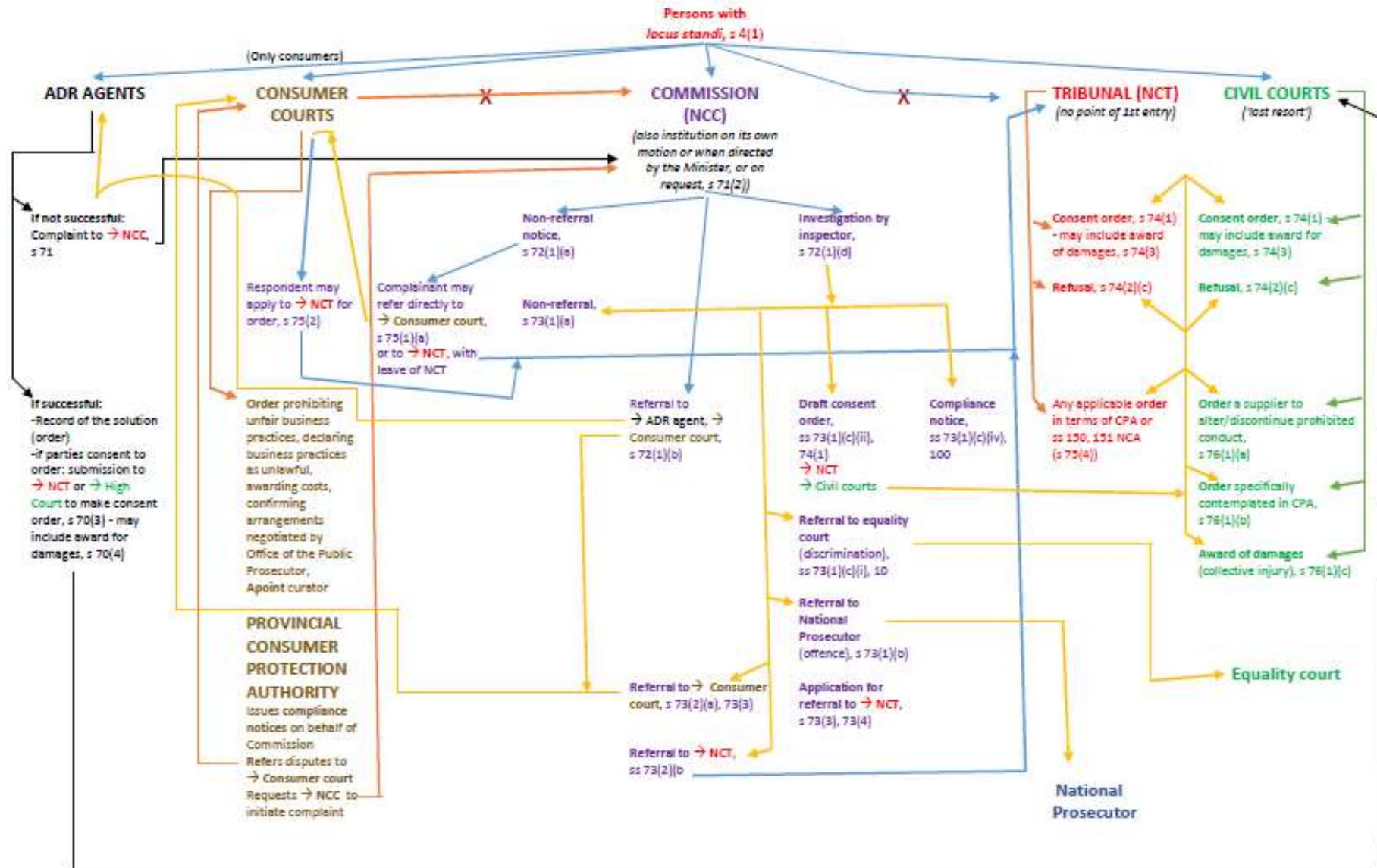
A drawback is that it is not easy for consumers to distinguish between ombuds with jurisdiction and industry ombuds, and to know whether an ombud is accredited or not. A common legal framework as in New Zealand would be helpful in this regard. In order to avoid overlapping jurisdiction and to achieve economies of scale, the merger of several industry ombuds could also be beneficial, also in terms of efficiency and credibility.

Section 70(1) grants *locus standi* only to consumers but not to the other entities mentioned in section 4(1). This might be an editorial error of the legislator. However, it could also be its intention to submit only smaller affairs to ADR agents and to reserve more complex class actions or actions, where consumer protection groups are involved, to the other entities.

The term 'courts' in the Act refers to civil courts. Small Claims Courts offer cost-efficient redress. Despite the contradiction between sections 69(d) and 52 in terms of the accessibility of civil courts, section 4(3) offers a solution by which consumers may approach a Small Claims Court as a first port-of-call if this is the more efficient solution in terms of consumer protection. This solution has the benefit that the Act applies and that the consumer is not obliged to use the path of the common law. It is also beneficial in terms of procedural economy.

The implementation of industry codes providing for industry-wide standards and contract forms would have the advantage that consumers are not confronted with surprising terms and could better shop around because of the comparability of the terms of various suppliers.

Fig. 1: The consumer redress mechanism of the Consumer Protection Act



PART II – STANDARD BUSINESS TERMS LEGISLATION IN GERMANY

INTRODUCTION

After the presentation of the South African legislation on the right to fair, just and reasonable terms and conditions in terms of the Consumer Protection Act, in this part of this thesis, the German standard business terms legislation under §§ 305 to 310 of the German Civil Code (BGB)²⁶¹⁷ and under the Injunctions Act (UKlaG)²⁶¹⁸ will be discussed. In order to facilitate a comparison between both regimes, this chapter will generally adopt the same structure as the South African part, except where a different presentation is necessary.²⁶¹⁹

A comparison with the German legislation on standard business terms is interesting because Germany was the first country in Europe to identify the issue of standard terms, and the first to address this field systematically. What is more, the German Standard Business Terms Act (AGB-Gesetz)²⁶²⁰ had an enormous impact on the drafting of the European Unfair Terms Directive.²⁶²¹

After a brief historical overview, from the first use of standard business terms during Germany's industrial revolution in the 19th century to date, the scope of application of §§ 305 *et seq.* will be discussed, followed by a presentation of legal problems inherent to the incorporation requirement of § 305(2).²⁶²² Then, the exclusion of surprising contract clauses (§ 305c) and the priority of individually agreed terms (§ 305b) shall be examined, before the field of interpretation of standard business terms will be presented. The heart of this part of this thesis will be the content control, consisting of the list of prohibited terms with or without an

²⁶¹⁷ BGB = Bürgerliches Gesetzbuch. **Except where otherwise indicated, the provisions mentioned in this part are those of the BGB.**

²⁶¹⁸ UKlaG = Unterlassungsklagengesetz.

²⁶¹⁹ In order to be in line with the wording of §§ 305 *et seq.* the terminology of the official English translation of the BGB, provided by the Federal Ministry of Justice and Consumer Protection, will be used in this part (https://www.gesetze-im-internet.de/englisch_bgb/). This especially refers to 'standard business terms', the 'user' (mostly the 'supplier' according to the terminology of the CPA) and the 'other party', which typically is the consumer (see § 305(1)).

²⁶²⁰ AGB-Gesetz or AGBG = Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen.

²⁶²¹ Maxeiner 2003 *Yale J. Int. Law* 109 (141).

²⁶²² **Except where otherwise indicated, legal provisions preceded by '\$' are those of the BGB.**

evaluative element (§§ 308 and 309) as well as the general clause of § 307. In the present part, also the legal implications of clauses that have not been incorporated into the agreement as well as the invalidity of contract terms will be examined. Finally, the Unterlassungsklagengesetz dealing with procedural questions and the defence against 'unfair' standard terms, especially through institutional actions,²⁶²³ will be examined.

As it will be presented further in detail in the historical overview, the appearance of standard business terms in the 19th century, due to the industrialisation of the country and mass production, was characterised by the unfettered shift of risks onto consumers.²⁶²⁴ After some hesitation, due to the fact that the Reichsgericht (RG) did not want to interfere with freedom of contract, the view gained ground that exploitative contractual terms must be restricted.²⁶²⁵ The Reichsgericht adopted different approaches in this regard, which all were unsatisfactory from a dogmatic point of view.²⁶²⁶ After World War II, the Bundesgerichtshof (BGH) then based its legislation on its landmark decision of 1956²⁶²⁷ where the principle of good faith (§ 242) became the fulcrum. From this moment on, an evolution in this field took its starting point what was in retrospective referred to as a 'highly commendable performance of German jurisprudence'.²⁶²⁸ In 1976, a time when the notion of consumer protection gained ground, the AGBG came into force. This statute was by far more than a 'codified case law', although the previous work of the courts had prepared the ground. It contained many innovations and corrections, and distinguished B2C and B2B contracts, for instance.²⁶²⁹ After the Unfair Terms Directive of 1993 was transposed into the AGBG,²⁶³⁰ its provisions were inserted, with some modifications, as §§ 305 to 310 into the BGB. For procedural questions, the Unterlassungsklagengesetz (UKlaG)²⁶³¹ was created. Today, the German standard business terms legislation is a modern legal instrument bearing the signature of a long evolution. The

²⁶²³ *Verbandsklagen*. Since this kind of action is inexistent in South Africa, its designation is inconsistent. Naudé summarises the different terms in use: 'actions in the collective interest' (Naudé 2010 *SALJ* 517), 'general use challenge' (Naudé 2010 *SALJ* 528), 'abstract challenge' (Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 58), 'ex ante challenge' (Naudé 2010 *SALJ* 517), for instance.

²⁶²⁴ WLP/Pfeiffer Introduction para 1.

²⁶²⁵ Stoffels *AGB-Recht* 6.

²⁶²⁶ These were: 1. a restrictive interpretation of the clause in favour of the consumer (see e.g., RGZ 142, 353; RG *JW* 1934, 2395), 2. the presumption that the consumer's 'declaration of submission' under the standard terms was invalid if they were unusual or inequitable (see e.g., RGZ 103, 84; 112, 253), and 3. the invalidity of clauses that are contrary to accepted principles of morality, that is public policy in terms of § 138 BGB (see e.g., RGZ 20, 115 (117); 62, 264 (266); 99, 107 (109); 115, 218 (219 *et seq.*)).

²⁶²⁷ BGHZ 22, 90 *et seq.*

²⁶²⁸ Zweigert and Kötz *Rechtsvergleichung* 329.

²⁶²⁹ Stoffels *AGB-Recht* 11.

²⁶³⁰ Gesetz zur Änderung des AGB-Gesetzes und der Insolvenzordnung of 09/07/1996.

²⁶³¹ BGBl. 2001 I at 3138 *et seq.*

significance of this field of law both in the law and in the economy cannot sufficiently be accentuated because it is *the* 'control instrument' in an (online) economy geared towards mass consumption, rationalisation, anonymisation and profit maximisation.²⁶³²

²⁶³² *Wendland* in: *Staudinger/Eckpfeiler* E para 9.

CHAPTER 1 – HISTORICAL OVERVIEW AND IMPLICATIONS OF STANDARD BUSINESS TERMS LEGISLATION

1. Historical Overview

1.1 Legislation before the Standard Business Terms Act

The existence of standard business terms in Germany can be seen as a consequence of the technical and economic development in the 19th century and the transition from a mostly agrarian to an industrial society. In the simultaneously developing service sector, the insurance industry, with its standardised mass contracts, was the first sector using standardised business terms, followed by the major banks in 1880. The lawmaker was not idle either as in 1871, the year of the foundation of the German Reich, the Liability Act of the German Reich came into force. It imposed liability on railroads and prohibited contracts excluding liability.²⁶³³ This tendency was intensified by the creation of some cartels during this time so that quite early standard terms were used in the manufacturing business as well as in trade and services.²⁶³⁴ The introduction of standard business terms allowed a rationalisation of time and effort. Other industries and businesses, such as architects, landlords and real estate agents, soon followed.²⁶³⁵

The appearance of widely used standard provisions was also a result of new contractual forms for which the then existing statutes did not cater for. Leasing and factoring, franchising, or special forms of service contracts,²⁶³⁶ e.g., travel contracts or developer contracts,²⁶³⁷ belong to this category. The new contractual forms were partly a further development of already existing contract types or new ones. Hence, the economic actors had to find solutions in order to cater to these new forms on the basis of freedom of contract. Standard terms were ideal because they allowed the creation of standardised contracts.²⁶³⁸ Gradually, the wide use of standard clauses let businesses systematically impose the contractual risks on their clients and modify the legal situation substantially to their favour.

This phenomenon has been widely discussed in the literature between the World Wars, and some authors argued that the legal characteristics of contracts did not reflect the statutory provisions anymore, but was rather a 'self-made law of the economy' — Naudé refers to 'private

²⁶³³ Reichshaftpflichtgesetz (RHPfG). See Kötz *Gutachten* 50. DJT at A38.

²⁶³⁴ Stoffels *AGB-Recht* 4, WLP/Pfeiffer Introduction para 1.

²⁶³⁵ WLP/Pfeiffer Introduction para 1.

²⁶³⁶ *Werkvertrag*.

²⁶³⁷ *Bauträgervertrag*.

²⁶³⁸ WLP/Pfeiffer Introduction para 2.

legislation'²⁶³⁹ — in the form of standard business terms.²⁶⁴⁰ Above all Ludwig Raiser contributed to the academic discussion on standard business terms. According to him, the use of standard terms makes economic sense, but their formulation and use must be considered in the light of the public interest and the legal consciousness of the community.²⁶⁴¹ Thus, businesses must be prevented from burdening customers unduly, harming the overall economy, or infringing the laws by applying deceit and pressure in order to obtain advantages for themselves. This is to be done by effective control through administrative bodies and the courts.²⁶⁴² The most important 'discovery' in Raiser's seminal work is the *ius dispositivum* as the applicable standard for the legitimacy of standard business terms.²⁶⁴³ Indeed, residual rules are merely subsidiary law in the field of the law of contract. Nonetheless, they contribute to an appropriate balance between the conflicting interests of the parties and therefore are the 'normal order' of the circumstances of a given case.²⁶⁴⁴ A legal system based on balance by control by a third party (such as the courts) cannot accept structural imbalances of this order.²⁶⁴⁵

On the other hand, the courts were very hesitant at that time with respect to the need for control of standard terms. The belief that the market would balance any shortcomings and the view that freedom of contract should be free from any public intervention still prevailed. Notably in a decision of 1883, the then German Supreme Court, the Reichsgericht, held that although the transfer of risk in the given case was inequitable and unfair and would shift the 'natural circumstances' due to a lack of legal limitations of freedom of contract in this respect, it would not be possible to invalidate the given agreement, irrespective of how offensive the terms might be.²⁶⁴⁶ Indeed, the BGB of 1896 took individually agreed contracts as the norm, and the historic legislator drafted the BGB against the backdrop of the idea that the parties to a contract will find a balance between their converging interests.²⁶⁴⁷ Nonetheless, gradually jurisprudence developed three different approaches for the content control of standard business terms because

²⁶³⁹ Naudé 2006 *Stell LR* 369.

²⁶⁴⁰ Großmann-Doerth *Selbstgeschaffenes Recht der Wirtschaft*, *passim*.

²⁶⁴¹ According to Stoffels, the accentuation of the aspect of the 'legal consciousness of the community' must be seen in the context of the time when Raiser wrote his book and is not significant anymore. See Stoffels *AGB-Recht* 5.

²⁶⁴² Raiser *Recht der AGB* 98 *et seq.*

²⁶⁴³ Stoffels *AGB-Recht* 5.

²⁶⁴⁴ Raiser *Recht der AGB* 293 *et seq.* See also Eiselen *Control of Unfair Standard Terms and CISG* 172.

²⁶⁴⁵ WLP/Pfeiffer Introduction para 4.

²⁶⁴⁶ RGZ 11, 100 (110).

²⁶⁴⁷ Wendland in: Staudinger/Eckpfeiler E para 1.

it became soon clear that the maxim of contractual fairness '*volenti non fit iniuria*' only could be put into practice where the parties were fitted with equal bargaining power.²⁶⁴⁸

The first approach consisted of a restrictive interpretation of the given clause. In the event of uncertainties, the clause in question was thus interpreted in favour of the consumer.²⁶⁴⁹ This jurisprudence was particularly applied to disclaimers of liability or warranty and other forms of transfer of risks. The boundaries of interpretation were often transgressed though since the Reichsgericht modified contracts and applied a content control in the guise of interpretation of clauses.²⁶⁵⁰ A second approach was based on the consumer's 'declaration of submission'²⁶⁵¹ under the business's standard terms and stated that an express and voluntary submission under standard terms was invalid if the given clauses were unusual or inequitable.²⁶⁵² In these cases, the courts did not clearly distinguish between the inclusion²⁶⁵³ of contract terms and content control, however.²⁶⁵⁴ Finally, the third approach, similar to § 307(1) BGB, was based on clauses being 'contrary to accepted principles of morality', i.e., public policy²⁶⁵⁵ pursuant to § 138 BGB,²⁶⁵⁶ in cases where a business imposed its standard terms upon a client by taking advantage of its monopoly.²⁶⁵⁷ Other cases were based on unconscionability in terms of § 242 BGB.²⁶⁵⁸ This approach became possible because in 1900, the BGB came into force and gave courts a statutory basis for intervention.²⁶⁵⁹ This approach had inconveniences too because cases in which companies took advantage of their freedom of contract could not be limited to monopolies. Furthermore, the application of public policy alone did not allow for the determination of a fair balance between the parties' rights and obligations.²⁶⁶⁰

²⁶⁴⁸ *Wendland* in: Staudinger/Eckpfeiler E para 1a.

²⁶⁴⁹ RGZ 142, 353; RG JW 1934, 2395. See current version of § 305 c (2).

²⁶⁵⁰ Stoffels *AGB-Recht* 6. The interpretation of clauses is nonetheless still a corrective measure of the courts in terms of content control, see § 5 AGBG (now § 305c (2) BGB). See WLP/Pfeiffer Introduction para 5.

²⁶⁵¹ *Unterwerfungserklärung*.

²⁶⁵² RGZ 103, 84; 112, 253.

²⁶⁵³ The official English translation of the BGB refers to 'incorporation'. See https://www.gesetze-im-internet.de/englisch_bgb/ (translation of the Federal Ministry of Justice and Consumer Protection).

²⁶⁵⁴ These two aspects are strictly separated today in §§ 305(2) and 307.

²⁶⁵⁵ In German '*Verstoß gegen die guten Sitten*'.

²⁶⁵⁶ § 138: '(1) A legal transaction which is contrary to public policy is void. (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.'

²⁶⁵⁷ The first decision in this regard was RGZ 20, 115 (117). See also RGZ 62, 264 (266); 99, 107 (109); 102, 396 (397); 103, 82 (83); 115, 218 (219 *et seq.*).

²⁶⁵⁸ RGZ 168, 329.

²⁶⁵⁹ Maxeiner 2003 *Yale J. Int. Law* 109 (142).

²⁶⁶⁰ WLP/Wolf Introduction para 6.

Hence, after the Nazi dictatorship, the newly established German Supreme Court, the Bundesgerichtshof (BGH), abandoned very soon the Reichsgericht's jurisprudence based on monopolies and preferred a content control based on § 242,²⁶⁶¹ regardless of whether the business held a monopoly. The BGH was inspired by Ludwig Raiser's work who contended that the misuse of freedom of contract did not only exist in cases where the user of standard terms was in a monopolistic position but also where it depends on the indifference or legal inexperience of the other party.²⁶⁶² Its decision of 29 October 1956 was a milestone in this respect.²⁶⁶³ In this case, which concerned the purchase of newly fabricated furniture, the BGH decided that the company had the right to exclude its warranty in its standard terms if it granted a right of rectification of defects instead. If this right could not be exercised, the client's warranty was reinstated though. According to the BGH, any other formulation of standard terms violates the principle of good faith because it would be an inequitable and unacceptable burden for the customer. In this regard, § 242 limits, pursuant to the BGH, the content of standard delivery terms.²⁶⁶⁴ The BGH justified the application of § 242 by stating that a company could abuse its freedom of contract by imposing its standard terms upon the customers because merely by the use of standard terms it claimed freedom of contract only for itself.²⁶⁶⁵ Therefore, according to the principle of good faith, businesses would be obliged to consider the interests of potential clients as well. Otherwise, the company in question abuses its freedom of contract.²⁶⁶⁶

In the beginning, the BGH faltered in its decisions as regards the criterion of good faith between the 'crass inadequacy' of the contractual terms and their 'contrariety to the principles of the community' or contractual justice.²⁶⁶⁷ Finally, in 1964, the BGH specified the standard of good faith (*Treu und Glauben*) using Raiser's idea of the guiding function of the *ius dispositivum*.²⁶⁶⁸ According to the court, as far as the provisions of the statutory law are not only based on considerations of expediency but rather on requirements of justice, any deviation from these requirements by standard terms must be based on reasons allowing a deviation that is compatible with the law and equity. The *ius dispositivum* can contain different degrees of

²⁶⁶¹ § 242: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.'

²⁶⁶² Raiser *Recht der AGB* 284.

²⁶⁶³ BGHZ 22, 90 *et seq.*

²⁶⁶⁴ BGHZ 22, 90 (100).

²⁶⁶⁵ The application of the principle of good faith found later application in § 9 AGBG (= § 307 BGB).

²⁶⁶⁶ BGH *NJW* 1965, 246; 1969, 230.

²⁶⁶⁷ WLP/Pfeiffer Introduction para 6, Wolf *Rechtsgeschäftliche Entscheidungsfreiheit* 253 *et seq.*

²⁶⁶⁸ BGHZ 41, 151 *et seq.*

'fairness', and the higher this degree, the stricter is the applicable standard for the compatibility of the deviation by standard terms with the principle of good faith.²⁶⁶⁹ Therefore, the BGH rejected terms that waived essential contractual obligations in most cases.²⁶⁷⁰

Overall, jurisprudence concerning standard terms was extremely complex and varied. Its objective was nonetheless uniform in the sense that inappropriate, inequitable or abusive clauses were invalidated. There is consensus that this was a 'highly commendable performance of German jurisprudence'.²⁶⁷¹ Today, it is unanimously recognised that freedom of contract as a means of a fair balancing of the parties' mutual interests is only appropriate where an approximate balance of bargaining power exists.²⁶⁷² It is the general understanding that mere formal freedom of contract is not sufficient, but that material freedom of contract must be achieved where not the formal position of a party but its actual power to shape the content of the agreement is significant.²⁶⁷³

1.2 The Standard Business Terms Act of 1976

The fact that the scrutiny of standard business terms was not codified was criticised from the beginning. According to Otto von Gierke, the principle of contract of freedom 'does not mean an arbitrary, but rather reasonable freedom of contract' because unrestricted freedom of contract will destroy itself and 'becomes a means for the suppression of the other party'.²⁶⁷⁴ After the spreading of standard terms in the period between the World Wars, the National Socialist government discussed the creation of a People's Code²⁶⁷⁵ but contented itself with to some dirigiste interventions with regard to some contract types (German uniform rental agreement, General German Carrier Conditions).²⁶⁷⁶

After World War II, the discussions on the protection of parties that are subject to standard business terms was revived, especially at the beginning of the '70s, when the notion of consumer protection became more weight. The need for a codified standard terms assessment seemed to become urgent, mainly because *de facto* content control was limited to B2B contracts. This was because consumers did assert their rights far less often, either because they ignored them, or because they did not want to take the procedural risk for the relatively small

²⁶⁶⁹ BGHZ 41, 151 (154).

²⁶⁷⁰ For instance, BGHZ 50, 200 (206 *et seq*); 72, 206 (208); BGH NJW 1973, 1878.

²⁶⁷¹ Zweigert and Kötz *Rechtsvergleichung* 329.

²⁶⁷² *Wendland* in: Staudinger/Eckpfeiler E para 1a.

²⁶⁷³ *Wendland* in: Staudinger/Eckpfeiler E para 1b.

²⁶⁷⁴ Von Gierke *Die soziale Aufgabe des Privatrechts* 23. My own translation.

²⁶⁷⁵ Volksgesetzbuch.

²⁶⁷⁶ Deutscher Einheitsmietvertrag, Allgemeine Deutsche Spediteursbedingungen. See Stoffels *AGB-Recht* 8-9.

sums at stake.²⁶⁷⁷ There was a need for legislation because judge-made law is limited in its scope because the courts can only deal with cases that are brought to them. Besides, court rulings have a limited effect because they are only valid *inter partes*. As in Germany, the losing party bears the costs, only few consumers wanted to take the risks involved with litigation. Only the most flagrant abuses were thus controlled by the courts. What is more, the absence of concrete provisions and the uneven application by lower courts was criticised.²⁶⁷⁸ On the other hand, legislative intervention is proactive, more systematic and has a universal effect.²⁶⁷⁹ It also increases legal certainty,²⁶⁸⁰ and the political process taking place before a law is passed gives the affected social groups the opportunity to participate.²⁶⁸¹

The report of the Federal Government on consumer protection policy of 18 October 1971 gave the decisive impulse for the preparatory work in this field. This report underlined the need for efficient protection of consumers against inappropriate contractual conditions.²⁶⁸² The Federal Minister of Justice then appointed a workgroup which presented its First Interim Report in March 1974, which did not deal with procedural questions though.

Significant too was the work of the 50th German Jurists' Conference.²⁶⁸³ The majority of this conference welcomed legislative measures for the regulation of standard terms. The conference recommended above all content control consisting of a combination of prohibited clauses and a general clause.²⁶⁸⁴ In this regard, the work of Hein Kötz must be emphasised. Kötz, a comparative-law scholar, presented a 100-page report on standard terms which called for legislative measures.²⁶⁸⁵ Hence, the question was no longer *whether* legislative measures were necessary, but *which* ones.²⁶⁸⁶

The propositions of the First Interim Report were the basis of a first Ministerial Draft of 1974 which was also limited to questions of the substantive law. An important question during the

²⁶⁷⁷ WLP/Pfeiffer Introduction para 7.

²⁶⁷⁸ Bunte *NJW* 1987, 921 (922), Dietlein *NJW* 1974, 1065 (1065).

²⁶⁷⁹ Dietlein *NJW* 1974, 1065 (1065).

²⁶⁸⁰ Bunte *NJW* 1987, 921 (922).

²⁶⁸¹ Stürner *JZ* 1974, 720.

²⁶⁸² Bericht der Bundesregierung zur Verbraucherpolitik of 18/10/1971, BT-Drs. 6/2724 at 8.

²⁶⁸³ Deutscher Juristentag (DJT). The German Jurists' Conference is an association that holds a bi-annual conference since 1860. The Conference brings together lawyers in private practice, in-house lawyers, civil servants, judges and academics to discuss legal reform projects and legal policy. It has repeatedly proved rather influential. Its deliberations receive wide coverage in the legal and non-legal press alike. See Creifelds *Rechtswörterbuch* s.v. 'Deutscher Juristentag' and the homepage of this institution at '<https://www.djt.de>'.

²⁶⁸⁴ See the thorough report of Kötz in *Verhandlungen des 50. DJT*, Vol. I, A at f) *et seq.*

²⁶⁸⁵ Kötz *Gutachten 50. DJT* at A1.

²⁶⁸⁶ Wolf *JZ* 1974, 465. Bunte notes that the conviction that legislative measures had to be taken was 'firmly anchored' in the public, the political parties and scholars. Bunte *NJW* 1987, 921 (921 and 922).

debate was if the statute merely should contain a general clause, or whether a catalogue of prohibited terms should complete a general clause. Another debate concerned the adequacy of standard clauses, i.e., whether the fairness enquiry should be geared to positive adequacy, or if inadequacy should lead to the invalidity of a clause. Furthermore, it was discussed if the statute should be applied only to clauses contained in forms, or to all kinds of contractual provisions.²⁶⁸⁷ A further question was whether the application of the provisions should be limited to consumers or be extended to businesses as well,²⁶⁸⁸ and if the same control standard should apply both to consumers and to merchants.²⁶⁸⁹

The statements and hearings on this Ministerial Draft finally led to a second Ministerial Draft in March 1975. In June 1975, this Draft was presented with minor modifications by the Federal Government to the German Bundestag as 'Draft for a Statute for the Regulation of the Law of Standard Business Terms'.²⁶⁹⁰ The result of this process should be a statute that had the objective 'to obtain validity of the principle of an appropriate balance between the interests of both parties which legitimates freedom of contract in accordance with the fundamental ideas of the BGB', and to 'obtain contractual justice'. The bill hence tended 'to restore the function of the private contract law which has been violated by the unfettered development in the field of standard business terms'. Thus, the statute should counter the advantage of standard business terms users and their possibility to formulate the contractual terms by doing so in an appropriate and reasonable manner, without restricting freedom of contract more than necessary.²⁶⁹¹

The Government's Draft was then submitted to the German Bundesrat which argued against the inclusion of procedural questions into the statute.²⁶⁹² Finally, the bill was passed by the Bundestag on 10 November 1976, and the Bundesrat assented to it two days later, so that the Standard Business Terms Act (AGBG)²⁶⁹³ could be promulgated on 9 December 1976 in the Federal Law Gazette.²⁶⁹⁴ Most of its provisions came into force on 1 April 1977.²⁶⁹⁵ In 1990, it was extended to the territory of the former German Democratic Republic.²⁶⁹⁶

²⁶⁸⁷ Grunsky *BB* 1971, 1113, *WLP/Pfeiffer* Introduction para 8.

²⁶⁸⁸ Brandner *JZ* 1973, 614.

²⁶⁸⁹ Wolf *JZ* 1974, 465 and 469.

²⁶⁹⁰ Entwurf eines Gesetzes zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz), BT-Drs. 7/3919.

²⁶⁹¹ BT-Drs. 7/3919 at 13.

²⁶⁹² See Report of the Law Commission, BT-Drs. 7/5422.

²⁶⁹³ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz).

²⁶⁹⁴ BGBl. I at 3317.

²⁶⁹⁵ § 30 AGBG.

²⁶⁹⁶ Gesetz über die Inkraftsetzung von Rechtsvorschriften der Bundesrepublik Deutschland in der Deutschen Demokratischen Republik of 21/06/1990, GBl.-DDR I at 357.

The AGBG contained in its § 1 a definition of standard business terms and provided in § 2 for the requirements for their incorporation into the contract.²⁶⁹⁷ The core of the content control²⁶⁹⁸ was the general clause (§ 9) invalidating standard terms that, contrary to the requirement of good faith, unreasonably disadvantage the other party (consumer). § 9(2) contained guidelines providing that in case of doubt an unreasonable disadvantage is to be assumed if a clause is not compatible with essential principles of the default legal position, or endangers the attainment of the purpose of the contract. Besides the general clause, a 'blacklist' in § 11 enumerated terms that were invalid without any discretion. Furthermore, § 10 contained a 'greylist' with terms that were prohibited *prima facie* but could be considered as valid after evaluation.²⁶⁹⁹ The content control provisions of §§ 9, 10 and 11 AGBG were applicable to all contracts.²⁷⁰⁰ Excluded from the ambit of the AGBG were, for example, contracts in the field of labour law,²⁷⁰¹ the law of succession, family law and company law (§ 23(1)). §§ 13 to 21 AGBG contained provisions dealing with institutional actions.²⁷⁰²

Although the AGBG was in many respects in keeping with the jurisprudence on the limits of standard business terms, it would be wrong to describe this statute as 'codified case law' since it contained many innovations which the former jurisprudence did not provide for as well as some corrections.²⁷⁰³ For instance, the new law differentiated between B2C and B2B transactions, and contrary to prior jurisprudence, the definitions of 'standard business terms' was more precise and included so-called form-contracts.²⁷⁰⁴ The material scope of application was therefore not only defined negatively, as in § 23 AGBG, but also positively.²⁷⁰⁵ The civil courts' role as controlling bodies was confirmed and legitimated, the standards specified and the methodology accentuated. The courts decided ultimately on the validity of standard terms, which meant that other alternatives, such as the creation of consumer protection authorities endowed with the task to validate standard terms beforehand, or the introduction of a procedure

²⁶⁹⁷ Brox *BGB-AT* (1991) 107-110.

²⁶⁹⁸ Palandt/*Grüneberg* § 307 para 1.

²⁶⁹⁹ Brox *BGB-AT* (1991) 112-115. The text of the AGBG is printed in UBH at 26-40, for instance.

²⁷⁰⁰ §§ 307, 308 and 309 BGB which largely correspond to §§ 9, 10 and 11 ABGB only apply to consumer contracts. For other (B2B) contracts, only the general clause of § 307 applies. See §§ 24 AGBG and 310(1) BGB. The BGH has decided however that the list contained in §§ 308 and 309 provide for an indication of an unreasonable disadvantage and that violations of the black- or greylists also might infringe § 307 in commercial agreements (BGH XII ZR 54/05, 27/05/2007).

²⁷⁰¹ Labour law is no longer excluded from the ambit of §§ 305-310 BGB. See § 310(4). *Wendland* in: Staudinger/Eckpfeiler E para 8.

²⁷⁰² *Verbandsklage*. Stoffels *AGB-Recht* 11.

²⁷⁰³ Stoffels *AGB-Recht* 10.

²⁷⁰⁴ § 1 AGBG.

²⁷⁰⁵ Stoffels *AGB-Recht* 11.

for the formulation of model conditions, were not provided for in this statute.²⁷⁰⁶ Such solutions would have meant more bureaucracy and would not have been compatible with a free economic order. *De facto* it would also have led to less judicial control because official 'authorisations' by an official body would have legitimised the given standard terms.²⁷⁰⁷ Although model terms would have been more compatible with the free economic order, there was a lack of associations being able to defend consumer interests during the negotiations of such model terms. This solution was therefore dismissed as well.²⁷⁰⁸

The scope of the AGBG was formulated very widely and B2B transactions were included too, although some flexibility was introduced by excluding some provisions for this kind of transactions.²⁷⁰⁹ The first step of the validity assessment of standard terms was the question of whether the terms became lawfully part of the agreement (incorporation or inclusion),²⁷¹⁰ followed by the content control, which was widely based on the jurisprudence of the BGH.²⁷¹¹ In cases in which the 'other party', i.e., the consumer, wished to oppose standard terms, it could enforce the provisions of the AGBG in individual proceedings at court. The validity of the given standard terms was then assessed in a so-called 'incidental control', i.e., within the proceedings at court. In order to strengthen the protection of this statute, the legislator introduced an 'abstract control' in the form of an 'institutional action'.²⁷¹² This kind of action was granted to certain qualified bodies, professional associations and chambers of industry and commerce as well as to chambers of crafts.²⁷¹³ The standing of consumer protection organisations ensures that consumers have knowledgeable partners on their side and that legal actions have a general effect. What is more, associations with *locus standi* have a certain bargaining power because in many cases, they can require an extrajudicial declaration of discontinuance.²⁷¹⁴ Hence institutional actions and the bargaining power that ultimately derives from it indirectly have the same effect as the drafting of model standard business terms.²⁷¹⁵

²⁷⁰⁶ WLP/Pfeiffer Introduction para 9.

²⁷⁰⁷ WLP/Pfeiffer Introduction para 9, Koch ZRP 1973, 89, Löwe FS Larenz 1973 at 396 *et seq*, Brandner JZ 1973, 617, Becker NJW 1973, 1917.

²⁷⁰⁸ WLP/Pfeiffer Introduction para 9.

²⁷⁰⁹ § 24 AGBG.

²⁷¹⁰ The conditions for the inclusion of standard business terms were set out in §§ 2 to 4 AGBG.

²⁷¹¹ §§ 8 to 11 AGBG. Stoffels *AGB-Recht* 11.

²⁷¹² *Verbandsklage*, §§ 13 *et seq* AGBG.

²⁷¹³ See § 13(2) AGBG.

²⁷¹⁴ *Außergerichtliche Unterlassungserklärung*.

²⁷¹⁵ WLP/Pfeiffer Introduction para 9.

The AGBG quickly played a central role in German contract law. According to Remien, contract law became above all the law of the control of standard business terms.²⁷¹⁶

The so-called 'contract model' solved the question of how freedom of contract would not unduly be restricted by giving courts control over contractual terms. From a legal standpoint, the existence of standard terms is based on the fact that the parties can differ from the legal set of rules serving as default provisions (*ius dispositivum*). In the case of standard terms however, the user restricts the other party's freedom of contract by imposing its terms and conditions. The other party (consumer) takes these terms as mandatory and usually merely accepts the core terms, the *essentialia negotii*. Therefore, users (suppliers) take upon themselves the obligation to draft suitable terms in good faith.²⁷¹⁷ Good faith requires that the terms be fair and that the user does not subject its counterpart to an unreasonable disadvantage.²⁷¹⁸ The AGBG limits the users' freedom to exploit their position as drafters to their sole benefit and prohibits them from taking inappropriate advantage of their counterparts. Therefore, not the parties' freedom of contract²⁷¹⁹ is controlled, but rather the user's freedom of contract-drafting.²⁷²⁰ This so-called 'contract model'²⁷²¹ does not assess a term's fairness but rather whether the user's standard terms serve as a good faith basis for the parties' contractual relationship.²⁷²² Hence, the contract model compares standard terms to two principal validity standards: first, the essential basic principles of the statute from which the given term deviates, and second, the essential rights and duties necessary to achieve the purpose of the contract.²⁷²³ Thus, the scope of the contract model focuses on the challenged terms, the relevant *ius dispositivum* and the contract concerned. On the other hand, the circumstances of the parties involved in a particular transaction are not taken into account.²⁷²⁴ This approach is therefore 'supra-individual and generalising' (or 'abstract-universal', 'abstract-general' or generalised-typified),²⁷²⁵ and not 'particular-personalised'.²⁷²⁶ The relevant statute serves a 'classifying and guiding function'.²⁷²⁷ Even though to foreign jurists not familiar with the 'dogmatic-conceptual' phase of German standard business terms law, the approach of the contract model must be a 'simply incomprehensible approach to the

²⁷¹⁶ Remien ZEuP 1994, 34.

²⁷¹⁷ BGHZ 54, 106 (109).

²⁷¹⁸ Maxeiner 2003 Yale J. Int. Law 109 (148).

²⁷¹⁹ Vertragsfreiheit.

²⁷²⁰ Vertragsgestaltungsfreiheit.

²⁷²¹ Vertragsmodell.

²⁷²² Maxeiner 2003 Yale J. Int. Law 109 (148).

²⁷²³ See § 307(2). Schmidt E DRiZ 1991, 81, 83.

²⁷²⁴ BGHZ 22, 91 (98); 17,1 (3).

²⁷²⁵ Abstrakt-generell.

²⁷²⁶ Konkret-individuell. Heinrichs NJW 1993, 1817, 1820.

²⁷²⁷ Ordnungs- und Leitbildfunktion. Schmidt-Salzer Allgemeine Geschäftsbedingungen 186-189.

problem', as Schmidt-Salzer comments,²⁷²⁸ it made the development of a judicature of specific prohibited terms in their various manifestations possible by a combination of legal provisions and judicial decisions.²⁷²⁹

1.3 The Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and its transposition into German law

The harmonisation of the European national laws has been discussed since the 1970s, but only in the '90s of the last century, those endeavours took a more concrete shape. In July 1990, the European Commission submitted its first proposal for a Council Directive on unfair terms in consumer contracts.²⁷³⁰ This proposal had many deficiencies though because of a content control including the control of the price-performance ratio, and the lack of a distinction between pre-formulated and individually negotiated terms. Above all German scholars harshly criticised this proposal.²⁷³¹ It was contended that the equal treatment of individually agreed terms and standard-form clauses would cause a 'considerable dilution of the principle of a free market economy, which is safeguarded by the EEC Treaty'²⁷³² and would therefore drastically restrict private autonomy and upset freedom of contract.²⁷³³ German authors argued that German standard terms legislation honoured freedom of contract, and that this principle counsels not the free application of standard terms, but their scrutiny. Where, on the other hand, the parties negotiate terms individually, their choice had to be accepted with regard to private autonomy.²⁷³⁴ The control of individually negotiated terms had to take into consideration the entire contract as well as the circumstances of its conclusion.²⁷³⁵ Furthermore, they argued that in a free-market economy, the price-performance relationship should be determined by the market and that the directive should not apply to the 'principle obligations' of the contract.²⁷³⁶

The following proposal for a directive followed in March 1992 under the impression of the criticism of the first proposal and the statements of the European Parliament and the Economic and Social Committee.²⁷³⁷ This proposal for a Council Directive contained many improvements

²⁷²⁸ Schmidt-Salzer *VersR* 1995, 1261, 1262.

²⁷²⁹ Kötz notes that the courts did not have to rely on indefinite general clauses, but could develop case groups, clause varieties and contract types. See Kötz *Gutachten* 50. *DJT* at A51.

²⁷³⁰ OJ EC 1990 No. C 243 at 2.

²⁷³¹ Brandner/Ulmer *BB* 1991, 701 *et seq.*, Hommelhoff *AcP* 192 (1992) at 90 *et seq.*

²⁷³² Brandner/Ulmer *Common Mkt- L. Rev.* 1991, 647, 652 *et seq.* (translation of Brandner/Ulmer). Their original contribution in German: Brandner/Ulmer *BB* 1991, 701, 703-704.

²⁷³³ Brandner/Ulmer *Common Mkt. L. Rev.* 1991, 647, 652-654.

²⁷³⁴ Zoller *JZ* 1991, 850, 853, 855.

²⁷³⁵ Brandner/Ulmer *Common Mkt- L. Rev.* 1991, 647, 654.

²⁷³⁶ Brandner/Ulmer *Common Mkt. L. Rev.* 1991, 647, 651-654, Bunte *FS Locher* 329, 331, 333.

²⁷³⁷ OJ EC 1992 No. C 73 at 7.

and had numerous similarities with the German AGBG but still included individually negotiated terms.²⁷³⁸ The antagonism between the proposal of the Directive and German standard business terms law originated in their different approaches. Whereas the German contract model applies to contracts in general, without taking into consideration the personal characteristics of the parties (abstract-universal approach), the draft of the Directive focused on consumer protection (particular-personalised approach).

After some resistance, the Commission finally agreed that the Unfair Terms Directive should not apply to individually agreed terms.²⁷³⁹ Furthermore, pre-formulated standard contracts were not considered individually negotiated,²⁷⁴⁰ and the control of the adequacy of the price-performance ratio and the Directive's application to the principal obligations of a contract were abandoned.²⁷⁴¹

Finally, the common position of the Council with a view to the adoption of the Council Directive on unfair terms in consumer contracts became the Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts.²⁷⁴² In conclusion, the German standard business terms legislation had a major influence on the Unfair Terms Directive.²⁷⁴³

In terms of article 1(1) of the Directive, '[t]he purpose of the[e] Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.' The material scope of the Directive covers 'contractual term[s] which ha[ve] not been individually negotiated'.²⁷⁴⁴ This is a broader definition for standard business terms than in article 1 AGBG.²⁷⁴⁵ What is more, the Directive does not include B2B agreements but only 'consumers', unlike the AGBG.²⁷⁴⁶ More importantly, the Directive considers a term 'unfair'²⁷⁴⁷ if it causes a significant imbalance

²⁷³⁸ Stoffels *AGB-Recht* 13.

²⁷³⁹ Article 3(1) of the Directive.

²⁷⁴⁰ Article 3(2) of the Directive.

²⁷⁴¹ Article 4(2) of the Directive.

²⁷⁴² OJ L 95 of 21 April 1993 at 29 *et seq.*

²⁷⁴³ Maxeiner 2003 *Yale J. Int. Law* 109, 160.

²⁷⁴⁴ Article 3(1) of the Directive.

²⁷⁴⁵ **Article 1(1) AGBG:** '(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes.' The AGBG did not yet contain the sentence 'Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties', which later was inserted into § 305(1).

²⁷⁴⁶ Pursuant to **art 2(b) of the Directive**, "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession'. For the personal scope of application of the AGBG see § 24 AGBG.

²⁷⁴⁷ In the German official translation of art 3(1) of the Directive, 'unfair' is translated by '*missbräuchlich*'.

in the parties' rights and obligations under the contract, whereas the centrepiece of the German general clause is an 'unreasonable disadvantage'. Since EU law has to be interpreted independently from national law, i.e., autonomously, it cannot be excluded that the content of EU and national laws might differ in certain instances. Because of the primacy of European law over national law and the radiating effect of the former, these differences should be minimal though.²⁷⁴⁸

On the other hand, many provisions of the Directive are similar to the AGBG: Article 4(2), read with recital 19, expressly excludes the price-performance ratio.²⁷⁴⁹ Besides, the general clause in article 3 of the Directive is geared to the principle of good faith.²⁷⁵⁰ The 'significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' in the Directive's general clause is, as Stoffels correctly contends, nothing else than the 'unreasonable disadvantage' referred to in § 9 AGBG because the Directive's general clause is not aimed to grant greater protection than the general clause in the AGBG.²⁷⁵¹ The Directive's list of prohibited terms in the Annex is merely a not binding 'reminder' directed to the Member States of possibly unfair terms though.²⁷⁵²

The Directive aims at a harmonised minimal standard of protection, and 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.²⁷⁵³ Stricter provisions of the AGBG are therefore not in conflict with the Directive.²⁷⁵⁴

The Directive was transposed into German law by a law which became effective on 25 July 1996.²⁷⁵⁵ The objective of this statute was not a complete overhaul but to amend the AGBG as little as possible to conform to the Directive²⁷⁵⁶ as the legislator was of the view that the protection required by the Directive could be achieved by the AGBG. On the other hand, the German lawmaker considered that the personal and material scope of application of the AGBG

²⁷⁴⁸ *Wendland* in: Staudinger/Eckpfeiler E para 10.

²⁷⁴⁹ Stoffels *AGB-Recht* 13.

²⁷⁵⁰ See § 9(1) AGBG.

²⁷⁵¹ Stoffels *AGB-Recht* 14 and 15.

²⁷⁵² **Article 3(3) of the Directive:** 'The Annex shall contain an indicative and non-exhaustive list of terms which may be regarded as unfair'.

²⁷⁵³ Article 8 of the Directive.

²⁷⁵⁴ BGH *NJW* 2001, 1132 (1133).

²⁷⁵⁵ Gesetz zur Änderung des AGB-Gesetzes und der Insolvenzordnung of 09/07/1996.

²⁷⁵⁶ UBH/*Ulmer* Introduction para 92 refers to a 'minimal solution'.

had to be amended. This led to the introduction of § 24a AGBG, applicable to consumer contracts.²⁷⁵⁷

1.4 The Law of Obligations Modernisation Act and the integration of the law of standard business terms into the BGB

After the Directive's transposition into German law, some specific intervention took place with respect to the AGBG. These were notably due to the Commercial Law Reform Act of 1998,²⁷⁵⁸ the Cashless Payment Transactions Act of 1999,²⁷⁵⁹ the Acceleration of Due Payments Act of 2000²⁷⁶⁰ and the Distance Selling Contracts Act of 2000.²⁷⁶¹ The by far most significant intervention was due to the Law of Obligations Modernisation Act of 26 November 2001, which took effect on 1 January 2002.²⁷⁶²

By the aforementioned statute, the AGBG was repealed, and the substantive provisions of the AGBG²⁷⁶³ were integrated into the BGB in a newly created Division 2 'Drafting contractual obligations by means of standard business terms'²⁷⁶⁴ containing the official note that '[t]his provision also serves to implement Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts.'²⁷⁶⁵

Despite the integration of the AGBG provisions into the BGB, the lawmaker did not choose to redraft these provisions but limited its intervention to some focal points, such as necessary modifications due to the modified law of defective performances, or the adaption of some provisions in the light of the Directive.²⁷⁶⁶ A rather significant modification was the abolition

²⁷⁵⁷ Now § 310(3) BGB. Stoffels *AGB-Recht* 18.

²⁷⁵⁸ Handelsrechtsreformgesetz (HRefG), BGBl. 1998 I at 1484 *et seq.*

²⁷⁵⁹ Überweisungs-gesetz (ÜG), BGBl. 1999 I at 1642. See §§ 675, 675a and 676 a to c BGB.

²⁷⁶⁰ Gesetz zur Beschleunigung fälliger Zahlungen, BGBl. 2000 I at 330 *et seq.*

²⁷⁶¹ Fernabsatzgesetz (FernAbsG), BGBl. 2000 I at 897 *et seq.* See § 312 c BGB.

²⁷⁶² Schuldrechtsmodernisierungsgesetz, BGBl. 2001 I at 3138 *et seq.*

²⁷⁶³ §§ 1 to 11 and 23 to 24a AGBG.

²⁷⁶⁴ §§ 305 to 310 BGB.

²⁷⁶⁵ The AGBG provisions have been integrated into the BGB as follows:

AGBG	BGB
§§ 1 and 2	§ 305
§ 23 (part)	§ 305a
§ 4	§ 305b
§§ 3 and 5	§ 305c
§ 6	§ 306
§ 7	§ 306a
§§ 8 and 9	§ 307
§ 10	§ 308
§ 11	§ 309
§ 23 (part)	§ 310

²⁷⁶⁶ Stoffels *AGB-Recht* 19.

of the applicability of content control to employment contracts.²⁷⁶⁷ With the integration into the BGB, the legislator hoped to achieve more transparency and understandability, a strong interlacing between the law of standard business terms and the law of obligations. Other objectives were the prevention of the development of different principles of interpretation, definitions and scrutiny standards as well as a strengthening of the concept of codification. The ultimate aim was that the BGB should regain the 'rank of a general codification of the civil law'.²⁷⁶⁸

The procedural provisions which were formerly contained in §§ 13 *et seq.* AGBG were not included in the BGB. Instead, the legislator created the Unterlassungsklagengesetz (UKlaG).²⁷⁶⁹ The reason for this was that the BGB, which only contains substantive law provisions, should not be 'tainted' with procedural provisions, and the Civil Procedures Act (ZPO)²⁷⁷⁰ should not contain provisions dealing with institutional actions.²⁷⁷¹

The creation of §§ 305 to 310 BGB was received with some criticism, and some authors favoured the maintenance of the AGBG.²⁷⁷² Some authors suggested that there had been no compulsory need for action, contrary to the legislator's given reasons,²⁷⁷³ as intransparency and contradictions had not characterised the parallel existence of the AGBG and the BGB. Ulmer even asserted that the signalling effect of the AGBG provisions were stronger if they had not been integrated into the BGB.²⁷⁷⁴ Indeed, one can criticise the fact that many AGBG provisions had been 'contracted' into fewer BGB provisions in a sometimes illogical manner.²⁷⁷⁵ For instance, the inclusion of standard business terms was regulated in a provision of its own (§ 2 AGBG), whereas now, it is contained in § 305(2) BGB. § 9 AGBG only contained the general clause, whereas § 307 BGB also contains a provision dealing with content control in its 3rd subsection.

Nonetheless, the insertion of the standard business terms legislation into the BGB must be seen more positively than negatively. Even though the organisation of some provisions could be

²⁷⁶⁷ Formerly § 23(1) AGBG. § 310(4) provides that when the provisions of § 305 *et seq.* are applied to employment contracts, reasonable account must be taken of the special features that apply in labour law. See UBH/*Fuchs* before § 307 para 18.

²⁷⁶⁸ Begründung des Regierungsentwurfs BT-Drs. 14/6040 at 92 and 97.

²⁷⁶⁹ BGBl. 2001 I at 3138 *et seq.*

²⁷⁷⁰ Zivilprozessordnung (ZPO).

²⁷⁷¹ *Verbandsklage*. Stoffels *AGB-Recht* 19.

²⁷⁷² Ulmer JZ 2001, 491 *et seq.*, Schulze and Schulze-Nölke *Schuldrechtsreform* 215 *et seq.*

²⁷⁷³ AnwKomm Schuldrecht-*Hennrichs* before §§ 305 *et seq.* para 6.

²⁷⁷⁴ Ulmer JZ 2001, 497.

²⁷⁷⁵ Palandt/*Heinrichs* (2008) before § 305 para 1, Ernst and Zimmermann *Zivilrechtswissenschaft* 503.

different, the codification in a single code is more transparent and logical. The BGB which deals with the most important civil law matters of individuals from birth to death is by far the best-known code in Germany (after the Grundgesetz), and probably only few laypersons knew of the existence of the AGBG. The signalling effect of the AGBG was therefore probably not as strong as Ulmer asserts. More importantly, courts assess standard terms within a so-called 'incidental control', i.e., within the assessment of other legal questions, such as the validity of a contract. The insertion of the given provisions into this code containing other relevant substantive provisions was thus logical.

From a systematic point of view, the provisions on standard business terms belong to the general part of the BGB, however,²⁷⁷⁶ and not to the general part of the law of obligations²⁷⁷⁷ because content control is also applicable for clauses concerning representation, prescription or property law. The legislator was of the view though that the standard business terms provisions should be inserted into Book II of the BGB because they mostly concerned the contract types contained in the special law of obligations.²⁷⁷⁸ The provisions of §§ 305 to 310 must be applied by analogy to clauses that do not contain any provisions of the law of obligations, save where provided otherwise, like in § 310.²⁷⁷⁹

2. Theoretical and practical implications of standard business terms legislation

The relatively long history of the German standard business terms legislation allowed an in-depth debate on various questions. These will be briefly discussed here.

2.1 Positive functions and negative implications of standard business terms

2.1.1 Positive functions of standard business terms

As already mentioned, standard clauses can rationalise transactions. In today's e-commerce mass contracts, this characteristic is essential.²⁷⁸⁰ Since the same conditions apply to a significant number of customers, the supplier's organisation and calculation is simplified, and it is not necessary to negotiate the terms individually.²⁷⁸¹ Furthermore, standard provisions avoid disputes as regards the content of the contract and allow a quick adjustment to changing economic and technical circumstances.²⁷⁸² The rationalisation effect is judged positively by German courts. It is thus permissible to consider aspects of rationalisation when formulating

²⁷⁷⁶ Book I, §§ 1 to 240 BGB.

²⁷⁷⁷ Book II, §§ 241 to 432 BGB.

²⁷⁷⁸ Book II, §§ 433 to 853 BGB. WLP/Pfeiffer Introduction para 13, UBH/Fuchs before § 307 para 17.

²⁷⁷⁹ WLP/Pfeiffer Introduction para 13.

²⁷⁸⁰ Wendland in: Staudinger/Eckpfeiler E para 2.

²⁷⁸¹ Stoffels *AGB-Recht* 21.

²⁷⁸² Raiser *Recht der AGB* 20, Stoffels *AGB-Recht* 22.

standard business terms, even if their wording deviates from legal provisions.²⁷⁸³ These effects can also be beneficial for clients since they do not need to negotiate the conditions of the agreement in question, and suppliers are able to lower their prices, especially when they act in a very competitive area.²⁷⁸⁴

Finally, standard terms often adjust the content of legal provisions which are not suitable for specific situations, or which simply do not exist. This function is also called 'gap-filling function'.²⁷⁸⁵ Furthermore, another function of standard terms is the 'typification function', i.e., contractual forms that are not contained in the BGB are 'created' and defined, such as leasing, factoring, franchise and automate installation contracts²⁷⁸⁶ which have their basis solely in complex and standardised instruments.²⁷⁸⁷ This phenomenon explains the term 'self-made law of the economy'.²⁷⁸⁸

2.1.2 Negative implications of standard business terms

Unfortunately, standard business terms also have negative effects, such as the fact that suppliers tend to act only in their own interest and pass on risks onto their clients.²⁷⁸⁹ These negative implications were also mentioned in the AGBG Bill, where a 'fundamental disregard of the principles of freedom of contract and contractual justice to the disadvantage of the other party to the contract' was observed 'which are subject to such pre-formulated contractual instruments'.²⁷⁹⁰

Often, the rationalisation effect and the tendency to shift risks overlap, however. Pre-formulated terms granting damages at a predetermined sum prevent the supplier from calculating damages for every single case, but also shift the risk onto the customer where the compensation would be higher than the predetermined sum.²⁷⁹¹

The borders between rationalisation, transfer of risk and abuse of the supplier's position are often blurred. Hence, not all deviations from the *ius dispositivum* which are disadvantageous

²⁷⁸³ BGH NJW 1996, 988 (989).

²⁷⁸⁴ Stöffels *AGB-Recht* 22.

²⁷⁸⁵ *Lückenausfüllungsfunktion*. Locher *Recht der AGB* 6.

²⁷⁸⁶ *Automatenaufstellungsverträge*. The object of these contracts consists of the installation of vending or gambling machines, for instance. Their dogmatic classification depends on the parties' agreement and the circumstances (lease, mixed contract, private company or profit-sharing agreement). See Creifelds *Rechtswörterbuch* s.v. 'Automatenaufstellungsvertrag'.

²⁷⁸⁷ Joost ZIP 1996, 1685, Stöffels *AGB-Recht* 22.

²⁷⁸⁸ Stöffels *AGB-Recht* 23. Großmann-Doerth coined this term in 1933 in his inaugural lecture with the title '*Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht*', Freiburger Universitätsreden 10.

²⁷⁸⁹ Wendland in: Staudinger/Eckpfeiler E para 3.

²⁷⁹⁰ BT-Drs. 7/3919 at 9. My own translation.

²⁷⁹¹ Stöffels *AGB-Recht* 23.

for the consumer are necessarily inadequate in the sense of § 307(1) or (2) no. 1. This applies above all to clauses that improve the calculation of business risks by a uniform contract implementation.²⁷⁹² Therefore, the question of whether a clause for which §§ 308 and 309 are not applicable is inadequate can only be answered by balancing the interests of the parties.²⁷⁹³

2.2 Legitimation of content control

As discussed above, the use of standard business terms has various functions which are appraised by jurisprudence. This does not explain though how to legitimise content control in the face of the principles of the law and other aspects.

2.2.1 Constitutional aspects

The German Constitutional Court (Bundesverfassungsgericht – BVerfG) has held in three landmark decisions that freedom of contract needs to be limited by the courts' content control due to constitutional reasons.

In its decision of 7 February 1990 ('commercial representative decision'),²⁷⁹⁴ the BVerfG put forward that freedom of contract is based on the principle of self-determination, which assumes that the conditions of free self-determination must exist *de facto*. Where in fact one party determines unilaterally the contractual provisions, the other part experiences heteronomy, which is the contrary of autonomy or self-determination. In cases where a balance of the parties' rights and obligations does not exist, a balance can often not be established by the provisions of contract law alone. Hence, in circumstances where constitutional rights, such as freedom of contract, are violated, a balance must be found by other legal provisions in order to ensure the protection of constitutional rights. The courts have thus to ascertain this protection by applying the provisions of the civil law, namely the general clauses.²⁷⁹⁵

In its 'security decision' of 19 October 1993,²⁷⁹⁶ the BVerfG specified that the constitutional threshold of intervention depends on the question of whether the given case is characterised by 'typified circumstances' that reveal a structural inferiority of the other party, and whether the consequences of the contract are unusually incriminatory for this party. In the court's view, the existing rules of contract law are sufficient to counter structural imbalances. Therefore, the civil courts have an obligation to ensure, when interpreting and applying general clauses, that

²⁷⁹² BT-Drs. 7/3919 at 9.

²⁷⁹³ UBH/Ulmer and Habersack Introduction para 5.

²⁷⁹⁴ BVerfG NJW 1990, 1469 (Handelsvertreterentscheidung).

²⁷⁹⁵ By 'general clauses' the BVerfG does not only refer to the general clause of § 307, but also to §§ 138 (public policy) or 242 BGB (good faith).

²⁷⁹⁶ BVerfG NJW 1993, 36 ('Bürgschaftsbeschluss').

contracts do not foster heteronomy. Where the contractual provisions are abnormally burdensome for one party and not appropriate for balancing the parties' interests, the courts cannot simply put forward the principle of *pacta sunt servanda* but must rather clarify whether the provision is a result of structurally imbalanced bargaining power. If necessary, they must correct this imbalance by employing the general clauses of the civil law. The procedure to be applied and the result to be achieved is, according to the BVerfG, a question of the civil law, for which the constitution grants a broad leeway.²⁷⁹⁷

In its decision of 6 February 2001²⁷⁹⁸ concerning judicial control of nuptial agreements on maintenance, the BVerfG described situations where the contractual balance is disturbed because of typical inferiority of one party. According to the court, the civil courts must intervene in these cases.²⁷⁹⁹ Although the problem of standard terms and its legal regulation are not explicitly dealt with in this decision, the following correlations can be observed: The unilateral claiming of freedom of contract by a party which imposes pre-formulated contract terms on the other party gives the user typically a preponderance to such a degree that in fact, it alone can determine the contractual content. Pre-formulated contracts create thus structural inferiority of the other party, which is why the risk of exploitation necessitates legal protection.²⁸⁰⁰

In summary, the law of standard business terms contained in §§ 305 *et seq.* can be understood as the realisation of the mandate of protection of constitutional rights defined by the Bundesverfassungsgericht. What is more, the BVerfG considers content control of pre-formulated contracts not only as 'constitutionally unproblematic', but also as 'necessary'.²⁸⁰¹

2.2.2 The approach of the contract theory

In the face of freedom of contract, the submission of contractual provisions to content control requires a justification. The reconcilability of freedom of contract and content control has produced some legal literature. Since this discussion is more of a theoretical nature without any practical relevance, only the main arguments shall be discussed.

²⁷⁹⁷ Stoffels *AGB-Recht* 24 and 25.

²⁷⁹⁸ BVerfG *NJW* 2001, 957 and its subsequent decision BVerfG *NJW* 2001, 2248.

²⁷⁹⁹ In this case, the BVerfG stated that provisions contained in a matrimonial agreement, by which the wife alone has to bear burdensome consequences in the case of a divorce, are not acceptable *de iure* if at the time when the agreement is concluded she is pregnant by her future husband.

²⁸⁰⁰ Stoffels *AGB-Recht* 25. See also the discussion on unilateral bargaining power in Part I ch 1 para 1.

²⁸⁰¹ BVerfG *NJW* 2005, 1036 (1037).

According to Schmidt-Rimpler, a 'warranted rightness' (*Richtigkeitsgewähr*), a term he has coined, is inherent to the conclusion of a contract.²⁸⁰² This means that the contract reflects not only the wills of the parties but also an 'objectively righteous order'. There are cases though in which this order does not exist due to a structural imbalance, for instance. Then, contractual justice must be re-established by external measures, i.e., legal control. Otherwise, the contract as a legal institution would suffer harm. In order to ensure legal certainty, these measures have to be restricted to 'typified' circumstances though in which the 'warranted rightness' generally and effectively fails.²⁸⁰³ This is undoubtedly the case where a supplier uses standard business terms because here, the user's superiority is 'conditioned by the situation'.²⁸⁰⁴ The user's (supplier's) advance is based on the fact that it can draft its terms without haste and by taking legal advice, whereas the other party (customer) is confronted with pre-formulated and rather comprehensive standard terms which he or she cannot easily apprehend in the given situation.²⁸⁰⁵ The legislator has considered this by its formulations in §§ 305 *et seq.* The 'pre-formulation' of standard business terms is expressed by words such as '*present*' (standard business terms to the other party' ('*Stellen*'))²⁸⁰⁶ and the non-existing possibility for the consumer to contribute to the formulation of standard business terms.²⁸⁰⁷

Raiser suggests another approach, which is rather complementary to the idea of the 'warranted rightness'. He refers to the 'institutionalised abuse of rights' (*institutioneller Rechtsmissbrauch*).²⁸⁰⁸ This approach gained importance before the AGBG came into force. The BGH formulates the 'institutionalised abuse of rights' in the sense that the user of standard business terms, who claims for himself freedom of contract by presenting them to the other party, is obliged, according to the principle of good faith, to take into consideration the interests of its future contractual partner when drafting its standard business terms. If the user only considers its own interests though, it abuses the principle of freedom of contract.²⁸⁰⁹ This approach aims to maintain the principle of freedom of contract and market-oriented competition²⁸¹⁰ and has its merits. Lieb correctly contends though that it is rather

²⁸⁰² Schmidt-Rimpler *AcP* 147 (1941) at 149, *Wendland* in: Staudinger/Eckpfeiler E para 1.

²⁸⁰³ Lieb *AcP* 178 (1978) 203.

²⁸⁰⁴ Lieb *AcP* 178 (1978) 202.

²⁸⁰⁵ See also the discussion on the supplier's 'information asymmetry' and bargaining power in Part I ch 3 para 1.1.

²⁸⁰⁶ § 305(1) 1st sent. BGB.

²⁸⁰⁷ § 305(1) 3rd sent. BGB.

²⁸⁰⁸ Raiser *Recht der AGB* 282.

²⁸⁰⁹ For instance, BGHZ 70, 304 (310).

²⁸¹⁰ Market failure has already been discussed in in Part I ch 3 para 1.1.1 a).

complementary to the approach mentioned above because it is not sufficiently precise in order to explain the legitimization of content control.²⁸¹¹

2.2.3 The approach of the economic analysis of law

Another approach consists of the use of economic tools in order to solve legal problems. According to this approach, legal forms are examined with respect to the question of whether they contribute to an efficient allocation of resources. The aforementioned rationalisation effect with its cost savings and organisational advantages for the user, the fact that negotiations become less burdensome for the parties as well as the lower transaction costs can be seen as an efficient resource allocation.²⁸¹²

Posner, an important protagonist of the Chicago School, is of the view that the take-it-or-leave-it situation that customers face does not justify any intervention through content control. In his opinion, in situations where a customer finds unattractive contractual conditions, he or she will contract with another supplier offering more attractive conditions.²⁸¹³

Posner's view is based on a misjudgement of the real market,²⁸¹⁴ and he misconceives that consumers merely compare the core terms of an agreement because of the high transaction costs.²⁸¹⁵ The only choice the consumer has is to refuse to conclude the given agreement ('negative freedom of contract').²⁸¹⁶ In addition, the supplier does not have any competitive advantages by offering better terms. In any event, it has lower costs by leaving its terms unchanged than taking over the risks it passed onto the consumer. Better terms do not necessarily offer a competitive advantage because consumers usually do not compare standard terms of different suppliers, due to the high transaction costs involved. Therefore, instead of a 'perfect market,' there is market failure. In this context, §§ 305 *et seq.* can be seen as an 'economic law with the objective to compensate for market failure'.

2.3 Protective purpose of §§ 305 *et seq.*

The provisions formerly contained in the AGBG and now in §§ 305 *et seq.* BGB primarily do not aim to protect the weaker party and to balance the bargaining power gap and inferiority of the 'other party' in the sense of § 305(1) 1st sent.²⁸¹⁷ If this were the case, the legislator would

²⁸¹¹ Lieb *AcP* 178 (1978) 201.

²⁸¹² Schäfer and Ott *Ökonomische Analyse* 394, Kötz *JuS* 2003, 211 *et seq.*

²⁸¹³ Posner *Economic Analysis* 102.

²⁸¹⁴ Köhler *ZHR* 144 (1980) 602 *et seq.*, Horn *AcP* 176 (1976) 320 *et seq.*

²⁸¹⁵ UBH/*Fuchs* before § 307 para 34, MüKo-*Basedow BGB* before § 305 para 5. Concerning the transaction costs, see also Part I ch 3 para 1.1.

²⁸¹⁶ *Negative Vertragsabschlussfreiheit*. Wendland in: Staudinger/Eckpfeiler E para 3.

²⁸¹⁷ Stoffels *AGB-Recht* 29.

have limited the application of §§ 305 *et seq.* to consumers. Furthermore, it could have submitted individually negotiated terms to content control because of the typical imbalance of the parties' bargaining power. The contract model is oriented towards general contract law and hence not limited to consumer protection. It aims to prevent abuse of freedom of contract-drafting and therefore protects all parties against the misuse of standard terms.²⁸¹⁸ Thus, §§ 305 *et seq.* cannot be qualified as pure consumer protection provisions, except for § 310(3) (consumer contracts).²⁸¹⁹ What is more, for the definition of 'standard business terms' in § 305(1), the relative strength of the parties to the contract is not relevant because also the consumer can be a 'user' of standard business terms and subjected to §§ 305 *et seq.*²⁸²⁰

According to the prevailing view in literature and jurisprudence, the provisions contained in §§ 305 *et seq.* have a more comprehensive protective purpose, namely to prevent the use of pre-formulated standard terms by compromising the 'warranted rightness'.²⁸²¹ German standard business terms legislation is thus a general law governing a particular contract practice, i.e., standard terms.²⁸²²

The aforementioned protective purpose was valid without restrictions until the amendment of the AGBG in 1996. With the transposition of the Directive on unfair terms in consumer contracts, § 24a AGBG was inserted and subsequently became § 310(3) BGB. In other words, consumer protection became part of German standard business terms legislation. The 'attainment of a high level of consumer protection' is one of the objectives of the European Union²⁸²³ and radiates on the German civil law because of the requirement to implement European directives in the national laws.²⁸²⁴ Accordingly, consumer protection is now part of the protective purpose of §§ 305 *et seq.* Another modification is the consideration of 'other circumstances attending the entering into of the contract' under § 310(3) no. 3, which reflects a particular-personalised approach, in contrast to the generally applied abstract-universal approach.²⁸²⁵

²⁸¹⁸ Eith *NJW* 1974, 16, 17.

²⁸¹⁹ Locher *JuS* 1997, 390.

²⁸²⁰ Stoffels *AGB-Recht* 30.

²⁸²¹ BGH *NJW* 1994, 2825 (2826); 1999, 3558 (3559); 2004, 1454 (1455), Palandt/*Heinrichs* Overview before § 305 para 8, Locher *Recht der AGB* 18.

²⁸²² Schmidt-Salzer *BB* 1995, 734-736.

²⁸²³ Article 153 of the EC Treaty.

²⁸²⁴ Stoffels *AGB-Recht* 30.

²⁸²⁵ Hommelhoff/Wiedenmann *ZIP* 1993, 565 *et seq.*

Stoffels legitimately asserts that this development is rather a modification than an amendment of the protective purpose of the standard business terms legislation. The fundamental conception of this legislation has not been given up so that one can argue that these provisions have been enriched by another protective purpose. Hence, § 310(3) is rather a special case of the protective purpose of §§ 305 *et seq.*, namely the prevention of abusive contract terms.²⁸²⁶

The argument that content control leads to the 'farewell of freedom of contract' can be countered by the fact that the user itself took its leave from freedom of contract by exercising this maxim unilaterally, to the extent that the consumer's rights become mere fiction.²⁸²⁷ Content control is thus a reaction to functional disorders of the contractual mechanism.²⁸²⁸

2.4 Contract theory *versus* norm theory

Very soon, the view prevailed that standard terms are 'products of a legal transaction since they emanate from the will of individuals and merely regulate concrete relations between the parties, who reach an agreement on a specific content, or submit themselves to this agreement'.²⁸²⁹ According to Raiser, from a dogmatic point of view, standard clauses are the content of a legal transaction, and the parties can freely choose their formulation with respect to the principle of freedom of contract. If the conditions for the conclusion of the contract are met and the agreement does not infringe public policy, they are legally valid and afford legal protection.²⁸³⁰

Despite these arguments of the contract theory,²⁸³¹ some authors, and especially Meyer-Cording,²⁸³² suggested before the coming into force of the AGBG a 'norm theory'²⁸³³ which was then based on a different and much more comprehensive definition of 'legal norms'. Without sharing Meyer-Cording's view on the definition of 'legal norms', Pflug²⁸³⁴ and Eike Schmidt²⁸³⁵ recently revived the norm theory with different arguments. They suggest that pre-formulated standard clauses cannot be seen as contractual declarations which are based on freedom of contract, even though they must be incorporated in terms of § 305(2). According to

²⁸²⁶ Stoffels *AGB-Recht* 31. See also Staudinger/*Coester* (2006) § 307 para 7, Locher in Ingenstau/Korbion *VOB-Kommentar* at 506 para 3, Damm *VersR* 1999, 129 note 91.

²⁸²⁷ Wendland in: Staudinger/Eckpfeiler E para 4.

²⁸²⁸ Wendland in: Staudinger/Eckpfeiler E para 5.

²⁸²⁹ Von Thur *Bürgerliches Recht AT* Vol. II/1 146. My own translation.

²⁸³⁰ Raiser *Recht der AGB* 81.

²⁸³¹ *Vertragstheorie*.

²⁸³² See Meyer-Cording *Rechtsnormen* 101 *et seq.*

²⁸³³ *Normentheorie*.

²⁸³⁴ Pflug *Kontrakt und Status, passim*.

²⁸³⁵ Schmidt E *JuS* 1987, 929 *et seq.*

Schmidt, they have a normative quality due to their intention to regulate economic relations supra-individually, and therefore have a general-abstract normative character.²⁸³⁶

The classification of standard business terms as contractual provisions or norms is not purely academic but has also practical repercussions, such as on interpretation. Contractual provisions are interpreted according to the general principles of the BGB and those of the interpretation of declarations of intent and agreements.²⁸³⁷ On the other hand, legal norms are interpreted by applying different principles, such as the grammatical construction (legislator's style which should reflect its intention), theological interpretation (search of the law's objective) and historical interpretation (historical development of the given norm).²⁸³⁸

The courts have not yet committed themselves to one or another theory. The Reichsgericht²⁸³⁹ coined a formula which later was also used by the BGH,²⁸⁴⁰ the 'submission to a ready and laid out legal order', when referring to carrier conditions.²⁸⁴¹ This formula was widely criticised and its dogmatic content never clarified. Besides, the highest courts tend – more or less indirectly – to adhere to the contract theory, which is reflected by their use of contractual vocabulary.²⁸⁴²

The norm theory refers to the issuance of standard terms by only one party, the user, and the lacking influence of the other party, who is usually the customer. These are factual observations though which do not allow any conclusions as regards the legal consequences.²⁸⁴³ Furthermore, the law itself clearly aims to preserve the contractual order and strengthen contractual justice, and thus freedom of contract.²⁸⁴⁴ In order to achieve these objectives, the law merely restricts freedom of contract. On the other hand, the argument that §§ 305 *et seq.* do not only contain 'contractual terminology', but also one that refers to a rather normative quality, has some merits.²⁸⁴⁵ In addition, it was upheld that for the interpretation of standard terms, an objective

²⁸³⁶ Schmidt E *JuS* 1987, 931.

²⁸³⁷ Palandt/*Heinrichs* (2008) § 305c para 15.

²⁸³⁸ Creifelds *Rechtswörterbuch* s.v. 'Auslegung (Interpretation)' para 1. These principles will be presented in ch 4.

²⁸³⁹ RGZ 81, 117 (119); 171, 43 (48); RG *DR* 1941, 1211.

²⁸⁴⁰ BGHZ 1, 83 (86), BGH *NJW* 1995, 2224 (2225 *et seq.*); 1995, 3117 (3118).

²⁸⁴¹ General German Carrier Conditions (*Allgemeine Deutsche Spediteursbedingungen (ADSp)*) and General Carrier Conditions for the Commercial Short-Distance Transportation of Goods with Motor Vehicles (*Allgemeine Beförderungsbedingungen für den gewerblichen Güternahverkehr mit Kraftfahrzeugen (AGNB)*).

²⁸⁴² In BGH *NJW* 1982, 1388 (1389), for instance, the BGH states as regards the conditions of the incorporation of standard business terms under § 2 AGBG (§ 305(2) BGB) that the legislator, by requiring the agreement of the other party, aimed to clarify that 'in terms of the *contractual nature* of the standard terms the other party must consent'. My own translation and emphasis.

²⁸⁴³ Fastrich *Inhaltskontrolle* 33.

²⁸⁴⁴ Stoffels *AGB-Recht* 36.

²⁸⁴⁵ § 305(1): 'contract terms pre-formulated for more than two contracts' (the German text refers to a 'multitude of contracts', i.e., '*Vielzahl von Verträgen*'). The translation of this provision by Geoffrey Thomas and Gerhard Dannemann (German Law Archive (2002) at <http://germanlawarchive.iuscomp.org/?p=632#b2s2>) is more precise

standard has to be applied. Therefore, only a 'neutral control' that would prohibit a stricter control of the standard terms user could be applied.²⁸⁴⁶ With the insertion of § 310(3) no. 3, this argument is not valid anymore, however. In terms of this provision, 'in judging an unreasonable disadvantage under section 307 (1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.' This is a concrete standard which takes into consideration the individual circumstances, and which is hardly compatible with the norm theory.²⁸⁴⁷ What is more, the legal provisions qualify standard business terms as 'contractual provisions'.²⁸⁴⁸ Finally, the legislator chose to insert §§ 305 *et seq.* in Book II of the BGB ('Law of Obligations'), which is a clear indication that the contract theory reflects its contractual conception of these provisions.²⁸⁴⁹

Hence, the arguments of the norm theory are not convincing.

2.5 Impact of the introduction of the standard business terms provisions into the BGB on B2B transactions

Under § 307(2) no. 1, '[a]n unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision (...) is not compatible with essential principles of the statutory provision from which it deviates'. Consequently, the courts also draw on other substantive provisions when assessing the fairness of a clause, such as the provisions concerning the prescription, the general provisions on defective performance, and particularly the provisions on the law of contract specifying the different contract types.²⁸⁵⁰ This begs the question of whether the leeway for businesses for the formulation of their agreements is limited due to the reform of the law of obligations. An example is § 475²⁸⁵¹ which declares that the provisions of the law of sales, which are normally *ius dispositivum* provisions, are mandatory for consumer sales

in this regard than the official translation by the German Ministry of Justice to which is generally referred to in this thesis. § 305(2): 'only become a part of a contract'; § 305 c (1): 'do not form part of the contract' etc. Emphasis added.

²⁸⁴⁶ WLP/Wolf Introduction para 13.

²⁸⁴⁷ Stoffels *AGB-Recht* 36.

²⁸⁴⁸ Stoffels *AGB-Recht* 36.

²⁸⁴⁹ Begründung des Regierungsentwurfs BT-Drs. 14/6040 at 92 and 97. See also justification of the government draft to § 2 AGBG (now § 305(2) BGB) in BT-Drs. 7/3919 at 13, according to which the objective of § 2 AGBG is to ensure that the introduction of standard terms into an individual contract is 'once again firmly anchored into the ground of the contractual will which is relevant in terms of the BGB.' My own translation.

²⁸⁵⁰ Stoffels *AGB-Recht* 20.

²⁸⁵¹ § 475 ('Deviating agreements'): '(1) If an agreement is entered into before a defect is notified to the entrepreneur and deviates, to the disadvantage of the consumer, from [§§] 433 to 435, 437, 439 to 443 and from the provisions of this subtitle, the entrepreneur may not invoke it. The provisions referred to in sentence 1 apply even if circumvented by other constructions. (2) The limitation of the claims cited in [§] 437 may not be alleviated by an agreement reached before a defect is notified to an entrepreneur if the agreement means that there is a limitation period of less than two years from the statutory beginning of limitation or, in the case of second-hand things, of less than one year. (3) Notwithstanding [§§] 307 to 309, subsections (1) and (2) above do not apply to the exclusion or restriction of the claim to damages.'

contracts, i.e., *ius cogens*. The fear is that the scrutiny of standard terms by the court will lead to a shift of standards for B2B contracts so that content control would become substantially obsolete in these cases.²⁸⁵² This apprehension is fuelled by the fact that the new law of sales is geared towards consumer sales law as the typical form of sales contracts.²⁸⁵³

Westermann correctly states that the result of the reform of the consumer sales law must not unnecessarily restrict the leeway of businesses in the formulation of their clauses.²⁸⁵⁴ Content control must consider the differences between 'normal' B2C sales and B2B sales because the provisions on consumer sales are based on the European directives on consumer protection *vis-à-vis* businesses and their superiority in respect of commercial knowledge and bargaining power. In B2B contracts, the interests are fundamentally different though since both parties are usually equally experienced, and therefore do not deserve the same protection as individual consumers. Hence, they should be able to negotiate provisions according to their situation.²⁸⁵⁵ What is more, § 310(1) 1st sent. provides that in the review of standard terms, 'reasonable account must be taken of the practices and customs that apply in business dealings'.²⁸⁵⁶ An extension of provisions that are aimed at consumer protection to B2B contracts can therefore be an unreasonable disadvantage for entrepreneurs.²⁸⁵⁷

3. Conclusion

Simultaneously with Germany's industrialisation in the 19th century, the use of standard business terms became widespread because of their rationalisation effect for mass transactions. They also catered to new contractual forms on the basis of freedom of contract, such as leasing or factoring, for which no legal provisions existed. The drawback was that businesses systematically burdened their clients with contractual risks, which led to the designation of a 'self-made law of the economy'.

After the Reichsgericht's hesitation to interfere with freedom of contract, it developed different approaches to encounter these problems as it became clear that the '*volenti non fit iniuria*'

²⁸⁵² WLP/Pfeiffer Introduction para 13a.

²⁸⁵³ Westermann JZ 2001, 535 *et seq*; agreeing: AnwKomm Schuldrecht/Henrichs § 307 para 13, Dauner-Lieb JZ 2001, 13; against a guiding function of the law of sales for B2B contracts: Staudinger/Coester (2006) § 307 para 251.

²⁸⁵⁴ Westermann JZ 2001, 535 *et seq*.

²⁸⁵⁵ Stoffels AGB-Recht 21.

²⁸⁵⁶ AnwKomm Schuldrecht/Henrichs § 307 para 251.

²⁸⁵⁷ Staudinger/Coester (2006) § 307 para 251. See, for instance, BGH NJW 2006, 47 (49). See also UBH/Fuchs before § 307 para 16.

maxim was only a reality where the parties had equal bargaining power. Because of their shortcomings, the BGH adopted a new jurisprudence in 1956 with a content control based on the principle of good faith (§ 242 BGB). According to the BGH, § 242 restricts the content of standard terms because businesses abuse their freedom of contract if they do not also consider their customers' needs under the principle of good faith. The BGH adopted a concept introduced by Raiser, where the *ius dispositivum* has a guiding function, and any deviation from this order has to be justified. Content control based on § 242 was the tool for this approach. Although the standard business terms jurisprudence was very complex and varied, in retrospective, it is considered a 'highly commendable performance' of the German courts.

Due to the development of the notion of consumer protection at the beginning of the 1970's and the fact that content control was *de facto* limited to B2B contracts, the impulse was given for the preparation of a legal framework for standard business terms. After several drafts and a final bill, the Standard Business Terms Act (AGBG) of 9 December 1976 came into force. This statute was not merely a 'codified case law' but contained many innovations and corrections, such as the differentiation between B2C and B2B transactions. The statute contained a general clause as well as a black- and a greylist. It also contained provisions for institutional actions. The civil courts kept their role as controlling bodies. The civil courts had to assess the validity of standard terms within a so-called 'incidental control', i.e., within the given civil proceedings. The possibility of institutional actions by specific qualified bodies, such as professional associations, was also created. These offered the advantage that legal actions had a general effect, and gave a great deal of bargaining power to associations through extrajudicial 'declarations of discontinuance'.

The Council Directive 93/13/ECC of 5 April 1993 on unfair terms in consumer contracts brought further amendments to German law, although the legislator believed that the AGBG should be amended as little as possible. Nevertheless, the Directive, transposed into German law in 1996, offered some interesting changes to the AGBG, such as the concept of consumer contracts. Other provisions and concepts of the Directive were quite similar to the AGBG, such as the exclusion of the adequacy of the price-performance ratio, or a general clause based on the principle of good faith. The legislator was free to adopt stricter or different provisions than those contained in the Directive as long as they were not in conflict with European law. Despite some terminological differences between the Directive and the AGBG / BGB provisions, the practical relevance should be minimal due to the primacy of the EU law over national law and the radiating effect of the former.

Finally, the AGBG was repealed by the Law of Obligations Modernisation Act of 2001, and its provisions were inserted, with minor amendments, into §§ 305 to 310 BGB. For systematic reasons, the procedural provisions formerly set out in the AGBG were inserted in a newly created Unterlassungsklagengesetz (UKlaG). Despite some criticism in favour of a maintenance of the AGBG, the insertion of the standard business terms legislation into the BGB must be judged positively. The codification of these provisions into a single code is more logical and transparent, and since the courts have to assess the validity of standard terms within an 'incidental control', which preconditions the scrutiny of other legal institutions contained in the BGB, it is only logical to merge these provisions into a single instrument. A drawback is however that some former AGBG provisions have been artificially contracted, and that systematically, §§ 305 to 310 rather belong to the general part of the BGB.

German courts judge the rationalisation effect of standard terms positively. These clauses have a gap-filling function which ensures that legal provisions can be adjusted to a given situation, as well as a typification function for contractual forms that are not codified. Suppliers tend to pass on risks to their clients and disregard the principles of freedom of contract though. Often, the rationalisation effect and the tendency to pass on risks to the other party overlap.

Jurisprudence and legal literature explain from different angles why content control is justified. The BVerfG justifies content control by the fact that freedom of contract is based on the principle of self-determination, and that the latter does not exist where one party determines the content of the contract unilaterally. It refers to 'typified circumstances' or a 'structural inferiority' of the other party. Courts must thus rebalance this heteronomy by applying the general clauses of the civil law (§§ 307, 138, 242 etc.). Hence, the civil courts have a mandate to counter these unconstitutional imbalances. Content control can be characterised as a reaction to functional disorders of the contractual mechanism.

In literature, content control is justified, e.g., by the concept of 'warranted rightness' which is based on the premise that contracts reflect an 'objectively righteous order' that is disturbed in the case of a structural imbalance. This imbalance has to be mended by legal control. Another, complementary approach refers to the 'institutionalised abuse of rights' whereby the drafter of standard terms must consider the other party's interests as otherwise, it abuses its freedom of contract.

Content control can also be justified economically. The use of standard terms offers an efficient allocation of resources because of their rationalisation effect. Because of the user's abuse of

freedom of contract and the existing imbalance in bargaining power, content control can also be seen as an economic law that aims to compensate market failure. The viewpoint of the Chicago School (Posner) misjudges the conditions of the real market, however.

Traditionally, German standard business terms legislation did not aim at consumer protection because it had a vaster protective purpose, i.e., to ascertain the 'warranted rightness' that is jeopardised by the use of pre-formulated standard terms. Due to the Unfair Terms Directive and the subsequent insertion of § 24a AGBG (§ 310(3) BGB), the legislation became however enriched by another protective purpose: consumer protection. Nonetheless, this is rather a modification than an amendment of the protective purpose of §§ 305 *et seq.*

The arguments of the supporters of the norm theory according to which standard terms are legal norms, are not convincing. The insertion of § 310(3) no. 3 which takes into consideration individual circumstances, the qualification of standard terms in legal provisions as 'contractual provisions' and the fact that the legislator inserted §§ 305 *et seq.* into the law of obligations of the BGB clearly speak for the contract theory.

The courts have to draw on other substantive law when assessing the 'fairness' of standard terms. § 475 provides that the law of sales provisions are mandatory in consumer contracts. This raises the question of whether this has an impact on B2B agreements because content control becomes substantially obsolete due to § 475, especially because the law of sales is geared towards consumer sales. Since B2B contracts do not deserve the same protection as consumer contracts, they must be judged differently though. In addition, businesses need sufficient leeway in their dealings with other businesses and should be able to negotiate their agreements according to their situation. Thus, the extension of provisions geared towards consumer protection to B2B contracts should be considered an 'unreasonable disadvantage' in the sense of § 307.

Today, there is consensus that freedom of contract as a means of a fair balancing of the parties' mutual interests is only appropriate where an approximate balance of power exists. Material freedom of contract must be achieved where not the formal position of a party, but its actual power to shape the content of the agreement is relevant.

CHAPTER 2 – SCOPE OF APPLICATION OF §§ 305 *ET SEQ.*

1. Material scope of application

1.1 Definition of 'standard business terms'

Pursuant to the official English translation of § 305(1) provided by the German Ministry of Justice,²⁸⁵⁸ standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. In Geoffrey Thomas' and Gerhard Dannemann's translation,²⁸⁵⁹ the German phrase '*für eine Vielzahl von Verträgen*' is translated literally by 'for a multitude of contracts', instead of 'for more than two contracts'. Since Thomas' and Dannemann's translation is closer to the German original text, it will be referred to in the following.

Since the amendment of the AGBG in 1996 due to the Unfair Terms Directive, §§ 305 *et seq.* also apply to contractual terms that do not necessarily fulfil the requisites for the notion of standard terms.²⁸⁶⁰ Despite this extension of the material scope of application to pre-formulated clauses in consumer contracts under § 310(3), the title of Division 2 of Book II of the BGB (Law of Obligations) is 'Drafting contractual obligations by means of standard business terms'.

1.1.1 Conditions for 'standard business terms'

§ 305(1) 1st sent. enumerates the conditions for standard terms. The 2nd sentence of this provision contains characteristics that are irrelevant for the classification of standard provisions, whereas the 3rd sentence contains a negative demarcation to individually negotiated clauses.²⁸⁶¹ This definition is extensive in order to include all pre-formulated clauses that necessitate legal protection for the benefit of the other party.²⁸⁶² Hence, all kinds of form contracts, notarised mass contracts and officially authorised standard terms are included. Where a court or lawyer has to interpret whether contractual terms are standard business terms, the protective purpose and rationale of §§ 305 *et seq.* must be kept in mind, i.e., the unilateral

²⁸⁵⁸ http://www.gesetze-im-internet.de/englisch_bgb/index.html.

²⁸⁵⁹ Reprinted in Maxeiner *Yale J. Int. Law* 177 *et seq.*

²⁸⁶⁰ § 310(3) no. 1: 'even if the [pre-formulated contracts] are intended only for non-recurrent use on one occasion'.

²⁸⁶¹ § 305(1): 'Standard business terms are all contract terms pre-formulated *for a multitude of contracts* which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.' (The phrase in *italic* corresponds to Thomas' and Dannemann's translation).

²⁸⁶² BT-Drs. 7/3919 at 15, MüKo/Basedow § 305 para 1.

usage of freedom of contract by the user.²⁸⁶³ § 305(1) 1st sent. also defines the 'user' as the party to the contract that presents to the other party the standard terms upon the entering into of the contract.²⁸⁶⁴

The conditions of § 305(1) must be fulfilled cumulatively.²⁸⁶⁵ It is important to note that not the contract as a whole is to be assessed but only its individual clauses because only specific clauses might be qualified as standard terms, whereas others might not.²⁸⁶⁶

a) Contract terms

In order to be qualified as standard business terms, the clauses in question must be contract terms. These are declarations of the user that are *intended* to govern the contract.²⁸⁶⁷ Hence, also terms that do not become part of the agreement, or those which are not incorporated in terms of § 305(2) are contract terms. What is more, the content of the contract is irrelevant.²⁸⁶⁸

Clauses that govern the conditions for the conclusion of a contract²⁸⁶⁹ must also be qualified as standard terms. It is nevertheless necessary to enquire by means of interpretation (§§ 133, 157) whether their content actually deviates from the conditions for the conclusion of a contract set out in §§ 145, 147, 148, 151 and 156.²⁸⁷⁰

Strictly speaking, clauses that aim to govern the conclusion of a contract are not standard business terms because they concern a pre-contractual relationship. However, §§ 305 *et seq.* also govern pre-contractual relations, for instance in §§ 308 no. 1 and 309 no. 7 lit. b), which is why also pre-contractual relations should be included in the standard terms assessment.²⁸⁷¹ Therefore, a clause by which an insurance contract is only valid if declarations *vis-à-vis* the insurance agent are made in writing defines the legal framework under which the contract is concluded, and thus falls under § 305 *et seq.*²⁸⁷²

§§ 305 *et seq.* do not apply to contracts of which the content has been established by law, directive or by-laws.²⁸⁷³ In practice, this is relevant for contracts for the supply of utilities, such

²⁸⁶³ BGH NJW 2010, 1277, UBH/Habersack § 305 para 5 *et seq.*

²⁸⁶⁴ Stöffels AGB-Recht 38. On the other hand, s 1 CPA defines both the 'supplier' and the 'consumer'.

²⁸⁶⁵ Stöffels AGB-Recht 38.

²⁸⁶⁶ BGH NJW 1998, 2600 *et seq.*

²⁸⁶⁷ BGH NJW 1987, 1634; 1996, 2575; 2005, 1645 (1646); 2009, 1337 (1338); 2014, 2269 (2270).

²⁸⁶⁸ Stöffels AGB-Recht 38.

²⁸⁶⁹ Vertragsabschlussklauseln.

²⁸⁷⁰ Stöffels AGB-Recht 38.

²⁸⁷¹ BGH NJW 2011, 139 (141).

²⁸⁷² BVerwG NJW 1998, 3216 (3218).

²⁸⁷³ Staudinger/Schlosser § 305 para 4.

as electricity, gas, district heating or water. On the other hand, where standard business terms have to be authorised by the competent authorities, this does not necessarily lead to the conclusion that the provisions in question are not to be qualified as standard terms. Contracts governed by public law must conform to §§ 305 *et seq.* too²⁸⁷⁴

Contract terms presume a bi- or multilateral transaction. Nonetheless, the other party might need protection also in cases where the user imposes pre-formulated clauses within a unilateral legal act²⁸⁷⁵ by which the user unilaterally uses its freedom of contract and hereby influences the contractual relation.²⁸⁷⁶ In these cases, the BGH applies §§ 305 *et seq.* by analogy.²⁸⁷⁷ Thus, a clause on a bank transfer form by which the bank reserves the right to credit the amount also to another account of the customer directly concerns the bank's obligations, and §§ 305 *et seq.* apply by analogy.²⁸⁷⁸ The same applies to a standard form by which the client grants power of attorney to the bank.²⁸⁷⁹ The reason why §§ 305 *et seq.* are applicable (by analogy) is that their applicability should not depend on random factors, such as the qualification as a unilateral or multilateral legal act.²⁸⁸⁰

In this context, it is important to distinguish between unilateral declarations of the user and those of the other party (consumer). Only for the latter, §§ 305 *et seq.* apply. This is because where the user makes a unilateral declaration, it merely uses its power of decision,²⁸⁸¹ e.g., when drafting the conditions of participation for a sports event.²⁸⁸² On the other hand, where the other party's rights are restricted by pre-formulated conditions and its legal position is concerned, §§ 305 *et seq.* apply.²⁸⁸³ This is notably the case where standard terms deviate from legal provisions which, in addition to other purposes, serve the other party's interests. Hence, if the user's (insurer's) standard terms deviate from the legal requirements of § 69(1) no. 2

²⁸⁷⁴ Staudinger/Schlosser § 305 para 5.

²⁸⁷⁵ *Einseitiges Rechtsgeschäft*. For such a legal act, the declaration of intent of only one party is needed. Examples are the establishment of a last will, the declaration of termination of a contract, the declaration of avoidance in terms of § 143, or a binding promise in terms of § 657. See Creifelds *Rechtswörterbuch* s.v. 'Rechtsgeschäft (2a)' 'Willenserklärung (2c)', Brox *BGB-AT* 50.

²⁸⁷⁶ UBH/Habersack § 305 para 16, WLP/Pfeiffer § 305 para 11.

²⁸⁷⁷ Stoffels *AGB-Recht* 40.

²⁸⁷⁸ BGH *NJW* 1986, 2428.

²⁸⁷⁹ BGH *NJW* 1987, 2011.

²⁸⁸⁰ Stoffels *AGB-Recht* 40.

²⁸⁸¹ BGH *NJW* 2011, 139 (141), Palandt/*Grüneberg* § 305 para 6, UBH/Habersack § 305 para 18.

²⁸⁸² In these cases, the application of the principle of good faith (§ 242) has to be considered so that the evaluative standard of §§ 305 *et seq.* is indirectly applied. See BGH *NJW* 2011, 139 (141).

²⁸⁸³ BGH *NJW* 2011, 139 (141).

VVG²⁸⁸⁴ for the insurance agent's power of attorney that also serve the client's interest, they are subject to content control.²⁸⁸⁵

Furthermore, one has to distinguish between contract terms, on the one hand, and mere recommendations, factual notices or requests, on the other. The point of departure is the standpoint of the recipient, i.e., how he or she has to understand the user's 'declaration'. A declaration is a contract term if the recipient (other party), by considering the objective wording of the declaration, must have the impression that the user tends to establish a (pre-)contractual relationship.²⁸⁸⁶ A notice at the entrance of a supermarket with the heading 'Information', according to which clients are requested to leave their (hand)bags at the entrance since otherwise they 'are kindly informed that they might be asked at the till to open them for control' gives the customer (recipient of the declaration) unmistakably the impression that this is not a mere nonbinding request. The notice rather suggests that the control of the bags is the necessary consequence of the fact that he or she entered the market with a bag. The fact that the notice is formulated politely ('kindly informed') does not matter in this regard because only the objective wording (purpose) of the notice is considered. The title of the notice 'Information' does not change this qualification either.²⁸⁸⁷ On the other hand, the information in a catalogue according to which 'the products are subject to modifications, and their descriptions are subject to corrections', or that pictures are only 'similar' are mere notices without any legal content as long as the consumer's rights (warranty, supplier's liability) are not restricted and he or she is informed thereof before the conclusion of the agreement. False or misleading catalogue information is subject to competition law though.²⁸⁸⁸

Internal notices or directives of companies are not aimed to be used *vis-à-vis* consumers and therefore are no standard terms. Despite this fact, if §§ 305 *et seq.* are circumvented (§ 306a),²⁸⁸⁹ §§ 305 *et seq.* are applicable.

²⁸⁸⁴ VVG = Versicherungsvertragsgesetz (Insurance Contract Act). § 69(1) no. 2 VVG: 'The insurance agent shall be deemed to have power of attorney in respect of (...) taking receipt of applications for the renewal of or amendment to a contract of insurance and its revocation, termination, rescission and other declarations relating to the insurance agreement, as well as any information to be provided by the policyholder throughout the policy period (...).'

²⁸⁸⁵ BGH *NJW* 1999, 1633 (1635); 2279 (2283).

²⁸⁸⁶ BGH *NJW* 1996, 2574; 2009, 1337; 2014, 2269 (2270 *et seq.*).

²⁸⁸⁷ BGH *NJW* 1996, 2575.

²⁸⁸⁸ BGH *NJW* 2009, 1337.

²⁸⁸⁹ § 306a: 'The rules in this division [§§ 305-310] apply even if they are circumvented by other constructions.'

It is controversially discussed if bond terms for securities are to be qualified as standard business terms. In the Klöckner decision,²⁸⁹⁰ the BGH was of the view that such bond terms are standard terms.

Ekkenga argues that the unrestricted application of §§ 305 *et seq.* for bond terms is not plausible. He argues that standard business terms legislation falls short of the factual circumstances in which bonds are issued, and bond terms cannot be assessed for the lack of a normative control standard. In addition, the assessment of standard terms does not consider the collective relations of the market.²⁸⁹¹ Masuch, on the other hand, puts forward the relationship between the issuer and the investors. Investors are not involved in the issuance contract between the issuer (company) and the bank. The investor (final client) is however in the same position as if the bonds were issued directly, which is why the evaluative standard of §§ 305 *et seq.* should apply. Private investors are regularly not in the position to understand entirely complex bond terms. What is more, it should make no difference whether bonds are issued directly or indirectly. The indirect issuance of bonds is merely another technique and should have no impact on whether §§ 305 *et seq.* apply.²⁸⁹²

More recently, the BGH made clear that only a restricted and modified application of §§ 305 *et seq.* can be considered in order to ensure functional trading of securities. This presumes a standardised content of securities. The court puts forward that if the content of securitised rights would depend on the circumstances of their acquisition, their transferability would not be possible. For the incorporation of bond terms, an implied agreement for their incorporation is therefore sufficient.²⁸⁹³ Because of the idiosyncrasies of bond terms, the BGH's view is correct.

b) Pre-formulation for a multitude of contracts

In order to be qualified as standard business terms, the contract clause must furthermore be pre-formulated for a multitude of contracts.

aa) 'Pre-formulated'

A contract term is pre-formulated if its wording has been readily formulated before the conclusion of future agreements.²⁸⁹⁴ It is irrelevant whether the pre-formulation is in writing, on another support (CD), or if the user makes its agent learn a specific formulation by heart in

²⁸⁹⁰ BGH NJW 1993, 57.

²⁸⁹¹ Ekkenga ZHR 160 (1996) 59 *et seq.*

²⁸⁹² Masuch *Anleihebedingungen und AGB-Gesetz* 149 *et seq.*

²⁸⁹³ BGH NJW 2005, 2917.

²⁸⁹⁴ BGH NJW 1998, 2600, WLP/Pfeiffer § 305 para 14.

order to insert it into its standard terms.²⁸⁹⁵ If, for instance, the user instructs its agents to insert 'residual payment at delivery' in the blank space next to the field 'payment at', the contract term is considered pre-formulated.²⁸⁹⁶ Furthermore, it is not necessary that the wording of the given formulation is identical each time. Not the repeated use of the same grammatical or orthographical structure is essential but the repeated use of the actual content of a formulation.²⁸⁹⁷ The supplier does not need to use its own formulations; the wording can also be drafted by a third party. This is the case, e.g., if a landlord uses a sample of a rental agreement drafted by a home and property owners association.²⁸⁹⁸

If the user's form provides for the possibility to complete certain information or choose between several possibilities, it must be assessed whether the completions merely concretise the object of the contract, without modifying its actual content, or whether they are completely independent and give a real option to the other party.²⁸⁹⁹ The completion of a form by inserting the other party's name and the designation of the object of the contract or a simple computation (e.g., the amount of an insurance premium) as a consequence of the duration of the contract are therefore considered pre-formulations.²⁹⁰⁰ On the other hand, where the customer has a real choice that is not limited to several options given by the user, one can assume that the wording is not pre-formulated. A client who can choose between several options provided for by the supplier does not have a real choice, though.²⁹⁰¹ Besides, the user could circumvent §§ 305 *et seq.* by giving several inadmissible options. Therefore, a customer who can choose between a three- or a four-year-duration for the subscription of a newspaper is confronted with two prohibited options in terms of § 309 no. 9 lit. a) because they impose a contract duration over two years. The fact that the other party may choose between two options does thus not exclude their qualification as pre-formulated contract terms.²⁹⁰²

Where the standard form provides for the possibility to insert another duration that the other party can freely choose, and next to the blank space for the insertion a specific duration is already indicated, the printed clause is considered to be a pre-formulation as it superimposes the possibility to choose another duration.²⁹⁰³ On the other hand, if the standard form merely

²⁸⁹⁵ BGH *NJW* 2001, 2635 (2636); 2002, 2388 (2389); *NJW-RR* 2014, 1133 (1134), BAG *NZA* 2012, 908 (909).

²⁸⁹⁶ OLG Dresden *BB* 1999, 228.

²⁸⁹⁷ OLG Düsseldorf *NZG* 1998, 353, OLG Dresden *BB* 1999, 228.

²⁸⁹⁸ Stoffels *AGB-Recht* 44.

²⁸⁹⁹ BGH *NJW* 1998, 2815 (2816); 1999, 1105 (1106); 3260.

²⁹⁰⁰ BGH *NJW* 2000, 1110 (1111).

²⁹⁰¹ MüKo/*Basedow* § 305 para 16.

²⁹⁰² Stoffels *AGB-Recht* 45.

²⁹⁰³ Stoffels *AGB-Recht* 45.

provides for a blank space without suggesting any pre-formulated options, the client's insertion can be regarded as independent because in this case, the user does not unilaterally impose its will.²⁹⁰⁴ If the user or its agents always insert the same information (e.g., the duration) without any negotiation, the given clause can be qualified as pre-formulated, however.²⁹⁰⁵

bb) 'For a multitude of contracts'

The given clause must be pre-formulated for a multitude of contracts. This condition expresses that standard terms are intended for mass contracts.²⁹⁰⁶ It is not necessary though that a clause has actually been incorporated into several agreements because the mere intention to do so suffices.²⁹⁰⁷ Hence, one can already assume that the supplier uses standard business terms if it does so for the first time, provided that it has the intention to use them also in the future.²⁹⁰⁸ On the other hand, if a clause has been drafted for a single contract and is later inserted in other agreements, the qualification as a standard clause only extends to the subsequent use, and not to the first contract.²⁹⁰⁹ When a supplier uses standard business terms that have been drafted by a third party (e.g., a contract of sale form provided by an automobile club), it is not necessary that the user itself has the intention to use the form for a multitude of contracts.²⁹¹⁰

The prevailing opinion asserts that a 'multitude' is given where the supplier uses the given clause in at least three cases.²⁹¹¹ It is sufficient that it is used for the same client. However, it is irrelevant if the use was intended for a limited number of contracts.²⁹¹²

cc) Non-recurrent use on one occasion in consumer contracts

§ 310(3) no. 2 provides for consumer contracts that § 305c (2) and 306 and 307 to 309 BGB as well as Article 46b EGBGB²⁹¹³ apply to pre-formulated contract terms even if they are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their contents.

²⁹⁰⁴ BGH *NJW* 1998, 1066 (1067), OLG Frankfurt *NJW-RR* 1997, 1485.

²⁹⁰⁵ BGH *NJW* 1992, 746; 1998, 1066 (1068).

²⁹⁰⁶ Stöffels *AGB-Recht* 45.

²⁹⁰⁷ BGH *NJW* 2004, 1454, WLP/Pfeiffer § 305 para 15.

²⁹⁰⁸ Stöffels *AGB-Recht* 45.

²⁹⁰⁹ BGH *NJW* 1997, 135.

²⁹¹⁰ BGH *NJW* 2010, 1131, BAG *NJW* 2010, 550 (552), Palandt/*Grüneberg* § 305 para 9.

²⁹¹¹ BGH *NJW* 2002, 138 (139); 2002, 2470 (2471), WLP/Pfeiffer § 305 para 16, UBH/*Habersack* § 305 para 25a, Faust *BGB-AT* 106. The official English translation of § 305 refers to pre-formulated contract terms 'for more than two contracts' and anticipates the prevailing view in literature and jurisprudence. The German text however refers to 'a multitude of contracts', which has been correctly translated by Thomas and Dannemann (*Maxeiner Yale J. Int. Law* 177 *et seq.*).

²⁹¹² BGH *NJW* 1981, 2344 (2345).

²⁹¹³ EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the Civil Code).

The fact that the law renounces the condition of a use 'for a multitude of contracts' in consumer agreements is due to article 3 of the Unfair Terms Directive. The Directive merely refers to terms 'which ha[ve] not been individually negotiated' and 'drafted in advance'.²⁹¹⁴ The condition set out in article 3(2) of the Directive that the consumer has not been able to influence the substance of the term due to the fact that it had been pre-formulated is similar to § 305(1) 3rd sent. The BGB norm provides that contract terms do not become standard terms to the extent that they have been negotiated in detail between the parties.²⁹¹⁵ Hence, individual agreements are not included in the scope of application of § 310(3) no. 2. Since the BGB condition of the presentation of the contract terms in § 305(1) is not mentioned in § 310(3) no. 2, it is irrelevant whether the user or a third party suggested a certain clause.²⁹¹⁶ On the other hand, if the client itself suggested a clause which is subsequently inserted into the contract, it deserves no protection.²⁹¹⁷

§ 310(3) no. 2 does not ascertain the application of the entire BGB division (§§ 305 *et seq.*). It is problematic that the application of §§ 305(2) (incorporation) and 305c(1) (surprising clauses), which ascertain transparency, is excluded in consumer contracts. When interpreting § 310(3) no. 2 in the light of articles 4(2) and 5 of the Unfair Terms Directive, one must conclude though that the clauses must be drafted in plain, intelligible language.²⁹¹⁸

Since § 1 UKlaG²⁹¹⁹ refers to the definition of standard business terms in § 305(1), and not to the extended definition in § 310(3) no. 2, clauses that are intended for non-recurrent use on one occasion are excluded in institutional actions.²⁹²⁰ This is understandable because institutional actions aim at standard clauses that are used in mass contracts. This interpretation is also coherent with article 7(2) of the Unfair Terms Directive that requires a control mechanism only for contractual terms that have been 'drawn up for general use'.²⁹²¹

²⁹¹⁴ Stoffels *AGB-Recht* 46.

²⁹¹⁵ BAG *NZA-RR* 2009, 519 (521), Palandt/*Grüneberg* § 310 para 17, Erman/*Roloff* § 310 para 20.

²⁹¹⁶ MüKo/*Basedow* § 310 para 71, Palandt/*Grüneberg* § 310 para 16.

²⁹¹⁷ Locher *Recht der AGB* 29, Palandt/*Grüneberg* § 310 para 16.

²⁹¹⁸ UBH/*Schäfer* § 310 para 91, Palandt/*Grüneberg* § 310 para 18.

²⁹¹⁹ § 1 UKlaG: 'Those who use provisions which are invalid under §§ 307 to 309 of the Civil Code in standard contract terms or who recommend such provisions for commercial use may be required to refrain from using such terms and to withdraw any recommendation made.'

²⁹²⁰ Staudinger/*Schlosser* § 1 UKlaG para 2. Medicus rightly asserts that in order to fall under the definition of standard business terms they do not necessarily have to be cumbersome or lengthy. For example, the sentence on the back of a cloakroom ticket 'Any liability excluded' is sufficient. See Medicus *BGB-AT* 164.

²⁹²¹ Stoffels *AGB-Recht* 47.

1.1.2 Presentation of the terms ('Stellen')

In addition to the conditions mentioned above, the user must present the contract terms to the other party upon entering into of the contract and require their application, i.e., unilaterally use its freedom of contract.²⁹²² By this condition of § 305(1) 1st sent., also the term 'user' is defined.²⁹²³ The definition of the user is relevant because clauses become only ineffective under §§ 305 *et seq.* if the other party suffers an unreasonable disadvantage. On the other hand, content control for the benefit of the user does not take place.²⁹²⁴ Disadvantages suffered by the user are not subject to these provisions. *Vice versa*, one cannot conclude that the party who has an advantage because of specific clauses is necessarily the user.²⁹²⁵

a) Concrete unilateral suggestion to incorporate the terms

By the fact that the contract terms have to be 'presented', the legislator underscores their unilateral imposition by the user. This unilateral presentation is the rationale and point of departure for the special treatment of standard business terms *vis-à-vis* individually agreed clauses.²⁹²⁶ Terms are presented if a party to the contract requires the incorporation of its standard terms into the contract and unilaterally suggests their incorporation.²⁹²⁷ The attempt of such a unilateral imposition is sufficient though.²⁹²⁸ This means that it is not necessary that a contract has been concluded, or that the contract terms have been effectively incorporated.²⁹²⁹

In case of doubt, the courts refer to the protective purpose of §§ 305 *et seq.*²⁹³⁰ Hence, where a party with significant market power (e.g., an automobile manufacturer *vis-à-vis* its subcontractors) requires the application of its standard terms in order to contract, as otherwise no deal will be reached, and the subcontractor inserts the manufacturers standard clauses in its offers from the outset, without being formally asked to do so, this insertion is not the result of a free choice. It is rather the effect of the manufacturer's practice to conclude only agreements for which its standard terms apply. By its market power, it indirectly imposed its terms. Therefore, the manufacturer is considered the standard terms user, even though it did not expressly require their application.²⁹³¹

²⁹²² Faust *BGB-AT* 106, Brox and Walker *SchuldR-AT* 38.

²⁹²³ Schwab *AGB-Recht* para 87, Stoffels *AGB-Recht* 47.

²⁹²⁴ BGH *NJW* 1998, 2280 (2281), BAG *NZA* 2006, 257 (258); 2007, 687 (690).

²⁹²⁵ BGH *NJW* 1995, 2034 (2035).

²⁹²⁶ BT-Drs. 7/3919 at 15.

²⁹²⁷ Palandt/*Grüneberg* § 305 para 10.

²⁹²⁸ Locher *Recht der AGB* 27.

²⁹²⁹ UBH/*Ulmer and Habersack* § 305 para 13.

²⁹³⁰ Stoffels *AGB-Recht* 47.

²⁹³¹ BGH *NJW* 1997, 2043; *NJW-RR* 2006, 740.

b) Terms drafted by third parties

§ 305(1) merely requires that the user present its standard terms to the other party, but not that it also has drafted them. If a third party has drafted the standard terms, one must assess which party is to be considered the one which presented them to the other party.²⁹³² Therefore, a supplier who uses standard terms drafted by a retail association must be regarded as the user. The same applies to an employer who uses a sample of an employment contract that has been drafted by its employer organisation.²⁹³³

In the past, it was problematic how to deal with contract terms that have been drafted by notaries public or lawyers (advocates) on the basis of their internal contract samples. The courts correctly argue that such contract terms have not been presented by a party if the notary public or lawyer is impartial and neutral²⁹³⁴ *vis-à-vis* both parties.²⁹³⁵ On the other hand, where a party uses a contract sample that had been drafted by a third party for a recurrent use, this party is considered the one who presents the given terms to the other party.²⁹³⁶ This is the case, e.g., where a building society plans to sell a certain number of houses and commissions a notary public with the drafting of the contracts of sale. If the building society inserts the notary public's clauses into its contracts, the company, and not the notary public, is considered the party who presents the standard terms to the other party.²⁹³⁷

For the considerations mentioned above, an imbalance between the parties in respect of their respective bargaining power is not necessary.²⁹³⁸ One can also not conclude that the party who benefits from certain clauses is necessarily the user,²⁹³⁹ even if this is regularly the case.

§ 310(3) no. 1 extends the scope of application to consumer contracts in that standard terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer. As a consequence, content control is also conducted for clauses that were inserted by a third party. In consumer contracts, clauses which are based on an internal contract sample of a notary public are thus also subject to content control.²⁹⁴⁰

²⁹³² BGH *NJW* 1994, 2825 (2826); 2010, 1131.

²⁹³³ Examples from Stoffels *AGB-Recht* 48.

²⁹³⁴ For notaries public, the impartial and neutral exercise of the office is set out in § 14 BNotO.

²⁹³⁵ BGH *NJW* 1991, 843; 1992, 2817, UBH/*Habersack* § 305 para 31.

²⁹³⁶ BGH *NJW* 1992, 2160 (2162), WLP/*Pfeiffer* § 305 para 27.

²⁹³⁷ BGH *NJW* 2002, 138 (139).

²⁹³⁸ BGH *NJW* 2010, 1131 (1132).

²⁹³⁹ BGH *NJW* 2010, 1131 (1132), UBH/*Habersack* § 305 para 29.

²⁹⁴⁰ Stoffels *AGB-Recht* 49.

The reason for this extension of the scope of application is that the Unfair Terms Directive does not contain the criterion of the 'presentation' of contract terms and that the Directive can be interpreted in that also clauses that had been pre-formulated by a third party should be subject to content control.²⁹⁴¹ The German legislature took account of this by modifying the criterion of 'presentation' in § 310(3) no. 1.²⁹⁴² Since the insertion of § 310(3), the above-mentioned discussion on clauses that have been formulated by a third party (e.g., a notary public) is hence only relevant for cases outside the scope of application of § 310, i.e., contracts that are not consumer contracts. Then, the entrepreneur is always considered the user.²⁹⁴³

The deeming-provision of § 310(3) no. 1 provides for an exception ('unless') for terms introduced by the consumer. In this case, the user bears the burden of proof.²⁹⁴⁴ The exception applies where, e.g., the consumer requires that a certain form be used for the contract of sale.²⁹⁴⁵

c) Bilateral suggestion to insert the terms

Cases where both parties require independently from each other the application of the same standard terms are controversially discussed.

This debate concerns cases, where, for instance, both the contractor and the builder wish to contract on the basis of the German Construction Tendering and Contract Regulations (Part B) (VOB/B).²⁹⁴⁶

According to the correct view, the protective provisions of §§ 305 *et seq.* are not applicable in these cases because it is impossible to determine who is the user and who is the other party.²⁹⁴⁷ A determination on the basis of the chronology of the negotiations, for example, would be arbitrary. Furthermore, the protective purpose of §§ 305 *et seq.* does not apply as none of the parties interferes with the freedom of contract-drafting of the other party, which is a prerequisite for the application of the content control provisions. Where single clauses require the application of §§ 305 *et seq.*, these provisions should apply by analogy.²⁹⁴⁸

²⁹⁴¹ Stoffels *AGB-Recht* 49.

²⁹⁴² BT-Drs. 13/2713 at 5, *Wendland* in: Staudinger/Eckpfeiler E para 10.

²⁹⁴³ WLP/Pfeiffer Art 3 RiLi paras 9 and 21.

²⁹⁴⁴ Heinrichs *NJW* 1996, 2192.

²⁹⁴⁵ BT-Drs. 13/2713 at 7.

²⁹⁴⁶ VOB/B = Vergabe- und Vertragsordnung für Bauleistungen – Teil B.

²⁹⁴⁷ UBH/Habersack § 305 para 29, WLP/Pfeiffer § 305 para 32, Erman/Roloff § 305 para 12. A different view have Staudinger/Schlosser § 305 para 31 and Sonnenschein *NJW* 1980, 1491 *et seq.*

²⁹⁴⁸ Stoffels *AGB-Recht* 50.

The BGH decided that the condition of the presentation of contract terms is not met where the incorporation of pre-formulated contract terms into the contract is based on a free decision of the party who was confronted with the suggestion to incorporate them. Hence, the court gives more room for the definition of a bilateral suggestion of insertion.²⁹⁴⁹ The confronted party must nonetheless have a free choice between the contract terms to be considered, and the opportunity not only to suggest its own wording but also to effectively enforce them *vis-à-vis* its counterpart. This kind of situations is met where it is fortuitous which party gets the standard form to be used, e.g., a contract of sale form for a vehicle provided by an automobile club.²⁹⁵⁰

1.1.3 Irrelevant circumstances

Pursuant to § 305(1) 2nd sent., it is irrelevant whether the provisions take the form of a physically separate part of an agreement or are made part of the contractual document itself. Their volume, the used typeface or font and the form the contract are irrelevant too. This provision merely has a clarifying function because the same result is achieved by the definition of standard business terms contained in the 1st sent. of § 305(1).²⁹⁵¹ However, the 2nd sentence highlights that the scope of application of §§ 305 *et seq.* should not be determined by applying formal criteria, but material characteristics that have to be geared towards the protective purpose of this provision.²⁹⁵² Therefore, the submission of the general conditions of sale via the internet does not prevent their qualification as standard business terms.²⁹⁵³

1.1.4 Contract terms that have been negotiated in detail between the parties

Under § 305(1) 3rd sent., contract terms do not become standard terms to the extent that they have been negotiated in detail. If such individually agreed clauses exist, the parties are on an equal footing regarding their negotiations and defence of their respective interests. This is why it is logical to exclude such terms from the protection of §§ 305 *et seq.*²⁹⁵⁴ § 305b highlights this fact by stating that individually agreed terms take priority over standard business terms.

²⁹⁴⁹ BGH *NJW* 2010, 1131 (1133).

²⁹⁵⁰ See Stoffels *WuM* 2011, 268.

²⁹⁵¹ MüKo/*Basedow* § 305 para 29.

²⁹⁵² UBH/*Habersack* § 305 paras 6 and 33.

²⁹⁵³ Löhnig *NJW* 1997, 1688. Stoffels *AGB-Recht* 51.

²⁹⁵⁴ BGH *NJW* 2014, 1725 (1728).

a) Function of § 305(1) 3rd sent.

The fact that terms which have not been pre-formulated for a multitude of contracts and not been presented to the other party are excluded *per se* from the scope of application of §§ 305 *et seq.* begs the question of the function of this provision.

Jurisprudence is of the view that the provision is a restriction of the definition of standard terms. According to the courts, it is sufficient for individually agreed clauses that the user is willing to modify its terms and that the other party is conscious of this readiness.²⁹⁵⁵ The threshold for assuming that 'negotiations' (*Aushandeln*) have taken place is very low.²⁹⁵⁶ Insofar, the 3rd sentence of this provision is a negatively formulated part of the legal definition of 'standard business terms'.²⁹⁵⁷ The prevailing view in literature also accepts that the terms have been individually negotiated if the user was willing to do so, and the terms have eventually not been modified.²⁹⁵⁸

Some authors require that the terms must have been modified so that they can be seen as individually negotiated. According to this view, the provision is thus no restriction of § 305 but merely has a clarifying function.²⁹⁵⁹

Despite the difficulties of proof, the prevailing view in jurisprudence and literature is more convincing. As long as the parties are both able and willing to modify certain terms and decide to leave them unchanged, the user does not abuse its bargaining power because both parties are on an equal footing.

b) Conditions for the 'negotiation'

The courts take the stance that in order to be considered to be negotiated in detail, a very high standard must be applied. The fact that the parties 'negotiate' is not sufficient. The BGH requires that the parties meet the conditions of an '*Aushandeln*' and not only of a '*Verhandeln*'.²⁹⁶⁰ Unfortunately, in English, both terms are translated by 'negotiating'. '*Aushandeln*' requires that the user places the clauses differing from the statutory provisions seriously at the other party's disposal and allows the client to shape their content.²⁹⁶¹ Hence, the user must be ready to

²⁹⁵⁵ BGH NJW 1977, 624 (625). See also Medicus *BGB-AT* 166.

²⁹⁵⁶ UBH/Ulmer and Habersack § 305 para 41.

²⁹⁵⁷ Stöffels *AGB-Recht* 52.

²⁹⁵⁸ MüKo/Basedow § 305 para 37, Palandt/*Grüneberg* § 305 para 21, Staudinger/*Schlosser* § 305 para 44.

²⁹⁵⁹ Braun *BB* 1979, 689 (692), Graf von Westphalen *DB* 1977, 946, Stübing *NJW* 1978, 1611.

²⁹⁶⁰ BGH *NJW-RR* 2005, 1040; *NJW* 2013, 856; 2014, 1725 (1727).

²⁹⁶¹ BGH *NJW* 2013, 856; 2014, 1725 (1727), BAG *NZA* 2006, 40 (44); 2008, 229, Brox and Walker *SchuldR-AT* 40. See also Graf von Westphalen *ZIP* 2010, 1110 *et seq.*

modify its standard terms accordingly. It is not sufficient though that the user expresses its *general* and diffuse willingness to modify specific clauses if the other party wishes so,²⁹⁶² or that the client is 'free' to sign the contract or to step away.²⁹⁶³

In order to be able to influence the content of a clause, the other party must understand its import. Therefore, the user must explain complicated or lengthy terms and ascertain that its client has actually grasped the implications so that the requirements of an *Aushandeln* are met.²⁹⁶⁴

These requirements are also be fulfilled where the supplier suggests several pre-formulated clauses to the other party between which the latter can choose. The customer must have the possibility to negotiate their contents though. The consumer's choice must not be influenced by the user, even not by the design of the standard form, or in another manner.²⁹⁶⁵

A standard business term does not lose its qualification as such by a subsequent modification. Only where the content of the clause is subsequently negotiated as described above, it might become an individually agreed clause. If the clause merely 'weakens' its adverse consequences for the other party, it is still a (not individually agreed) standard clause. This is because the user still prevails in its power to formulate the clause to the disadvantage of the other party.²⁹⁶⁶ For instance, a standard provision by which the other party has to pay an unreasonable amount in advance is still unlawful if the user – after being asked by the client to cancel this clause – only slightly reduces the amount to be paid in advance. Then, the user reworded its clause once more to its client disadvantage, and there was no real negotiation between the parties.²⁹⁶⁷

§ 305(1) 3rd sent. is also applicable in B2B contracts. The BGH applies this provision to B2B contracts without restrictions.²⁹⁶⁸ Because of the principle of freedom of contract and the 'self-responsibility' of businesspersons, many authors argue that the requirements for individually agreed terms should be lowered *de lege ferenda* for B2B agreements. The high requirements of the BGH in terms of 'negotiating' (*Aushandeln*) are unrealistic, according to this opposing opinion. Some authors thus suggest that the threshold for the requirements should be lowered for very far-reaching contracts that the other party agrees upon on the basis of its commercial

²⁹⁶² BGH *NJW-RR* 2005, 1040 (1041).

²⁹⁶³ BGH *NJW* 2005, 2543.

²⁹⁶⁴ BGH *NJW* 2005, 2543 (2544).

²⁹⁶⁵ BGH *NJW* 2003, 1313 (1314); 2008, 987 (989).

²⁹⁶⁶ BGH *NJW* 2013, 1431 (1432).

²⁹⁶⁷ BGH *NJW* 2013, 1431 (1432).

²⁹⁶⁸ BGH *NJW* 1992, 2283 (2285); 2000, 1110.

experience and decision-making.²⁹⁶⁹ Klaus Peter Berger suggests that contract terms that are used *vis-à-vis* a businessperson should be deemed negotiated if the other party has negotiated them or other provisions of the same contract in a manner that is reasonable in the light of the object of the contract.²⁹⁷⁰ Others suggest a catalogue of criteria for the differentiation between standard business terms and individually agreed terms.²⁹⁷¹

Stoffel correctly contends that, although B2B contracts should be treated differently than B2C contracts in certain circumstances, a modification of the legal standards should only be considered if the current law does not allow for appropriate solutions.²⁹⁷² An interpretation of § 305(1) 3rd sent. which is guided by the purpose of this norm is likely to find appropriate solutions without any modifications of this provision.²⁹⁷³ It is particularly the 'specific situation during the conclusion of the contract that leads to the conclusion that the other party freely and self-responsibly agreed to a certain standard form, and that therefore there is no need for protection by standard business terms legislation'.²⁹⁷⁴ Such a situation could be given, according to some authors, in M&A contracts²⁹⁷⁵ or bidding procedures for business acquisitions,²⁹⁷⁶ i.e., complex transactions with a significant transaction volume. Even if some contracts are presented as 'packages', one must not forget though that the single clauses of an agreement have to be assessed individually and that it is rare that every single contract clause has been negotiated individually.²⁹⁷⁷ A sweeping non-application of § 305(1) 3rd sent. for such 'contract packages' should thus be seen with some scepticism.²⁹⁷⁸

1.1.5 Burden of proof

In general, the party that claims the protection of the standard business terms legislation must prove that the given clause must be qualified as a standard clause. This will be the client in most cases, or an association in the context of an institutional action.²⁹⁷⁹ If the content and appearance of a contract give the impression that the agreement has been drafted for a multitude of contractual relationships, and it was presented by a professional, e.g., a property developer,

²⁹⁶⁹ Suggestion of the Frankfurter Initiative zur Fortentwicklung des AGB-Rechts at www.zvei.org/Downloads/Recht/AGB-Recht-Positionspapier-Endfassung-20110210.pdf (no longer available).

²⁹⁷⁰ K. P. Berger *NJW* 2010, 467.

²⁹⁷¹ Müller, Griebler and Pfeil *BB* 2009, 2660 *et seq.*

²⁹⁷² Stoffels *AGB-Recht* 53.

²⁹⁷³ Fuchs *FS Blaurock* 91 *et seq.*

²⁹⁷⁴ Fuchs *FS Blaurock* 103. My own translation.

²⁹⁷⁵ Kästle *NZG* 2014, 288.

²⁹⁷⁶ Fuchs *FS Blaurock* 95.

²⁹⁷⁷ Stoffels *AGB-Recht* 54.

²⁹⁷⁸ Kieninger *AnwBl* 2012, 1261 (1262), *MüKo/Basedow* § 305 para 16.

²⁹⁷⁹ *UBH/Habersack* § 305 para 60, *MüKo/Basedow* § 305 para 45.

the used contract is *prima facie* a form contract with standard clauses.²⁹⁸⁰ This is regularly the case if it contains many typical clauses that have not been adjusted to a given situation.²⁹⁸¹

Once it has been established that the contract contains standard terms, the user has to prove the individually agreed terms in order to avoid a control of their content.²⁹⁸² A clause by which the parties agree that the terms have been individually agreed upon²⁹⁸³ is not sufficient in order to assume that the given clause has been negotiated in detail. This results from § 309 no. 12 lit. b).²⁹⁸⁴ Even individual agreements in which the parties declare that the entire contract has been negotiated in all details are ineffective because such a clause runs contrary to the protective purpose of § 305(1) 3rd sent.²⁹⁸⁵ A clause by which the parties subsequently recognise the validity of standard terms or renounce to assert their invalidity is nonetheless valid.²⁹⁸⁶

In consumer contracts, the consumer is protected under § 310(3) no. 1 and 2. Hence, in the case of § 310(3) no. 1, according to which in consumer contracts, standard terms are deemed to have been presented by the entrepreneur unless they were introduced into the contract by the consumer, the consumer bears the onus of proof that the clause in question had been pre-formulated for a multitude of contracts. On the other hand, the entrepreneur has to prove that the pre-formulated clauses were negotiated in detail.²⁹⁸⁷

On the other hand, § 310(3) no. 2 highlights the fact that the consumer did not influence the content of the term because of its pre-formulation. Consequently, the consumer must prove that the clause was pre-formulated and that he or she therefore had no influence on its contents.²⁹⁸⁸

1.2 Exceptions from the material scope of application

It should be noted that it is useful to begin the enquiry of the scope of application with § 310 since this provision contains modifications or exclusions of the scope of application.²⁹⁸⁹

²⁹⁸⁰ BGH *NJW* 2004, 502 (503); 2014, 1725 (1727); BAG *NZA* 2008, 170 (171). No *prima facie* proof if the property developer does not act within a commercial activity: BGH *NJW* 1999, 1261 (1262).

²⁹⁸¹ BAG *NZA* 2008, 1004 (1006).

²⁹⁸² BGH *NJW* 1998, 2600 (2601).

²⁹⁸³ *Aushandlungsklausel*.

²⁹⁸⁴ WLP/Pfeiffer § 305 para 58. **§ 309 no. 12 lit. b):** '(Burden of proof) [A] provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) (...) b) having the other party to the contract confirm certain facts' is ineffective in standard business terms.

²⁹⁸⁵ BGH *NJW* 2014, 1725 (1728), UBH/*Ulmer and Habersack* § 305 para 65.

²⁹⁸⁶ BGH *NJW* 2014, 2269 (2275).

²⁹⁸⁷ BGH *NJW* 2008, 2250 (2251).

²⁹⁸⁸ BGH *NJW* 2008, 2250 (2252 *et seq*), UBH/*Schäfer* § 310 para 89.

²⁹⁸⁹ Faust *BGB-AT* 105.

In terms of § 310(4), §§ 305 *et seq.* do not apply to contracts in the field of the law of succession, family law and company law or collective agreements²⁹⁹⁰ and private-sector works agreements²⁹⁹¹ or public-sector establishment agreements.²⁹⁹² The legislator was of the view that the protection of §§ 305 *et seq.* unnecessary, inappropriate or not system-compatible in these cases.²⁹⁹³

1.2.1 Law of succession

The application of the standard business terms legislation in the field of the law of succession was rejected because standard terms are not very current in the law of succession.²⁹⁹⁴ Besides, §§ 305 *et seq.* are aimed at contractual relationships based on a mutual exchange of performances.²⁹⁹⁵ Although many contracts in the field of the law of successions are drafted by a notary public using standard forms for this task, contracts such as contracts of inheritance,²⁹⁹⁶ contracts of renunciation of inheritance²⁹⁹⁷ and inheritance distribution contracts²⁹⁹⁸ are excluded from the content control of §§ 305 *et seq.* Content control can be based on § 242 (good faith), however. On the other hand, contracts by which an heir sells the inheritance²⁹⁹⁹ or the execution of a promise of donation *mortis causa* while the testator is still alive³⁰⁰⁰ are contracts under the law of obligations. In this case, §§ 305 *et seq.* are applicable.³⁰⁰¹

1.2.2 Family law

An application of §§ 305 *et seq.* in family law with its prescribed contract types and restricted freedom of varying from legal provisions would not be appropriate. Like in the law of succession, contracts in this field are quite individualised, so there is no need for strict content control.³⁰⁰² The exception concerns marriage contracts,³⁰⁰³ contracts on the equalisation of accrued gains,³⁰⁰⁴ agreements of maintenance³⁰⁰⁵ and agreements on the equalisation of

²⁹⁹⁰ *Tarifverträge.*

²⁹⁹¹ *Betriebsvereinbarungen.*

²⁹⁹² *Dienstvereinbarungen.*

²⁹⁹³ BT-Drs. 7/3919 at 41.

²⁹⁹⁴ *Wendland* in: Staudinger/Eckpfeiler E para 13.

²⁹⁹⁵ BT-Drs. 7/3919 at 41.

²⁹⁹⁶ *Erbverträge.* See § 2274.

²⁹⁹⁷ *Erbverzichtsverträge.* See § 2346.

²⁹⁹⁸ *Erbauseinandersetzungsvereinbarungen.* See §§ 2042 *et seq.*

²⁹⁹⁹ *Erbschaftsverkauf.* See § 2371.

³⁰⁰⁰ *Zu Lebzeiten vollzogene Schenkung auf den Todesfall.* See § 2301(2).

³⁰⁰¹ UBH/Schäfer § 310 para 113 *et seq.*, Staudinger/Schlosser § 310 para 74, Palandt/Grüneberg § 310 para 48.

³⁰⁰² BT-Drs. 7/3919 at 41.

³⁰⁰³ *Eheverträge.* See §§ 1408 *et seq.* See also BVerfG NJW 2001, 957, BGH NJW 2004, 930, Rakete-Dombek NJW 2004, 1273 *et seq.*, Dauner-Lieb JZ 2004, 1027.

³⁰⁰⁴ *Verträge über den Zugewinnausgleich.* See §§ 1372 *et seq.*

³⁰⁰⁵ *Unterhaltsverträge.* See § 1585c.

pension rights.³⁰⁰⁶ §§ 134 (statutory prohibition), 138 (legal transactions contrary to public policy) and 242 (good faith) are applicable though. What is more, contracts under the law of obligations between family members, such as contracts of sale, do not fall under the exception of § 310(4).³⁰⁰⁷

1.2.3 Company law

a) Rationale of the exception

Contrary to §§ 305 *et seq.* which target contractual relationships in which performances are exchanged, company law regulates, *inter alia*, the organisation of companies by company agreements.³⁰⁰⁸ Hence, §§ 305 *et seq.* are not appropriate for these relationships with their various particular characteristics.³⁰⁰⁹ In private companies³⁰¹⁰ and limited companies,³⁰¹¹ there is no imbalance between the partners because the agreements are mostly negotiated in person and with the assistance of specialised lawyers and tax counsellors.³⁰¹² There is also no need for protection where the relevant legal provisions are mandatory.³⁰¹³ Atypical situations are thinkable though, especially in semi-public companies³⁰¹⁴ and associations that call for protection in the form of content control.³⁰¹⁵

b) Scope of the exception

The wording of § 310(4) ('in the field of ... company law') is quite vague.³⁰¹⁶ Nonetheless, it is generally accepted that the term 'company law' includes here the law of partnerships³⁰¹⁷ and

³⁰⁰⁶ *Versorgungsausgleichsvereinbarungen*. See § 1587o.

³⁰⁰⁷ Stoffels *AGB-Recht* 56.

³⁰⁰⁸ Bamberger/Roth/Becker § 310 para 28, *Wendland* in: Staudinger/Eckpfeiler E para 13.

³⁰⁰⁹ BT-Drs. 7/3919 at 41.

³⁰¹⁰ *Personengesellschaften*.

³⁰¹¹ *Gesellschaften mit beschränkter Haftung (GmbH)*.

³⁰¹² MüKo/Basedow § 310 para 86.

³⁰¹³ Stoffels *AGB-Recht* 57. See §§ 23(5) and 38 AktG, §§ 18 2nd sent. and 11a GenG.

³⁰¹⁴ *Publikumspersonengesellschaften*. These companies are characterised by the fact that the company is created by a small number of founders, and the company agreement provides that others can invest in the company without having any further rights (votes etc.). There is neither any personal or other relation between the founders and the subsequent investors nor among the subsequent investors. The most popular semi-public company is the GmbH & Co. KG. The GmbH & Co. KG is a limited partnership with typically the sole general partner being a limited liability company (GmbH). It can thus combine the advantages of a partnership with those of the limited liability of a corporation. See Stoffels *AGB-Recht* 58 and Schade *Handels- und Gesellschaftsrecht* 142-151 (Kommanditgesellschaft), 174-201 (GmbH).

³⁰¹⁵ Grunewald *FS Semler* 179 *et seq.*, Stoffels *AGB-Recht* 57.

³⁰¹⁶ Stoffels *AGB-Recht* 57.

³⁰¹⁷ *Personengesellschaften*. Examples: BGB-Gesellschaft or GbR (*Gesellschaft bürgerlichen Rechts* - civil law partnership), oHG (*offene Handelsgesellschaft* - general partnership), KG (*Kommanditgesellschaft* - limited partnership) or GmbH & Co. KG.

corporations,³⁰¹⁸ as well as the law of cooperatives³⁰¹⁹ and associations.³⁰²⁰ Only if specific instruments or provisions concerning the organisation of these structures, such as company agreements or articles of association, or constructions pertaining to the membership of the legal structure, §§ 305 to 310 are not applicable.³⁰²¹ Therefore, a provision in a partnership agreement of a limited company (GmbH) by which the partners, a group of partners or the majority of the partners have the right to exclude a partner from the company without an objective reason, is not subject to content control.³⁰²² On the other hand, clauses pertaining to the exchange of performances or the use of a thing in an association are subject to such a control. Hence, for employment contracts of board members³⁰²³ or the sale of company shares³⁰²⁴ §§ 305 *et seq.* apply. As far as company acquisition contracts are negotiated individually, they are not subject to content control.³⁰²⁵ On the other hand, if such a contract consists of standardised clauses, such as in the company sales contracts of the former Trust Agency,³⁰²⁶ the exception of company law under § 310(4) does not apply.³⁰²⁷

In this context, it is important to note that the company in question does not tend to circumvent the application of §§ 305 *et seq.* (§ 306a)³⁰²⁸ by using another construction, for instance, by choosing the form of a book club (association), although, in respect of the contractual relationships, another company structure would be required.³⁰²⁹

c) Content control of pre-formulated company agreements and articles of association with the standard of good faith (§ 242)

The fact that § 310(4) excludes company law from content control leads to the result that also agreements where a need for protection obviously exists are excluded from the scope of

³⁰¹⁸ *Kapitalgesellschaften*. Examples: AG (*Aktiengesellschaft* – stock corporation/public limited company), GmbH (*Gesellschaft mit beschränkter Haftung* – limited liability company), KG a.A. (*Kommanditgesellschaft auf Aktien* – partnership limited by shares), BGH NJW 1995, 192.

³⁰¹⁹ *Genossenschaften*.

³⁰²⁰ *Vereine*. BGH NJW 1998, 454 (concerning associations), BGH NJW 1988, 1729 (concerning cooperatives).

³⁰²¹ Stoffels *AGB-Recht* 57.

³⁰²² BGH NJW 2005, 3641, Verse *DStR* 2007, 1822.

³⁰²³ BGH NJW 1989, 2683 (2684 *et seq.*), Bauer/Arnold *ZIP* 2006, 2338.

³⁰²⁴ UBH/Schäfer § 310 para 123, Erman/Roloff § 310 para 29, MüKo/Basedow § 310 para 89

³⁰²⁵ MüKo/Wurmnest § 307 para 99.

³⁰²⁶ The *Treuhandanstalt* ('Trust agency') was an agency established by the government of the German Democratic Republic to (re)privatise East German government-owned enterprises (*Volkseigene Betriebe* or 'VEB' for short), prior to the German reunification. See Creifelds *Rechtswörterbuch* s.v. 'Treuhandanstalt'.

³⁰²⁷ Stoffels *AGB-Recht* 58.

³⁰²⁸ § 306a: 'The rules in this division [§§ 305-310] apply even if they are circumvented by other constructions.'

³⁰²⁹ Stoffels *AGB-Recht* 58.

application of §§ 305 *et seq.* Therefore, the courts perform a content control based on the principle of good faith (§ 242).³⁰³⁰

aa) Semi-public companies

Semi-public companies (*Personenpublikumsgesellschaften*) are created by a small number of founders. The company agreement provides that others can invest in the company without having any further rights (votes, etc.). There is no personal or other relationship between the founders and the subsequent investors or among the subsequent investors.³⁰³¹ Despite the exclusion of company law in terms of § 310(4), the BGH performs content control based on § 242.³⁰³² The reason is that the subsequent investors have to accept a company agreement that has been pre-formulated by the initial investors, without having the possibility to amend this agreement. Such a company agreement is thus similar to standard business terms, and content control is necessary in order to avoid abuses.³⁰³³ The BGH applies this jurisprudence by analogy also to dormant partnerships.³⁰³⁴ There, the dormant partner also has no influence on the company agreement and is merely capitalistically involved.³⁰³⁵

In a landmark decision of 1975,³⁰³⁶ the BGH decided that a clause in a company agreement of a semi-public company (GmbH & Co. KG) by which claims against the GmbH (limited liability company) or the members of the supervisory board, based on an infringement of their obligations, become time-barred after three months, and by which the liability of the GmbH and the members of the supervisory board *vis-à-vis* partners and former partners was limited to the assets that the persons against whom the claims were raised had invested in the company was ineffective under § 242. Indeed, such a construction would give advantage to the partners sitting on the supervisory board so that the protection of the investors was insufficient.

Also ineffective is a clause in a company agreement of a semi-public company providing that the managing director, who is also a partner, can only be dismissed with the unanimous approval of the other partners. According to the BGH, a simple majority is sufficient.³⁰³⁷

³⁰³⁰ § 242: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.' A description of similarities of and differences between company agreements and standard business clauses can be found in Bieder *ZHR* 174 (2010), 708 *et seq.*

³⁰³¹ BGHZ 64, 238 (241); 102, 172 (177 *et seq.*); 104, 50 (53).

³⁰³² BGHZ 104, 50, 53.

³⁰³³ BGHZ 64, 238 (241); 102, 172 (177); 104, 50 (53), UBH/*Schäfer* § 310 para 134 *et seq.*

³⁰³⁴ *Stille Gesellschaften*. BGH *NJW* 2001, 1270.

³⁰³⁵ Creifelds *Rechtswörterbuch* s.v. 'Stille Gesellschaft'. See also §§ 230-237 HGB.

³⁰³⁶ BGHZ 64, 238.

³⁰³⁷ BGH *NJW* 1988, 969.

The BGH assesses the clauses of company agreements of semi-public companies by referring to the principle of good faith. The court emphasises though that a comparative legal yardstick is not necessary.³⁰³⁸ Because of the particularities of semi-public companies, a reference to HGB³⁰³⁹ or BGB provisions would be unsuitable since semi-public companies differ to a large extent from other legal structures.³⁰⁴⁰ Hence, the courts tend to be geared to the general principles of company law, and partially to the guiding principles of semi-public companies.³⁰⁴¹

bb) Associations

Associations have some parallels with semi-public companies, which is why the courts here also apply a content control based on § 242. Associations are vested with statutory power³⁰⁴² and the power of self-administration³⁰⁴³ which are both based on the principle of organisational autonomy.³⁰⁴⁴ The principle of organisational autonomy is grounded on the principle of private autonomy (freedom of contract) though, which itself is restricted, e.g., through content control.³⁰⁴⁵ It is important to distinguish in this context between control of articles of association (statutes) and other internal regulatory instruments on the one side, and the decisions of the association, on the other.³⁰⁴⁶

Clauses of articles of association and other regulatory instruments are subject to content control under § 242 if the association has significant economic or social power, and a member is dependent on its membership because there is no alternative to it on the basis of a monopolistic position of the association.³⁰⁴⁷ Hence, the BGH decided that the regulatory framework of the umbrella organisation of credit cooperatives are subject to content control under § 242 because the cooperatives do not become members on a voluntary basis.³⁰⁴⁸ Content control (§ 242) of a regulatory instrument of a sports association can also have an impact on non-members if they must recognise the rules in order to be able to participate in a competition. This is the case of the rules of the umbrella organisation of tournament riding, an influential association. Non-

³⁰³⁸ BGHZ 64, 238 (244).

³⁰³⁹ HGB = Handelsgesetzbuch (Commercial Code).

³⁰⁴⁰ Stimpel *FS Fischer* 773, Stöffels *AGB-Recht* 60.

³⁰⁴¹ BGHZ 84, 11 (14 *et seq.*).

³⁰⁴² *Satzungsgewalt*.

³⁰⁴³ *Selbstverwaltungsbefugnis*.

³⁰⁴⁴ *Vereinsautonomie*.

³⁰⁴⁵ *WHL/Horn* § 23 *AGBG* para 88.

³⁰⁴⁶ Stöffels *AGB-Recht* 60.

³⁰⁴⁷ BGH *NJW* 1989, 1724 (1726); 2000, 1028, UBH/*Schäfer* § 310 para 136.

³⁰⁴⁸ BGH *NJW* 1989, 1724 (1726).

members of this association who do not accept its rules are not allowed to participate in competitions.³⁰⁴⁹

Decisions of associations having an impact on members are also subject to content control based on good faith.³⁰⁵⁰ The most common decisions in this field concern exclusions of members and penalties. The threshold for intervention is very high though and only met if the decision is obviously inequitable.³⁰⁵¹

d) Modifications due to the Unfair Terms Directive?

Some authors are of the view that due to the principle of interpretation in accordance with the European directives, §§ 305 *et seq.* should be applicable to company agreements where consumer contracts are involved (e.g., for the acquisition of shares).³⁰⁵² Recital 10 of the Unfair Terms Directive³⁰⁵³ clarifies however that the existing exceptions should further exist. Hence, the exclusion of company law is not modified by the Unfair Terms Directive.³⁰⁵⁴

1.2.4 Limited control in labour law

Under § 310(4), §§ 305 *et seq.* do not apply to collective agreements and private-sector works agreements or public-sector establishment agreements. Thus, employment contracts are not excluded from the scope of application. When assessing employment contracts, reasonable account must be taken of the special features that apply in labour law, however,³⁰⁵⁵ and § 305(2) (incorporation) and (3) (framework agreements) must not be applied.³⁰⁵⁶

Pre-formulated employment contracts are ubiquitous, and these agreements are rarely agreed individually.³⁰⁵⁷ Before the modernisation of the law of obligations, the entire labour law was excluded from the application of the AGBG (§ 23). The inclusion of labour law in § 310(4) was probably the most significant modification in individual labour law in the last decades.³⁰⁵⁸ The legislator justified this inclusion by the fact that in spite of a certain protection of employees by collective agreements and legal provisions, they need protection because of their existential dependence on their employment. Furthermore, there must be a counter-weight of

³⁰⁴⁹ BGH *NJW* 1995, 583.

³⁰⁵⁰ UBH/*Schäfer* § 310 para 137.

³⁰⁵¹ Stöffels *AGB-Recht* 61.

³⁰⁵² Heinrichs *NJW* 1997, 1407, MüKo/*Basedow* § 310 para 92, Armbrüster *ZIP* 2006, 413.

³⁰⁵³ **Recital 10:** '(...) whereas as a result inter alia contracts relating to (...) the incorporation and organisation of companies or partnership agreements must be excluded from this Directive.'

³⁰⁵⁴ Stöffels *AGB-Recht* 62.

³⁰⁵⁵ *Wendland* in: Staudinger/*Eckpfeiler* E para 15.

³⁰⁵⁶ § 310(4) 2nd sent.

³⁰⁵⁷ Staudinger/*Krause* Annex to § 310 para 1.

³⁰⁵⁸ Preis/Roloff *ZfA* 2007, 44.

the employer's power to determine the employment conditions unilaterally.³⁰⁵⁹ The inclusion of labour law into content control also ensures that courts will no longer reach varying rulings leading to legal uncertainty. This also contributes to an equalisation of the level of protection of content control between labour and civil law.³⁰⁶⁰

A consequence of the previously mentioned inclusion is that the courts now differentiate between pre-formulated and individually agreed employment contract clauses.³⁰⁶¹ Where employees can negotiate their working conditions to a certain degree, one must assume that they are able to defend their interests. Despite this fact, this 'more' of freedom of contract must not be nullified by considerations of equity (§ 315(3))³⁰⁶² or public policy (*gute Sitten*) (§ 138(1)).³⁰⁶³ In a ruling of 2005, the BAG held that equity control in the sense of general control of reasonableness in terms of § 242, which is independent of the particularities of the contract, does not take place anymore. The BAG stated that §§ 305 *et seq.* concretise the principle of good faith (§ 242) in terms of the content of employment clauses.³⁰⁶⁴

a) No control for collective, company and service agreements

Collective agreements are concluded between employers' associations or individual employers, on the one hand, and labour unions, on the other. If the conditions of the Collective Bargaining Act (TVG)³⁰⁶⁵ are met, the collective agreement applies directly between the parties. Since the bargaining power of the parties is balanced, there is no need for protection in terms of content control as both parties' interests are sufficiently considered. What is more, neither party is the 'user' in the sense of § 305.³⁰⁶⁶ More importantly, the autonomy of collective bargaining

³⁰⁵⁹ BT-Drs. 14/6857 at 54.

³⁰⁶⁰ BT-Drs. 14/6857 at 54.

³⁰⁶¹ Hanau *NJW* 2002, 1242, Stöffels *AGB-Recht* 63.

³⁰⁶² § 315(3): 'Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.'

³⁰⁶³ § 138(1): 'A legal transaction which is contrary to public policy is void.' Thüsing/Leder *BB* 2005, 940, Stöffels *AGB-Recht* 63.

³⁰⁶⁴ BAG *NZA* 2005, 1111 (1116).

³⁰⁶⁵ TVG = Tarifvertragsgesetz.

³⁰⁶⁶ BAG *AP* no. 22 concerning § 611 'Ausbildungsbeihilfe', Stöffels *AGB-Recht* 63.

(*Tarifautonomie*) is a constitutional right (article 9(3) GG),³⁰⁶⁷ and the parties' power to shape their agreements must not unnecessarily be restricted by content control.³⁰⁶⁸

Private-sector works agreements³⁰⁶⁹ and public-sector establishment agreements are excluded too under § 310(4). Particularly the normative character of these agreements speaks for their equal treatment with collective agreements.³⁰⁷⁰ Like for collective agreements, only a legal control against the standard of superior norms is possible in these cases.³⁰⁷¹

b) Collective agreements as legal norms in terms of § 307(3)

In their employment contracts, employers often refer to the collective agreement(s) that apply in the given branch. The collective agreement then becomes applicable to the given contract of employment.³⁰⁷² Consequently, also employees who are not bound to the given collective agreement benefit from it. The legislator did not wish to alter this practice and expressed this, in a quite complicated manner, in § 310(4) 3rd sent. According to this provision, collective agreements (as well as private-sector works agreements and public-sector establishment agreements) are equivalent to legal provisions within the meaning of section 307(3).³⁰⁷³ Hence, employment contract clauses which refer to collective agreements as a whole³⁰⁷⁴ or a 'self-contained regulatory complex'³⁰⁷⁵ are merely declaratory in nature and not subject to content control in terms of §§ 307 to 309 ((§ 307(3)). The objective of this provision is not to allow for

³⁰⁶⁷ **Article 9(3) GG:** 'The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a [Compulsory military and alternative civilian service], to paragraphs (2) and (3) of Article 35 [Legal and administrative assistance and assistance during disasters], to paragraph (4) of Article 87a [Armed Forces], or to Article 91 [Internal Emergency] may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.'

³⁰⁶⁸ BT-Drs. 14/6857 at 54.

³⁰⁶⁹ See § 77 BetrVG.

³⁰⁷⁰ Stöffels *AGB-Recht* 64.

³⁰⁷¹ Stöffels *AGB-Recht* 64. The former jurisprudence of the BAG according to which private-sector works agreements and public-sector establishment agreements were subject to a general equity control was heavily criticised. See also Preis/Ulber *RdA* 2013, 211.

³⁰⁷² Stöffels *AGB-Recht* 65.

³⁰⁷³ **§ 307(3):** 'Subsection (1) and (2) above, and [§§] 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under subsection (1) sentence 2 above, in conjunction with subsection (1) sentence 1 above.'

³⁰⁷⁴ Reference to single clauses of a collective agreement is not sufficient. See BAG *NZA-RR* 2009, 593.

³⁰⁷⁵ The BAG requires at least a reference of entire and definable areas in the case of a partial reference to an agreement. See BAG *NZA* 2009, 1366 (1368).

an indirect material content control of collective agreements that have been included in employment contracts by reference.³⁰⁷⁶

c) Consideration of the special features that apply in labour law

Pursuant to § 310(4) 2nd sent., reasonable account must be taken of the special features that apply in labour law when §§ 305 *et seq.* are applied to employment contracts.³⁰⁷⁷ This vague formulation begs the question what it actually means. The government merely states that the prohibited clauses without the possibility of evaluation (§ 309) should not apply in labour law without restriction.³⁰⁷⁸ This provision does not have the practical impact that was expected at the beginning, though. According to the prevailing view, the 'special features that apply in labour law' that must be considered are the legislature's evaluations in labour and social law, as well as deviating factual situations in this field of law, or the fact that certain prohibitions in §§ 308 and 309 do not aim at long-term contractual relationships such as employment contracts.³⁰⁷⁹ The discussion in legal literature on this topic is more of a theoretical nature.³⁰⁸⁰

1.2.5 Exception in case of inclusion of the VOB/B as a whole

In terms of § 310(1) 3rd sent., in cases that involve contracts with an entrepreneur, a legal person under public law or a special fund under public law, § 307 (1) and (2) as well as § 308 no. 1, 2 to 8 do not apply to contracts in which the entire Construction Tendering and Contract Regulations, Part B (VOB/B)³⁰⁸¹ in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provisions. The VOB/B contains general conditions for the execution of building works. They are always applied in public works contracts, but also private construction agreements.³⁰⁸² The VOB/B are no statutory provisions in the sense of § 307(2) no. 1, but general business terms, which is why they are subject to content control under §§ 305 *et seq.*³⁰⁸³ Jurisprudence has always recognised their special role and treats them differently from other standard terms, however. The courts argue that they have been negotiated between various interest groups, such as developers, construction companies and public authorities,

³⁰⁷⁶ Stoffels *AGB-Recht* 66.

³⁰⁷⁷ Also termination contracts and settlement agreements are subject to this provision because of their regulatory content in the field of labour law. See UBH/*Fuchs* § 310 para 148.

³⁰⁷⁸ BT-Drs. 14/6857 at 54.

³⁰⁷⁹ Stoffels *AGB-Recht* 66 and 67, with further references.

³⁰⁸⁰ Staudinger/*Krause* Annex to § 310 para 144, Junker *FS Buchner* 378 *et seq.*

³⁰⁸¹ Version 2012. Notice of 31 July 2009, *BAnz* no. 155 of 15 October 2009, last amended by notice of 26 June 2012 (*BAnz AT* 13 July 2012 B3).

³⁰⁸² Stoffels *AGB-Recht* 68.

³⁰⁸³ UBH/*Christensen Spez. AGB-Werke* Part 4 (9) para 1 *et seq.*

which is why the interests of these parties are fairly balanced. Hence, when the parties have agreed that the VOB/B should apply *as a whole*, the courts will hold that they withstand content control.³⁰⁸⁴ Where the parties agree though that only parts of the VOB/B should apply, §§ 305 *et seq.* are applicable.³⁰⁸⁵ Furthermore, the BGH decided that in consumer contracts, the VOB/B are subject to content control.³⁰⁸⁶

The legislator adopted this new jurisprudence in the new version of § 310(1) 3rd sent., pursuant to which the VOB/B are excluded from content control only if they are applied *without deviation as to their content vis-à-vis* entrepreneurs and a legal person under public law or a special fund under public law. The least deviation entails content control in terms of §§ 305 *et seq.* For reasons of legal certainty, it is irrelevant what weight the deviation has, or who benefits from it.³⁰⁸⁷ What is more, in consumer contracts, content control always takes place, even if the application of the VOB/B as a whole has been agreed.³⁰⁸⁸

2. Personal scope of application

2.1 Restrictions concerning entrepreneurs and public entities as clients

1.1.1 Classification of § 310(1)

As mentioned earlier, the assessment of the scope of application should start with § 310 since this provision contains some modifications and exclusions of the scope of application.³⁰⁸⁹

§ 310(1)³⁰⁹⁰ concerns standard terms which are used in contracts with³⁰⁹¹ an entrepreneur, a legal person under public law or a special fund under public law. This means that generally, all persons *vis-à-vis* of whom a supplier uses standard terms benefit from the protection of §§ 305 *et seq.* This applies regardless of their personal status, intellectual abilities or economic

³⁰⁸⁴ BGH *NJW* 1983, 816 (818).

³⁰⁸⁵ BGH *NJW* 2004, 1597.

³⁰⁸⁶ BGH *NZBau* 2008, 640 (642 *et seq.*).

³⁰⁸⁷ This was already the case before the new version of this provision came into force. See BGH *NJW* 2004, 1597.

³⁰⁸⁸ Palandt/*Grüneberg* § 307 para 145, BT-Drs. 16/9787 at 17.

³⁰⁸⁹ Faust *BGB-AT* 105.

³⁰⁹⁰ § 310(1): '[§] 305 (2) and (3) and [§§] 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. [§] 307 (1) and (2) nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in [§§] 308 and 309; reasonable account must be taken of the practices and customs that apply in business dealings. In cases coming under sentence 1, [§] 307 (1) and (2) do not apply to contracts in which the entire Award Rules for Building Works, Part B [*Vergabe- und Vertragsordnung für Bauleistungen Teil B - VOB/B*] in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provision.'

³⁰⁹¹ The German text expresses the idea of two 'opposing' parties more clearly by using the preposition '*gegenüber*' (*vis-à-vis*), instead of 'with'.

situation³⁰⁹² as this provision only excludes the application of certain provisions of this BGB division.³⁰⁹³ This is legitimate because the legislator aims to balance the client's need for protection with regard to the unilateral use of the supplier's (user's) freedom of contract. On the other hand, §§ 305 *et seq.* are an emanation of the *bona fides* principle so that the legislator considered the exclusion of certain persons *per se* from the scope of application of §§ 305 *et seq.* as inappropriate.³⁰⁹⁴

The legislator considered though that especially in commerce, the need for protection of the other party is lesser than it is for consumers.³⁰⁹⁵ The same applies to public entities which usually have business experience in their field.³⁰⁹⁶ Hence, commercial and public clients are included in the protection of §§ 305 *and seq.*³⁰⁹⁷ They benefit only from a reduced protection, however. The incorporation requirements (§ 305(2) and (3)), the unconditioned prohibition of certain clauses (§§ 308 and 309) and the extension of the international scope of application (article 29a EGBGB) do thus not apply in commercial transactions.³⁰⁹⁸

2.1.2 Clients to whom the exception applies

a) Entrepreneurs as 'the other party'

According to the legal definition of § 14(1), an entrepreneur is a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of its trade, business or profession. Under § 14(2), a partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities. 'Trade, business or profession' is any independent participation in commerce that is intended to have a certain duration. According to a more recent understanding, the intention to realise profits is not necessary. It is sufficient that the transactions are done with consideration of commercial and economic principles.³⁰⁹⁹ The law applies the notion of 'entrepreneur' according to the

³⁰⁹² The CPA, on the other hand, privileges 'vulnerable consumers'. See s 3 and Part I ch 2 para 3.2 a) bb).

³⁰⁹³ UBH/Schäfer § 310 para 9.

³⁰⁹⁴ BT-Drs. 7/3919 at 43.

³⁰⁹⁵ BT-Drs. 7/3919 at 43.

³⁰⁹⁶ Schmidt *BGB-AT* 416.

³⁰⁹⁷ This point was subject to discussion when the AGBG was drafted. In a first draft, merchants (*Kaufleute*) should not benefit at all from the protection of the AGBG legislation. See *DB Beilage* 18/74 at 23.

³⁰⁹⁸ Stöffels *AGB-Recht* 70. With the reform of the commercial law of 1998 (BGBl. 1998 I at 1474), the qualification as a merchant (*Kaufmann*) is not the point of reference anymore, but the commercial or professional activity of the other party. Hence, also freelancers are included since their situation has to be considered equal in terms of the use of standard terms. See BT-Drs. 13/8444 at 46 *et seq.*

³⁰⁹⁹ BGH *NJW* 2006, 2250 (2251), UBH/Schäfer § 310 para 18, MüKo/Basedow § 310 para 45.

situation³¹⁰⁰ so that the same person can be an entrepreneur in one situation and a consumer in another.

In case of doubt, by reference to the legal concept of § 344(1) HGB,³¹⁰¹ an entrepreneur that concludes a transaction most probably will do so in his or her capacity as an entrepreneur, and not as a private person.³¹⁰²

Entrepreneurs are thus capital companies (AG, KgaA, GmbH),³¹⁰³ partnerships (oHG, KG),³¹⁰⁴ individual merchants, freelancers, artisans and farmers. Employees or civil servants are no entrepreneurs because they are not independent. Therefore, a professor who purchases a new computer for her own account in order to assess her students' assignments acts as a consumer, and not as an entrepreneur.³¹⁰⁵ On the other hand, the activity as an entrepreneur does not need to be the person's main occupation. Therefore, the activity of lessors who own several flats which they administrate themselves can be seen as entrepreneurs if this activity requires a certain expenditure of time and organisation. Ebay power sellers are regularly considered entrepreneurs.³¹⁰⁶

b) Public entities as 'the other party'

The legislator considers that not only entrepreneurs but also public entities need less protection in terms of §§ 305 *et seq.* Legal persons under public law are the State (government), public corporations (e.g., municipalities), public agencies (e.g., universities, social security agencies), foundations of public law and the churches.³¹⁰⁷ After the privatisation of the German Federal Post Office (Deutsche Bundespost), only a few special funds under public law remain, such as the Federal Railway Fund (Bundeseisenbahnvermögen – BEV) and the Fund of the European

³¹⁰⁰ Faust *BGB-AT* 105.

³¹⁰¹ § 344(1) HGB: 'A legal transaction that is concluded by a merchant is, in case of doubt, presumed to be concluded within the scope of his or her commercial enterprise.' My own translation, since there is no official translation of Book IV of the HGB.

³¹⁰² Palandt/*Ellenberger* § 14 para 2, UBH/*Schäfer* § 310 para 22.

³¹⁰³ Aktiengesellschaft (AG), Kommanditgesellschaft auf Aktien (KgaA), Gesellschaft mit beschränkter Haftung (GmbH).

³¹⁰⁴ Offene Handelsgesellschaft (oHG), Kommanditgesellschaft (KG). For these entities, in no case there is room for private transactions. Stoffels *AGB-Recht* 70.

³¹⁰⁵ Borges *DZWiR* 1997, 404.

³¹⁰⁶ OLG Frankfurt *NJW* 2005, 1438.

³¹⁰⁷ Stoffels *AGB-Recht* 71.

Recovery Program (ERP-Sondervermögen).³¹⁰⁸ In most cases, however, public entities will act standard terms users, in which case they need no protection under §§ 305 *et seq.*³¹⁰⁹

2.1.3 Inapplicable provisions

§ 310(1) provides that the incorporation requirements of § 305(2) and (3) do not apply to entrepreneurs and public entities so that also an implied concurrence of wills is sufficient.³¹¹⁰

The prohibitions of §§ 308 no. 1, 2 to 8 and 309 find no application in terms of § 310(1). Nonetheless, the enquiry by means of the general clause (§ 307) remains possible. Furthermore, § 310(1) 2nd sent. clarifies that § 307 nevertheless applies to these cases to the extent that this leads to the ineffectiveness of the contract provision set out in §§ 308 and 309. This means that the valuations contained in §§ 308 and 309 can be considered within the general clause. This approach allows for a flexible application of the law by taking reasonable account of the practices and customs that apply in business dealings (§ 310(1) 2nd sent. *in fine*).³¹¹¹

2.2 Personal scope of application of § 310(3)

2.2.1 Background of the provision

§ 310(3)³¹¹² extends in its no. 1 and 2 the object of content control and modifies in its no. 3 the standard for the enquiry of an unreasonable disadvantage. The provision has been inserted due to the Unfair Terms Directive and therefore aims at consumer protection in line with the Directive.³¹¹³

³¹⁰⁸ The ERP Fund is based on a convention between the United States of America and the Federal Republic of Germany for economic cooperation. It was concluded in 1949 (BGBl. 1950 at 9). See Creifelds *Rechtswörterbuch* s.v. 'ERP-Sondervermögen'.

³¹⁰⁹ Stoffels *AGB-Recht* 71.

³¹¹⁰ Stoffels *AGB-Recht* 71.

³¹¹¹ Stoffels *AGB-Recht* 71.

³¹¹² § 310(3): 'In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos: 1. Standard business terms are deemed to have been presented by the entrepreneur, unless they were introduced into the contract by the consumer; 2. [§] 305c (2) and [§§] 306 and 307 to 309 of this Code and Article 46b of the Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuche] apply to pre-formulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their contents; 3. in judging an unreasonable disadvantage under [§] 307 (1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.'

³¹¹³ Stoffels *AGB-Recht* 71.

2.2.2 Consumer contract

§ 310(3) applies to contracts between an entrepreneur and a consumer (referred to as 'consumer contracts'). Contrary to the Unfair Terms Directive, § 310(3) is not limited to specific contract types,³¹¹⁴ namely contracts on goods and services.³¹¹⁵

The definition of 'entrepreneur' in § 14 is the counterpart of the definition of 'consumer' in § 13.³¹¹⁶ In terms of this provision, a consumer means every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession. This corresponds to the definition of 'consumer' in article 2 lit. b) of the Directive.³¹¹⁷ A civil law company (*Gesellschaft bürgerlichen Rechts*) consisting of several natural persons can be qualified as a natural person as well.³¹¹⁸ This applies as long as the natural person concludes the contract for purposes that are mainly not related to its commercial or independent professional activity, i.e. the contract serves primarily private purposes. This is the case where a contract is concluded for private consumption or private investment or asset management.³¹¹⁹

Unlike the Unfair Terms Directive, § 310(3) does not require the parties to conclude a certain type of transaction, such as a sales agreement. Hence, for the German provision, consumption of the given item is not necessary, even though consumption will in most cases be the final purpose of the contract. § 13 defines 'consumer' negatively since the legal transaction must be concluded neither for a commercial nor for an independent activity.³¹²⁰ Insofar, the German legislature extends permissibly³¹²¹ the scope of the concerned legal transactions in comparison to the Directive in that the latter requires only a purpose that is 'outside [the consumer's] trade, business or profession'.³¹²² Therefore, an employed (i.e., dependent) commercial agent who buys a car for his or her business trips is a consumer in terms of §§ 13 and 310(3).³¹²³

³¹¹⁴ Palandt/*Grüneberg* § 310 para 11.

³¹¹⁵ **Recital 2 of the Directive** refers to 'contract[s] between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand', and **art 4(1) of the Directive** refers to 'goods or services for which the contract was concluded.'

³¹¹⁶ Faust *BGB-AT* 106.

³¹¹⁷ Stoffels *AGB-Recht* 72. **Article 2 lit. b):** '[C]onsumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.'

³¹¹⁸ BGH *NJW* 2002, 368, UBH/*Schäfer* § 310 para 57.

³¹¹⁹ Stoffels *AGB-Recht* 72.

³¹²⁰ In the English translation, this is not sufficiently clear though, as the German negatively formulated phrase for 'der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann' (*neither for ... nor for*) is translated in English by a positive grammatical structure that is closer to art 2 lit. b) of the Directive: 'for purposes that predominantly are *outside* his trade, business or profession'. Emphasis added.

³¹²¹ **Article 8 of the Directive:** 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

³¹²² Stoffels *AGB-Recht* 72.

³¹²³ Stoffels *AGB-Recht* 72.

The wider BGB definition of 'consumer' also means that employees are 'consumers' *vis-à-vis* their employers with respect to their contracts of employment.³¹²⁴ § 13 is highly abstract, which is why it does not require any consumption or a non-professional use of the given item; only independent activities are excluded. German standard business terms legislation is not linked to specific contract types so that also in labour law, it is appropriate to apply § 310(3). After all, an employee is comparable to a consumer with regard to its inferior position because it is economically dependent on its workplace.³¹²⁵

On the other hand, someone who concludes a contract (e.g., a franchise agreement)³¹²⁶ in order to start a commercial or independent business is an entrepreneur, and not a consumer in the sense of § 310(3).³¹²⁷

The enquiry of whether a contract is concluded for private or professional (independent) purposes must be undertaken objectively at the time of the conclusion of the agreement. This is done by taking its content and other surrounding circumstances that are visible for the other party into consideration. The customer's intention is therefore irrelevant.³¹²⁸

It can be difficult to assess whether a contract is concluded for private or a professionally independent use in the case of a so-called dual use,³¹²⁹ i.e., a mixture of both. § 13 refers to a 'predominant' use outside the consumer's trade, business or profession. Hence, the predominant use that is visible for the supplier is relevant, taking into consideration the client's conduct, its professional situation and needs, for instance.³¹³⁰ This means that a client who intended to buy an item for private use is not considered a consumer if the supplier objectively had to interpret the other party's conduct otherwise.³¹³¹

³¹²⁴ BAG NZA 2005, 1111 (1115), confirmed by BVerfG NZA 2007, 85, 86; BAG NZA 2011, 89 (90); 2013, 1265 (1266), ErfK/Preis § 611 para 182, *Wendland* in: Staudinger/Eckpfeiler E para 15. Hence, the specific provisions for consumer contracts in § 312(3) must also be taken into consideration.

³¹²⁵ Preis NZA 2003, special supplement to issue no. 16 at 24.

³¹²⁶ In terms of s 5(6)(d) CPA, franchise agreements are regarded as transactions between a consumer and a supplier. See discussion in Part I ch 2 para 2.2 a) aa).

³¹²⁷ BGH NJW 2005, 1273; 2008, 435 (436).

³¹²⁸ Palandt/Ellenberger § 13 para 4, OLG Karlsruhe NJW-RR 2012, 289.

³¹²⁹ This term is also used in German law ('Dual-use'). See Stoffels *AGB-Recht* 73.

³¹³⁰ KG NJW-RR 2011, 1418, NK/Ring § 14 para 31.

³¹³¹ BGH NJW 2009, 3780 (3781).

3. Standard business terms in international legal relations

3.1 Protection granted by the private international law

3.1.1 General remarks

In our more and more international world, not only businesses conclude contracts with other businesses that are located in other countries. Consumers too buy goods and services from companies overseas, for instance, from mail order firms or service companies that offer their product in various countries. Just as German companies, foreign firms make their transactions subject to their standard business terms. This begs the question of whether clients in Germany can also benefit from the protection against unfair standard terms.³¹³²

The answer to this question depends on whether the contractual relationship is subject to German or foreign law, and whether also special connecting criteria³¹³³ granting particular protection must be applied. These questions are answered by the application of the private international law of the country whose courts deal with the given case. German courts thus apply the German private international law,³¹³⁴ which is why the following discussion focuses only on this aspect. Since courts might have to apply another foreign domestic law to decide a case, this might lead to imponderable outcomes. In order to unify the different regimes in terms of questions of conflict of law, Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (Rome I)³¹³⁵ provides in its article 6 that the courts in the EU Member States have, in theory, to apply the same law. In order to minimise conflicts of law, German standard terms users should insert a forum clause stipulating the exclusive competence of German courts or courts of another EU Member State.³¹³⁶

3.1.2 Applicable law to contracts under the law of obligations

a) Free choice of law

Article 3(1) of the Rome-I Regulation provides that the parties can freely select the law applicable to the contract. It is not necessary that the parties or the contract have any relation

³¹³² Stoffels *AGB-Recht* 75.

³¹³³ *Sonderanknüpfung*.

³¹³⁴ Regulation (EU) no. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters regulates the international competence of jurisdiction. For actions brought before 10 January 2015, Regulation (EC) no. 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is still applicable though (art 66 of Reg 1215/2012).

³¹³⁵ Regulation (EC) no. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

³¹³⁶ Stoffels *AGB-Recht* 75.

to the chosen law. Under certain circumstances, the law applicable to the user's standard business terms can be freely chosen.³¹³⁷

b) Objective connecting criteria

If the parties did not select a law, or their choice is invalid, the Rome-I Regulation sets out different criteria for the determination of the applicable law for contracts of carriage,³¹³⁸ consumer contracts,³¹³⁹ insurance contracts covering large risks³¹⁴⁰ and individual employment contracts.³¹⁴¹

In cases where the previously mentioned contracts are not concerned (articles 5 to 8 of Rome I), the applicable law is determined in terms of article 4 of Rome I.³¹⁴² According to this

³¹³⁷ This topic will be discussed later in this chapter.

³¹³⁸ **Article 5(2) of Rome I:** 'To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.'

³¹³⁹ **Article 6(1) of Rome I:** 'Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.'

³¹⁴⁰ **Article 7(2) of Rome I:** 'An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation. To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.'

³¹⁴¹ **Article 8(2) 1st sent. of Rome I:** 'To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.'

Article 8(3) of Rome I: 'Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.'

³¹⁴² **Article 4(1) of Rome I:** 'To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial

provision, the contract is subject to the law of the country to which it has the closest connections. This will regularly be the country where the supplier has its habitual residence.³¹⁴³ For contracts not listed in article 4(1), the characteristic performance has to be determined in terms of article 4(2).³¹⁴⁴

Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the one indicated in paragraphs 1 or 2 of article 4, the law of that other country shall apply.³¹⁴⁵ Where the law applicable cannot be determined under paragraphs 1 or 2 of article 4, the contract shall be governed by the law of the country with which it is most closely connected.

c) Scope of the applicable law and standard business terms legislation

The law applicable to the contract according to a choice of law or the objective connectivity criterion means that only the provisions of the legal system in question apply to the contract 'from the cradle to the grave'. The applicable legal provisions determine the coming into being and validity of the contract,³¹⁴⁶ its formal validity,³¹⁴⁷ as well its scope and performance of the contractual obligations, its interpretation and the consequences of breach (damages).³¹⁴⁸

This means that if German law applies, the customer benefits from §§ 305 *et seq.*³¹⁴⁹ German employees who work for foreign employers will most probably be subject to foreign law. This is either because their employment contract provides so, or because article 4(1) and (2) of Rome I provides for equivalent objective connectivity criteria. As the Unfair Terms Regulation grants minimum protection for all EU and EEC Member States, the employee benefits from a

instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.'

³¹⁴³ See art 4(1)(a)-(f) of Rome I.

³¹⁴⁴ **Article 4(2) of Rome I:** 'Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.'

³¹⁴⁵ Article 4(3) of Rome I.

³¹⁴⁶ **Article 10(1) of Rome I:** 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

³¹⁴⁷ **Article 11(1) of Rome I:** 'A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.'

³¹⁴⁸ **Article 12(1) of Rome I:** 'The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract.'

³¹⁴⁹ Stöffels *AGB-Recht* 77.

high level of protection. Less protection is only offered where the national, e.g., German law grants a higher level of protection,³¹⁵⁰ or where the law on a non-EU or EEC country applies.

It is important to note that sometimes the parties agree that for contracts for the international sale of goods, the CISG³¹⁵¹ shall apply, provided that the country in question is a signatory of that convention.³¹⁵² If the parties did not exclude the application of CISG in terms of article 6 CISG, the UN convention replaces the national provisions on commercial law.³¹⁵³

3.1.3 Special connecting criteria for the application of protective provisions in standard term contracts

The Rome-I Regulation provides for special rules by which also protective provisions of §§ 305 *et seq.* apply that might improve the other party's situation. This applies above all for consumer contracts, individual employment contracts and domestic contracts and transnational contracts without any connection to third countries.

a) Consumer contracts: article 6(2) of the Rome-I Regulation

Notwithstanding article 6(1) of Rome I (law of the habitual residence of the consumer), the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3 (freedom of choice). Such a choice may thus not have the result of depriving the consumer of the protection afforded to him or her by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

Hence, in consumer contracts, one has to assess if the national law contains mandatory provisions from which the parties must not derogate.

aa) Conditions of article 6(2)

In order to be applicable, the parties must conclude a consumer contract. Certain contracts are excluded in terms of article 6(4). This applies for agreements on the supply of services to be supplied exclusively in a country other than that in which the consumer has its habitual residence, contracts of carriage other than a contract relating to package travel as well as certain

³¹⁵⁰ See art 8 of the Unfair Terms Directive.

³¹⁵¹ United Nations Convention on Contracts on the International Sale of Goods (CISG) of 11 April 1980.

³¹⁵² Article 1(1) lit. b) CISG. Almost all EU Member States (Germany included), the U.S., numerous East-European and African countries are signatories to CISG. South Africa is not a contracting State, however. For an overview of all participating countries see 'CISG – Table of Contracting States' at <http://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states>.

³¹⁵³ Stoffels *AGB-Recht* 77. The application of the CISG will be discussed later in detail in this chapter.

agreements relating to a right *in rem* in immovable property or a tenancy of immovable property. What is more, certain contracts concerning financial instruments,³¹⁵⁴ as well as insurance contracts (article 7) and contracts of carriage do not apply under article 6(1).

Furthermore, the supplier must act in the exercise of his or her trade or profession. Besides, there must be a connection between his or her professional activity and the habitual residence of the consumer in terms of article 6(1)(a) in order to justify the application of the domestic law.³¹⁵⁵ It is sufficient though if the professional directs such activities to that country or to several countries, including that country (article 6(1)(b)). This is the case, e.g., where the supplier undertakes promotion or marketing measures in the given country, such as the distribution of prospects or catalogues, newspaper commercials, phone calls or commercial television spots.³¹⁵⁶

It is however arguable whether a professional (supplier) also 'directs' its activities to one or several countries in the sense of article 6(1)(b) if the contract has been concluded by means of e-commerce. The ECJ has developed several guidelines concerning article 15(1) lit. c) of the Council Regulation (EC) no. 44/2001 of 22 December 2000 (Brussels I),³¹⁵⁷ which is similar to article 6(1) of the Rome-I Regulation, that could be helpful in this regard.³¹⁵⁸ The link between both regulations is specifically pointed out in recital 24 of the Rome-I Regulation.³¹⁵⁹

³¹⁵⁴ Article 6(4)(a)-(e) of Rome I.

³¹⁵⁵ *MüKo/Martiny* Art 6 Rom-I-VO para 29.

³¹⁵⁶ *MüKo/Martiny* Art 6 Rom-I-VO para 32.

³¹⁵⁷ **Council Regulation (EC) No. 44/2001 of 22 December 2000** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). **Article 15(1)**: 'In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if: (a) it is a contract for the sale of goods on instalment credit terms; or (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'

³¹⁵⁸ *Staudinger/Magnus* Art 6 Rom-I-VO para 115.

³¹⁵⁹ **Recital 24 of the Rome-I Regulation**: 'With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques.' Consistency with Regulation (EC) No. 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No. 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No. 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'

According to the ECJ, a supplier 'directs' its activity to a country if its activity has an international character, if its website contains directions for clients from other Member States to the supplier, the use of another language or currency as the one which is current in the supplier's country, the possibility to book and to receive a booking confirmation in this other language, the indication of telephone numbers with an international dialling code ('00xx...' or '+xx...'), the use of another top-level domain (e.g., '.de' or '.fr') or the indication of an international clientele on the professional's website.³¹⁶⁰ Mere accessibility to the professional's website from the country in which the consumer has its habitual residence is not sufficient though.³¹⁶¹ Furthermore, according to the ECJ, causality between the supplier's 'direction' of its activity to this country and the conclusion of the contract is not necessary.³¹⁶² The last point is however contrary to recital 25 of Rome I ('and the contract is concluded as a result of such activity'), and it is disputable whether this jurisprudence is also valid for the Rome-I Regulation.³¹⁶³ In any event, it should not be necessary that the contract itself has been concluded by means of distance selling.³¹⁶⁴ What is more, pursuant to recital 24 of Rome I, 'the language or currency which a website uses does not constitute a relevant factor.' Finally, the contract must fall within the scope of such activities.³¹⁶⁵

If the conditions of article 6(1) are not met, the law applicable to the contract is determined pursuant to articles 3 (freedom of choice) and 4 (applicable in the absence of choice) of Rome I. Consumers who chose to conclude a contract with a foreign supplier on their own initiative must thus be content with the legal standards of the given country.³¹⁶⁶

bb) Legal consequences

Under article 6(2) 2nd sent. of Rome I, the selection of a certain law is valid. A complementary special rule is introduced though under which the consumer protection provisions of the country of the consumer's habitual residence apply.³¹⁶⁷ The mandatory provisions of §§ 305 *et seq.* are such provisions that cannot be derogated from by agreement.³¹⁶⁸ Since the consumer cannot be deprived of 'the protection afforded to him', the so-called 'favourability principle'³¹⁶⁹

³¹⁶⁰ ECJ dec. of 07/12/2010 – C-585-08, *Pammer*, C-144/09, *Hotel Alpenhof*, para 83 (NJW 2011, 505).

³¹⁶¹ ECJ dec. of 07/12/2010 – C-585-08, *Pammer*, C-144/09, *Hotel Alpenhof*, para 94. See also rec. 24 of Rome I.

³¹⁶² ECJ dec. of 07/12/2010 – C-585-08, *Pammer*, C-144/09, *Hotel Alpenhof*, para 32.

³¹⁶³ Staudinger/Steinrötter NJW 2013, 3505 (3506).

³¹⁶⁴ ECJ dec. of 06/09/2012 – C-190/11, *Mühlleitner*, para 45 (NJW 2012, 3225). See also recital 24 of Rome I.

³¹⁶⁵ Article 6(1) *in fine* of Rome I.

³¹⁶⁶ MüKo/Martiny (2010) Art 6 para 29.

³¹⁶⁷ Palandt/Thorn Art 6 Rom-I-VO para 8.

³¹⁶⁸ Staudinger/Magnus Art 6 Rom-I-VO para 140, MüKo/Martiny Art 6 Rom-I-VO para 44.

³¹⁶⁹ *Günstigkeitsprinzip*.

applies. According to this principle, the consumer protection provisions of the BGB apply only if they are more favourable to the consumer in the concrete case than the provisions of the selected law or the law applicable by virtue of connecting criteria.³¹⁷⁰

cc) Gap in the protection

The scope of article 6 of Rome I is much wider than the scope of its predecessor provision of article 29 EGBGB³¹⁷¹ since all kinds of consumer contracts fall under its ambit as long as its application is not superseded by articles 5 or 7. A great deal of contracts is excluded by article 6(4) though so that in these cases, the consumer does not benefit from increased protection under the BGB provisions.³¹⁷²

b) Article 46b EGBGB

Article 46b EGBGB repeals article 29a EGBGB and applies to areas where the EU has set out special conflict-of-law rules.³¹⁷³

aa) Significance of article 46b EGBGB

In order to facilitate the purchase of goods and services in other EU countries for consumers, besides the harmonisation of the national consumer protection legislation, it is necessary to protect consumers from the exclusion of these provisions. Therefore, a number of directives contain conflict-of-law rules which prevent that a supplier might choose to select a legislation that affords less protection.³¹⁷⁴ Under article 23 of Rome I, these conflict-of-law rules take precedence over the provisions contained in Rome I.³¹⁷⁵ The function of article 46b EGBGB is to transpose the said conflict-of-law rules into German law. Hence, the Directives mentioned

³¹⁷⁰ Staudinger/*Magnus* Art 6 Rom-I-VO para 137, MüKo/*Martiny* Art 6 Rom-I-VO para 46.

³¹⁷¹ Article 29 EGBGB included only certain consumer contracts, such as contracts on the delivery of movable things, the performance of services or the financing of these transactions.

³¹⁷² Stoffels *AGB-Recht* 79.

³¹⁷³ Stoffels *AGB-Recht* 80.

³¹⁷⁴ **Article 6(2) of the Unfair Terms Directive** provides that '[M]embers shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.' Similar provisions contain articles 7(2) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, 12(2) of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, 22(4) of the Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and 12(2) of the Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

³¹⁷⁵ Staudinger/*Magnus* Art 46b EGBGB para 1.

above are transposed into German law by article 46b(1) EGBGB,³¹⁷⁶ with the exception of the Timeshare Directive for which article 46b(4)³¹⁷⁷ applies.³¹⁷⁸

Article 46b EGBGB is wider than article 6(2) 2nd sent. of Rome I in that it covers all types of consumer contracts (as far as they fall under the ambit of the consumer protection directives). A close connection to the EU/EEC single market is sufficient.³¹⁷⁹ Article 46b EGBGB is nonetheless more restrictive compared to article 6 of Rome I in that it only applies in choice-of-law cases but not where an objective connecting criterion applies.³¹⁸⁰

bb) Conditions of the application of article 46b EGBGB

Article 46b(1) applies to contracts which, due to a valid choice of law, are governed by the law of a country which is not a member of the EU or the EEC.³¹⁸¹ Furthermore, the agreement in question must be a consumer contract. This condition is not expressly mentioned in article 46b, the Directives mentioned in paragraph 3 require such a contract, however.³¹⁸²

In addition, the contract must show a close connection to the area of an EU or EEC³¹⁸³ Member State. Article 46b(2)³¹⁸⁴ concretises this condition. Since the German legislator oriented itself

³¹⁷⁶ **Article 46b(1) EGBGB:** 'If a contract, due to choice of law, is governed by the law of a country which is neither a Member State of the European Union, nor another Contracting State of the Agreement on the European Economic Area, yet if the contract shows a close connection to the area of one of these states, then the provisions of this particular state that have [been] adopted in implementation of the consumer protection directives are nevertheless applicable.'

³¹⁷⁷ **Article 46b(4) EGBGB:** 'If a timeshare contract, a long-term holiday product contract, a resale contract or an exchange contract in the meaning of Art 2 para. 1 (a) to (d) of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33 of 3.2.2009 at 10) is governed by the law of a country which is neither a Member State of the European Union, nor another Contracting State of the Agreement on the European Economic Area, then the consumers shall not be deprived of the protection granted in implementation of this directive, if 1. any of the immovable properties concerned is located in the sovereign territory of a Member State of the European Union or of another Contracting State of the Agreement on the European Economic Area, or 2. in the case of a contract not directly related to an immovable property, the entrepreneur pursues commercial or professional activities in a Member State of the European Union or another Contracting State of the Agreement on the European Economic Area or where he, by any means, directs such activities to such a state, and the contract falls within the scope of such activities.'

³¹⁷⁸ Stoffels *AGB-Recht* 80.

³¹⁷⁹ Stoffels *AGB-Recht* 80.

³¹⁸⁰ Palandt/*Thorn* Art 46b EGBGB para 4.

³¹⁸¹ Stoffels *AGB-Recht* 80.

³¹⁸² Palandt/*Thorn* Art 46b EGBGB para 3.

³¹⁸³ Iceland, Liechtenstein and Norway. See Palandt/*Thorn* Art 46b EGBGB para 2.

³¹⁸⁴ **Article 46b(2) EGBGB:** 'A close connection must be assumed particularly where the entrepreneur 1. carries on a professional or commercial activity in a Member State of the European Union or in a Contracting State of the Agreement on the European Economic Area in which the consumer has his or her habitual residence, or 2. directs such activity in some way towards this Member State of the European Union or towards another Contracting State of the Agreement on the European Economic Area or towards several states including this state, and the contract falls within the scope of this activity.'

to article 6(1) of Rome I,³¹⁸⁵ one can assume that the previously mentioned jurisprudence concerning article 15(1) lit. c) of the Brussels I Directive applies, especially concerning the concretisation of the condition of the direction of commercial or professional activities.³¹⁸⁶ The enumeration in article 46b(2) is not exhaustive though ('particularly'), so that also other conditions may apply.³¹⁸⁷

The 'close connection' is assessed by considering the circumstances of the given case³¹⁸⁸ and applying all connecting criteria of the private international law, such as the consumer's habitual residence, the entrepreneur's principal or branch office, the place of the conclusion of the contract, its language and the place of execution or the location of the purchased item.³¹⁸⁹ The view that the 'close connection' has no autonomous meaning has to be dismissed as otherwise, paragraph 2 of article 46b would not contain concretisations of this condition.³¹⁹⁰

Even though article 46b(1) EGBGB merely requires a close connection to *one* of the EU or EEC countries, this provision also applies where there is a connection to several of them. The Directives that are transposed by article 46b require a close connection 'with the territory of the Member States' (article 6(2) of the Unfair Terms Directives) or 'with the territory of one or more Member States' (article 22(4) of the Consumer Credit Directive).³¹⁹¹ In this case, it must be assessed to which country the closest connection exists. Any connection to third countries must be disregarded.³¹⁹²

Even though article 46b(2) mentions the habitual residence of the consumer as a criterion for the existence of a close connection, article 46b(1) may nonetheless apply in cases where a consumer living outside the EU/EEC concludes a contract within the single market. The Directives mentioned in paragraph 3 do not require the consumer to have its habitual residence in the EU/EEC, neither does paragraph 4.³¹⁹³ Its high consumer protection standards thus protect consumers living outside the single market who conclude a contract within the EU/EEC.³¹⁹⁴

³¹⁸⁵ MüKo/*Martiny* Art 46b EGBGB para 57.

³¹⁸⁶ See discussion above.

³¹⁸⁷ Stoffels *AGB-Recht* 81.

³¹⁸⁸ Palandt/*Thorn* Art 46b EGBGB para 3.

³¹⁸⁹ Palandt/*Thorn* Art 46b EGBGB para 3.

³¹⁹⁰ See MüKo/*Martiny* Art 46b EGBGB para 38 who shows some sympathy for this approach but finally does not adhere to it.

³¹⁹¹ MüKo/*Martiny* Art 46b EGBGB para 51.

³¹⁹² MüKo/*Martiny* Art 46b EGBGB para 55.

³¹⁹³ Staudinger/*Magnus* Art 46b EGBGB para 50.

³¹⁹⁴ Stoffels *AGB-Recht* 82.

cc) Legal consequences

If the conditions of article 46b(1) EGBGB are fulfilled, the provisions for the implementation of the directives mentioned in article 46b(3) are applied to the contract in question. Article 46b(1) therefore is a reference to domestic law.³¹⁹⁵ This means that the provisions the given country has adopted by implementing the consumer protection directives apply directly. Hence, it is not necessary to assess further the conflict-of-law rules of this country.³¹⁹⁶

Article 46b(1) refers to 'the provisions of this particular state that have been adopted in implementation of the consumer protection directives'. If the contract shows a close connection to German law, §§ 305 *et seq.*, 13 (consumer) and 14 (entrepreneur) are applicable. For all other areas not covered by these provisions, the chosen law of the other country is still applicable.³¹⁹⁷ For instance, since the incorporation control of §§ 305(2), 305c(1) BGB offers a higher protection than the directives – which do not provide for incorporation control – the German provisions are considered 'provisions (...) that have been adopted in implementation of the consumer protection directives', and therefore apply under article 46b(1) EGBGB.³¹⁹⁸

Since the directives mentioned in article 46b(3) merely prescribe a minimum consumer protection standard, the question arises whether the reference to the law of the country showing a close connection also applies if it offers a higher standard than the directives. As long as the standard clause falls into the material scope of application of the directive, this should be the case.³¹⁹⁹ On the other hand, if the directive offers higher protection, the standard of the directive should apply. Article 6(2) of the Unfair Terms Directive is no hindrance to this view.³²⁰⁰

Contrary to article 6(2) 2nd sent. of Rome I, article 46b(1) EGBGB does not require a comparison as to which law is more favourable to the consumer. Such a 'favourability comparison' must be applied, however.³²⁰¹ The said consumer protection directives merely require that the consumer must not lose its protection, but they do not allow for a deterioration of its situation. Hence, the law of the non-EU/EEC country must be compared with the law of the country with the closest connection to the contract. If the law of the EU/EEC country offers

³¹⁹⁵ *Sachnormverweisung*.

³¹⁹⁶ Stoffels *AGB-Recht* 82.

³¹⁹⁷ Stoffels *AGB-Recht* 82.

³¹⁹⁸ Example from Stoffels *AGB-Recht* 83.

³¹⁹⁹ *MüKo/Martiny* Art 46b EGBGB para 75, *Staudinger/Magnus* Art 46b EGBGB para 53.

³²⁰⁰ Stoffels *AGB-Recht* 83.

³²⁰¹ *MüKo/Martiny* Art 29a EGBGB para 81, *Staudinger/Magnus* Art 29a EGBGB para 54.

less protection than the law of the third country, the latter prevails.³²⁰² Hence, if the law of a non-EU/EEC country prohibits an exclusion of liability also for minor negligence (meaning better consumer protection), § 309 no. 7 lit. b), which excludes only gross negligence, is not applicable.³²⁰³

It is noteworthy that the law to which article 46b(1) refers does not apply if it widens the *material* scope of application of the given directive.³²⁰⁴ According to article 3(1) 5th indent of the Distance Sales Directive,³²⁰⁵ the Directive does not apply to contracts concluded at an auction. If such contracts are included in a law implementing the Directive, which is the case in §§ 312b to 312d BGB, the material scope of application of the Directive is widened. Therefore, these provisions cannot be applied by reference in terms of article 46b EGBGB, and the selected law is applicable.³²⁰⁶

c) Article 8 of the Rome-I Regulation – employment contracts

According to § 310(4), German standard terms legislation is also applicable to employment contracts. Article 8(1) 2nd sent. of Rome I provides that for the selection of the applicable law, a comparison as to what law is more favourable for the consumer has to be undertaken. If the chosen law thus offers less protection than §§ 305 *et seq.*, the German provisions apply, provided that they would have been applicable if no other law had been selected.³²⁰⁷

Article 8(2) 1st sent. provides that to the extent that the parties have not chosen the law applicable to the individual employment contract, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. It is irrelevant whether the employee temporarily works in another country (2nd sent.).³²⁰⁸

Where the law applicable cannot be determined (which is the case, e.g., for flight attendants or lorry drivers), article 8(3) sets out that the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.³²⁰⁹

³²⁰² Stoffels *AGB-Recht* 83.

³²⁰³ Example from Stoffels *AGB-Recht* 83.

³²⁰⁴ Stoffels *AGB-Recht* 83.

³²⁰⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997.

³²⁰⁶ Freitag/Leible *EWS* 2000, 344.

³²⁰⁷ Stoffels *AGB-Recht* 84.

³²⁰⁸ Stoffels *AGB-Recht* 84.

³²⁰⁹ Stoffels *AGB-Recht* 84.

If a closer connection exists to another country than the country of employment, the law of that other country shall apply (article 8(4)).³²¹⁰

d) Article 3(3) and (4) of the Rome-I Regulation

If a contract has no connection to the chosen law, save the selection of this law itself, article 3(3) of Rome I provides that the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. In other words, the *ius cogens* of the country with the closest connection applies. For such a close connection, it is sufficient that the contract has been concluded in this country, is executed there, or the head office or habitual residence of a party is located there.³²¹¹

On the other hand, if there is a connection to one or several Member States, the choice of the law of a third country cannot override the mandatory provisions of the Member State under article 3(4) of Rome I. In this context, the phrase 'provisions which cannot be derogated from by agreement' also includes mandatory provisions contained in the directives themselves, although directives do not have a direct and mandatory effect between individuals.³²¹²

Since articles 6 of Rome I and 46b EGBGB already provide for protection with respect to consumer contracts and ensure better protection for consumers due to the favourability principle, article 3(3) has no practical significance for consumer contracts.³²¹³ Article 3(3) of Rome I can nevertheless be relevant in B2B contracts and ensure the applicability of the mandatory provisions of §§ 305 *et seq.*³²¹⁴ Pfeiffer opines though that the parties can choose to select a foreign law for contracts without any connection to this foreign law by an arbitration clause.³²¹⁵ For consumer contracts, this possibility should have no relevance though. In any event, such clauses should be an unreasonable disadvantage for the consumer in terms of § 307(1) because the costs involved for arbitration should be higher than the sum at stake.

Example: S, a producer of printing machines located in Heidelberg, sells a printing machine for B's business in Mainz. The contract is concluded in Heidelberg. Both companies are registered in Germany. The parties agree that the purchase price shall be transferred to S's account in a German bank. S's standard terms contain a clause by which the contract is subject to English law.

³²¹⁰ Stoffels *AGB-Recht* 84.

³²¹¹ Staudinger/*Magnus* Art 3 Rom-I-VO para 138, MüKo/*Martiny* Art 3 Rom-I-VO para 93.

³²¹² Staudinger/*Magnus* Art 3 Rom-I-VO para 161.

³²¹³ Staudinger/*Magnus* Art 3 Rom-I-VO para 25, with further references.

³²¹⁴ Stoffels *AGB-Recht* 83.

³²¹⁵ Pfeiffer *NJW* 2012, 1169.

Since in this example the contract has no connection to English law (except for the choice-of-law clause), §§ 305 *et seq.* are applicable in terms of article 3(3) of Rome I.³²¹⁶

3.2 Validity of choice-of-law clauses in standard business terms

In international commercial relationships, it is common to insert a choice-of-law clause in standard terms according to which the law of a particular country shall govern the contract. Such clauses are often inserted unilaterally by one party, and not individually agreed. There is broad consensus today that such choice-of-law clauses are permissible.³²¹⁷

Hence, today, only the question under which conditions a choice-of-law clause in standard terms is valid under article 3(1) of Rome I is of interest.³²¹⁸

3.2.1 Choice-of-law clause as a separate agreement

The choice-of-law clause is considered a separate agreement from the main agreement (e.g., the contract of sale).³²¹⁹ Thus, both contracts have to be assessed separately in terms of their existence and validity. The choice-of-law agreement has understandably to be assessed first.³²²⁰

The existence and validity of the choice-of-law agreement must be determined, according to articles 3(5)³²²¹ and 10(1)³²²² of the Rome-I Regulation, in terms of the legal order that the parties agreed upon in their contract.³²²³ If the parties agreed, for instance, that Spanish law should apply, the existence and validity of the choice-of-law clause must hence be determined according to Spanish law.

It is unclear how the situation is to be dealt with where the standard terms of both parties contain different choice-of-law clauses. The prevailing view maintains that in these cases there is no consensus on the applicable law. Therefore, a scrutiny of the validity of a choice-of-law clause according to both legal systems is unnecessary.³²²⁴ According to another view, both choice-of-

³²¹⁶ Example from Stöffels *AGB-Recht* 85.

³²¹⁷ § 10 no. 8 ABGB provided that an agreement on the validity of foreign law is invalid, unless there is a reasonable interest for its validity. This prohibition was revoked in the course of the private international law reform of 1986, since it was not compatible with the principle of the free choice of law granted by art 3 of the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention).

³²¹⁸ Stöffels *AGB-Recht* 86.

³²¹⁹ *Kollisionsrechtlicher Verweisungsvertrag*.

³²²⁰ Stöffels *AGB-Recht* 86.

³²²¹ **Article 3(5) of Rome I:** 'The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.'

³²²² **Article 10(1) of Rome I:** 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

³²²³ As to the similar provisions of art 27(4) and 31(1) EGBGB see BGH *NJW-RR* 2005, 1071 (1072).

³²²⁴ MüKo/*Spellenberg* Art 10 Rom-I-VO para 69, Soergel/v. *Hoffmann* Art 31 EGBGB para 10.

law clauses have to be assessed in terms of their validity.³²²⁵ If the choice of law is invalid under both legal orders, no choice of law has been made. If only one choice-of-law clause is valid according to the law applicable in terms of that clause, the selected law applies. However, if both clauses are valid, there is no consensus in terms of article 3(1) of Rome I, and no choice of law has been validly made.³²²⁶

Both views differ merely with respect to the situation where only one choice-of-law clause is valid. In the other situations, there is no valid choice-of-law clause according to both views. Since the invalidity of the underlying agreement itself (e.g., a contract of sale) is not affected in the case of an invalid choice-of-law clause, it is suggested that in situations where the parties' standard terms contain conflicting choice-of-law clauses, the provisions of article 4 of Rome I should apply. The parties should hence be treated as if no choice has been made. Article 4 of Rome I offers a well-balanced and reasonable solution in this regard. If the parties wish to avoid such a situation, they should put a clause in their agreement according to which in the case of conflicting choice-of-law clauses the underlying agreement is suspended until they have found an agreement as to which law shall apply. Whether such a 'protection clause',³²²⁷ that is common in order to find a solution in the case of differing standard terms in B2B contracts,³²²⁸ is reasonable depends on the given case. In most cases, the parties might have no interest in suspending the main contract though and wish rather execute it. Hence, they should probably prefer the solution offered by article 4 of Rome I.

3.2.2 Choice of German law

If the choice-of-law clause determines the application of German law, §§ 305 *et seq.* apply. However, if the object of the contract is the international sale of goods for commercial use, the CISG³²²⁹ might apply. The CISG contains provisions that take precedence over national provisions on the incorporation of standard terms and therefore choice-of-law clauses.³²³⁰

a) Incorporation

Where German law applies pursuant to the choice-of-law clause, the standard terms have to be incorporated according to §§ 305(2), 305b and 305c(1).³²³¹ A choice-of-law clause is not

³²²⁵ Meyer-Sporenberg *RIW* 1989, 347, 348, Schwenzler *IPRax* 1988, 86, 87, Sieg *RIW* 1997, 811, 817.

³²²⁶ Stoffels *AGB-Recht* 87.

³²²⁷ *Abwehrklausel*.

³²²⁸ See discussion on conflicting standard business terms ('battle of forms') in ch 3 para 1.5.

³²²⁹ United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).

³²³⁰ Staudinger/*Magnus* Art 14 CISG para 40. The CISG will be discussed later in this chapter.

³²³¹ For the incorporation of standard business terms see ch 3.

surprising in terms of § 305c(1) if one of the parties is domiciled in Germany. If the supplier's standard terms stipulate that German law shall be applicable, this clause is not surprising *vis-à-vis* a customer who resides abroad.³²³²

It is debatable whether a choice-of-law clause has been validly incorporated if the foreign commercial customer does not react to a commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*) containing such a clause.³²³³ Under article 10(2) of Rome I,³²³⁴ the law of the country in which the other party has its habitual residence is also applicable if it appears from the circumstances that it would not be reasonable to determine the effect of its conduct in accordance with the law specified in article 10(1). In other words, the silence of the customer does not imply acceptance of the choice-of-law clause if the law of its habitual residence does not apply similar principles with respect to a commercial letter of confirmation (e.g., in Austria),³²³⁵ and the customer has a legitimate interest to be protected because it could count on the applicability of the law of its habitual residence. This is regularly not the case if the negotiations took place in another country, or if in previous commercial relations with the supplier, German law was applicable.³²³⁶ Has the choice-of-law clause therefore not validly been incorporated, the applicable law is determined in terms of article 4 of Rome I (applicable law in the absence of choice).³²³⁷

b) Validity

If the pre-formulated choice-of-law clause has been validly incorporated into the contract, a content control under § 307 (general clause) will not take place.³²³⁸ Its validity has already been definitely confirmed by article 3(1) of Rome I, and an additional content control would undermine the Rome-I Regulation.³²³⁹

³²³² WLP/Hau IntGV para 23, Staudinger/*Magnus* Art 3 Rom-I-VO para 176.

³²³³ Such a commercial letter of confirmation is a custom of trade in Germany (i.e., not regulated by law). Offers made over the phone are confirmed by letter by one of the parties in order to have a proof of the agreement. If the recipient does not oppose itself against the content ('silence') of this letter, the agreement is concluded. See Creifelds *Rechtswörterbuch* s.v. 'Bestätigungsschreiben'.

³²³⁴ **Article 10(2) of Rome I:** 'Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.'

³²³⁵ See OLG Karlsruhe *NJW-RR* 1993, 567 (568), OLG Munich *IPRax* 1991, 46 (49).

³²³⁶ Staudinger/*Hausmann* Art 10 Rom-I-VO para 107 *et seq.*

³²³⁷ Stoffels *AGB-Recht* 87.

³²³⁸ WLP/Hau IntGV para 22, MüKo/*Martiny* (2007) Art 31 EGBGB para 23.

³²³⁹ Stoffels *AGB-Recht* 88.

3.2.3 Reference to foreign law

If the choice-of-law clause refers to foreign (i.e., not German) law, this law is applicable. In B2B contracts for the international sale of goods, the CISG has to be considered since this convention contains overriding rules as regards the incorporation of standard terms, which also concerns pre-formulated choice-of-law clauses.³²⁴⁰

a) Incorporation

Pursuant to articles 3(5) and 10(1) of Rome I, the incorporation of a choice-of-law clause is assessed by applying the foreign legal system to which the clause refers.³²⁴¹

As discussed above, under article 10(2) of Rome I, also the law of the consumer's habitual residence might apply in certain cases. In this regard, only those foreign provisions are applicable that concern the consent to the choice of law. For consumers in Germany, the provisions on incorporation set out in §§ 305(2) and 305c(1) are therefore applicable (if the conditions of article 10(2) of Rome I are met). Article 10(2) of Rome I requires that it must appear from the circumstances that it would not be reasonable to determine the effect of the consumer's conduct in accordance with the determined law according to paragraph 1 of the same provision. This condition is regularly only met in international distance selling agreements where a law has been selected that the other party does and needs not to know.³²⁴²

b) Validity

Content control of the choice-of-law clause does not take place under the foreign law since the same principles as for a clause stipulating the application of German law apply.³²⁴³

3.3 German standard business terms legislation and the CISG

Contrary to Germany, South Africa is not a contracting State of United Nations Convention on Contracts for the International Sale of Goods (CISG). Despite this fact, a short overview of the implications of the CISG on B2B contracts should complete the discussion of this chapter.

3.3.1 Scope of application of the CISG

In B2B contracts for the international sale of goods, the CISG is to be considered. According to article 1(1) CISG, the Convention applies to contracts of sale of goods between parties whose places of business are located in different countries. It is sufficient that the country whose law

³²⁴⁰ Staudinger/*Magnus* Art 14 CISG para 42.

³²⁴¹ BGH *NJW* 1994, 262.

³²⁴² Staudinger/*Hausmann* Art 10 Rom-I-VO para 107 *et seq.*

³²⁴³ Stoffels *AGB-Recht* 89. See discussion above.

applies in terms of the choice-of-law clause is a contracting State of the CISG (article 1(1) lit. b) CISG), or that the places of business of both parties are located in countries that are both signatory of the CISG (article 1(1) lit. a) CISG).³²⁴⁴

The CISG provisions take precedence over national law, but only to the extent that the CISG contains exhaustive provisions in the given area.³²⁴⁵ Questions concerning matters governed by this Convention which are not expressly regulated in it must be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (article 7(2) CISG). The law applicable under the rules of private international law is set out in articles 3 and 4 of Rome I.

The CISG governs only the formation of the contract and the extent of the parties' rights and obligations (article 4(1) CISG). This includes questions of liability and of proof.³²⁴⁶

The national law thus provides for rules concerning the validity of the contract (including standard terms control),³²⁴⁷ capacity, representation, prescription and questions of ownership.³²⁴⁸

3.3.2 Incorporation of standard terms according to the CISG

Since articles 14 to 24 CISG contain exhaustive provisions for the formation of the contract, the application of the German incorporation provisions, such as § 305(2) is excluded.³²⁴⁹ Hence, the conditions for the incorporation of standard terms are exclusively governed by the CISG.³²⁵⁰ The rules for the non-incorporation of surprising clauses must be determined by national law though since they concern the question of the validity of specific contract clauses.³²⁵¹

Since the CISG does not provide for any rules concerning the incorporation of pre-formulated contract clauses, article 14 *et seq.* CISG (formation of the contract) apply. Hence, the standard

³²⁴⁴ Stoffels *AGB-Recht* 89.

³²⁴⁵ Staudinger/*Magnus* Before Art 1 *et seq* CISG para 1.

³²⁴⁶ Staudinger/*Magnus* Art 4 CISG paras 41 and 63.

³²⁴⁷ Articles 4 lit. a) and 5 CISG.

³²⁴⁸ Article 4 lit. b) CISG. Stoffels *AGB-Recht* 90.

³²⁴⁹ WLP/*Hau* IntGV para 72.

³²⁵⁰ Staudinger/*Magnus* Art 14 CISG para 40, with further references. See also CISG-AC Opinion No. 13 (1) *Inclusion of Standard Terms under the CISG*, available at <https://www.cisgac.com/cisgac-opinion-no13>.

³²⁵¹ Staudinger/*Magnus* Art 14 CISG para 42. In this regard, see Eiselen *Control of Unfair Standard Terms and CISG* 166 and 169 *et seq* and Eiselen 2011 *PELJ* 3. See also CISG-AC Opinion No. 13 (1) *Inclusion of Standard Terms under the CISG* and Comment A3, available at <https://www.cisgac.com/cisgac-opinion-no13>.

terms must be part of an offer in the sense of article 14 CISG, which has to be assessed by applying the interpretation provision of article 8 CISG.³²⁵² The other party (buyer) must have the occasion to take reasonable notice of the standard terms.³²⁵³ This is regularly the case where the supplier refers explicitly to its standard terms, and the latter are drawn up in a language the other party can understand.³²⁵⁴ Furthermore, the recipient must agree to the standard terms (article 18 CISG). Silence, e.g., concerning a commercial letter of confirmation, is not sufficient,³²⁵⁵ unless the parties are bound by any usage to which they have agreed or by any practices which they have established between themselves.³²⁵⁶

Article 19 CISG³²⁵⁷ contains rules for the incorporation of colliding standard terms. If the standard terms of one party do not materially alter the terms of the other party, the contract is concluded, whereby the standard terms of the offeree prevail.

³²⁵² For the criteria of interpretation see BGH *NJW* 2002, 370 (371). **Article 8 CISG:** '(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.'

³²⁵³ BGH *NJW* 2002, 370 (371). See also CISG-AC Opinion No. 13 (3) *Inclusion of Standard Terms under the CISG*, available at <https://www.cisgac.com/cisgac-opinion-no13>.

³²⁵⁴ BGH *NJW* 2002, 370 (371), Staudinger/*Magnus* Art 14 CISG para 41, with further references. See also CISG-AC Opinion No. 13 (6) *Inclusion of Standard Terms under the CISG*, available at <https://www.cisgac.com/cisgac-opinion-no13>. See also Eiselen 2011 *PELJ* 4 *et seq* (with further references) for the presentation of the three distinct approaches the courts have developed concerning the availability of standard terms: 1. Strict approach which requires that the standard terms must be made available to the other party at the time of contracting, Eiselen correctly argues (at 12) that this approach - that is stricter than the German domestic law - does neither correspond to domestic German nor to international commercial practice which generally accepts that the text of the standard terms will or should be available at the time of contracting. Besides, in the modern world with its various means of communication, the buyer can make enquiry about the standard terms or protest their inclusion at the time of contracting; it is not more difficult to do so in international trade than it is in a domestic contract (at 13). 2. Moderate approach according to which a clear reference to the inclusion of the terms is sufficient. 3. Lenient approach that allows the inclusion of the standard terms even after the conclusion of the agreement. Eiselen correctly argues that this approach is unacceptable since a party cannot add unilaterally additional terms to the contract after it has been concluded. If one party insisted on additional terms, this would amount to breach of contract (at 234).

As to the language in which the standard terms are written, Eiselen legitimately asserts that it makes no practical difference if they are written in a language that the other party does not understand if the latter does not read them or require a copy of the standard terms; the language in which they are formulated becomes entirely immaterial then. The other party then obviously has no interest in obtaining the wording of the terms and has also not objected to their inclusion. Hence, it has made the impression that it has assented to the standard terms (at 16 and 17). What is more, it is submitted that in international sales, business people can be expected to be aware of the existence of standard terms and to require a translation in a language they understand.

³²⁵⁵ **Article 18(1) CISG:** 'A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.'

³²⁵⁶ Article 9(1) CISG. Staudinger/*Magnus* Art 19 CISG para 26.

³²⁵⁷ **Article 19 CISG:** '(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer

If the terms of both parties differ materially, which is a recurrent situation, two theories apply. According to one view, the alleged acceptance is considered a new offer which is accepted when the contract is executed (so-called 'last shot rule').³²⁵⁸ The other opinion argues that the contradicting standard terms neutralise each other and are replaced by the legal provisions ('remaining validity solution').³²⁵⁹

Although the second view corresponds to the solution presented above as regards colliding choice-of-law clauses, it is submitted that in the context of the CISG, article 19(1) contains a provision that excludes the application of the last shot rule (which is referred to as 'theory of the last word' applied by German courts). Article 19(1) CISG unmistakably provides that '[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter offer.' The fact that paragraph (2) contains the phrase 'which do not materially alter the terms to the offer' points out that paragraph (1) applies to situations where the terms materially differ from the terms of the other party. It is therefore suggested that the 'remaining validity solution' is *contra legem*.

3.3.3 Content control

Content control of standard business terms is a question of the 'validity of the contract or of any of its provisions' in terms of article 4 2nd sent. lit. a) CISG, for which the Convention does not provide any rules. Therefore, the national provisions that apply in terms of the private international law rules are applicable. Under articles 3 and 4 of Rome I, the content control set out in § 307 (general clause) applies if German law is applicable.³²⁶⁰

3.3.4 Exclusion of the application of the CISG in standard terms

Pursuant to article 6 CISG, the parties may exclude the application of the CISG or derogate from or vary the effect of any of its provisions.³²⁶¹ This provision expresses the principle of party autonomy which permits the parties to exclude the application of the CISG in whole or

which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.'

³²⁵⁸ The English term is also used in German law. MüKo HGB/*Ferrari* Art 19 CISG para 15, Karollus *UN-Kaufrecht* 70 *et seq.*

³²⁵⁹ *Restgültigkeitslösung*. Staudinger/*Magnus* Art 19 CISG para 20 *et seq.*, with further references.

³²⁶⁰ Stoffels *AGB-Recht* 91.

³²⁶¹ Staudinger/*Magnus* Art 6 CISG para 1.

in part at the time or after the conclusion of the agreement.³²⁶² The parties can exclude the application of the CISG expressly or impliedly. If a contract contains a choice-of-law clause in favour of the law of a CISG country, the application of the CISG is not impliedly excluded.³²⁶³ Hence, for the exclusion of the CISG, the insertion of an express clause is recommended.³²⁶⁴

4. Conclusion

Since the definition of standard business terms of § 305(1) is very wide and includes all kinds of pre-formulated clauses, it is useful to keep the rationale of the provision in mind in order to restrict the application of § 305 *et seq.* to cases where the protective purpose of this provision is affected. The enquiry concerns the individual clauses of the given agreement, but not the contract as a whole.

Standard terms are contract clauses which are *intended* to govern the contract. Hence, also non-incorporated clauses or those who eventually do not become part of the contract are qualified as standard clauses. On the other hand, contracts of which the content has been established by law do not form part of the standard terms enquiry.

As the protection of §§ 305 *et seq.* should not depend on random factors, the BGH applies these provisions by analogy to unilateral legal acts. Where the user makes a unilateral declaration to the consumer's detriment, e.g., by deviating from legal requirements, §§ 305 *et seq.* also apply.

With regard to the qualification of bond terms for securities, the BGH correctly argues that §§ 305 *et seq.* are applied in a restricted and modified manner. The factual circumstances of the issuance and the idiosyncrasies of such terms speak for this view.

For the qualification as pre-formulated standard terms, the actual content of the formulation is significant. Where the consumer has a real choice between several options, the clause cannot be qualified as pre-formulated.

³²⁶² CISG-AC Opinion No. 16 (1) *Exclusion of the CISG under Article 6*, available at <https://www.cisgac.com>.

³²⁶³ BGH *NJW* 1997, 3309 (3310); 1999, 1259 (1260); Staudinger/*Magnus* Art 6 CISG para 24, with further references.

³²⁶⁴ Stöffels *AGB-Recht* 91. Pursuant to **art 6 CISG**, generally, a clear intent to exclude: (a) should be inferred, for example, from: (i) express exclusion of the CISG; (ii) choice of the law of a non-Contracting State; (iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application. (b) should not be inferred merely from, for example: (i) the choice of the law of a Contracting State; (ii) choice of the law of a territorial unit of a Contracting State.

A clause is pre-formulated for a multitude of contracts (i.e., in at least three cases) if the user has such intention. In consumer contracts, the standard terms enquiry applies to pre-formulated contracts even if they are intended only for non-recurrent use on one occasion.

By the condition of 'presentation' of contract terms, the legislator highlights their unilateral imposition by the user. Already an indirect imposition suffices.

The use of a model contract drafted by the user's professional association or clauses stemming from a lawyer's contract sample are open to scrutiny in terms of §§ 305 *et seq.* Under § 310(3) no. 1, standard terms are deemed to have been presented by the entrepreneur, unless the consumer introduced them. In cases where both parties require independently from each other the application of the same standard terms, e.g., the VOB/B, §§ 305 *et seq.* are not applicable. The reason is that it is not possible to determine the parties' roles as user or other party.

The irrelevant circumstances enumerated in § 305(1) 2nd sent. merely have a clarifying function. A negotiation in detail under § 305(1) 3rd sent. should be assumed where the parties are both able and willing to modify certain terms and finally decide not to change them because the user does not abuse its stronger position. The BGH applies a high standard for a 'negotiation in detail' (*Aushandeln*). § 305(1) 3rd sent. also applies to B2B contracts. A differentiated solution which considers the specific circumstances of B2B transactions should only be applied in cases where there is no need for protection of the commercial partner (e.g., in M&A agreements).

§ 310(4) contains a number of exceptions from the scope of application. The legislator considered content control in terms of §§ 305 *et seq.* in the law of succession, family law and company law as unnecessary, inappropriate or incompatible. Content control according to § 242 (good faith) remains possible, however. Since associations show some parallels with companies, the BGH also applies here a content control based on the *bona fides* principle.

The scrutiny of employment contracts is not excluded from content control anymore, unlike collective agreements and private-sector work agreements or public-sector establishment agreements. In order to avoid an indirect content control of collective agreements, also clauses in employment contracts that refer to collective agreements are excluded from content control.

Because of the special role of the VOB/B, which are strictly speaking standard terms, jurisprudence always treated them differently if they were applied as a whole because they

offer a fair balancing between the parties' interests due to negotiations of the various interest groups involved.

As businesses and public entities do not have the same need for protection as individuals, a reduced protection standard is applied. The incorporation requirements, the prohibitions of §§ 308 and 309 or the extension of the international scope of application are therefore not applicable. The valuations of §§ 308 and 309 can be considered within § 307 though.

The object of content control and the standard for the assessment of an unreasonable disadvantage are modified for consumer contracts (§ 310(3) no. 1 and 2). This provision is not limited to specific contract types so that consumption of the given item is not necessary, unlike for the Unfair Terms Directive. Employees are also regarded as consumers.

Whether German clients can benefit from the high protection standard of §§ 305 *et seq.* in international contracts depends on the German private international law. The Rome-I Regulation offers an elaborate mechanism to identify the applicable law. It unifies the varying regimes of the Member States so that the courts within the EU must apply the same law. In this regard, the ECJ has developed guidelines for the Brussels I Regulation which might also be of assistance for Rome I, especially for e-commerce contracts. In terms of the favourability principle, the BGB consumer protection provisions only apply if they are more favourable to the consumer than the provisions of the selected law.

Article 46b EGBGB transposes the conflict-of-law rules of the EU consumer protection directives into German law but is more extensive in that it applies to all consumer contracts. This provision is significant for choice-of-law clauses that provide that the law of a non-member of the EU or the EEC shall be applicable. The provision also applies to consumers living outside the EU/EEC.

Article 46b(1) EGBGB is a reference to domestic law. For all areas that are not covered by 'the provisions of this particular state that have been adopted in implementation of the consumer protection directives' the law that the parties have selected still applies under article 46b(1) EGBGB. If the directive offers higher protection than the selected law, the directive's standard should apply. Hence, a 'favourability comparison' between the law of the selected non-EU/EEC law and the law of the country with the closest connection to the contract is necessary in order to avoid a deterioration of the consumer's situation. Where the parties have chosen the application of a particular law for an employment contract, a comparison is also necessary

under article 8(2) 1st sent. of Rome I. Otherwise, the contract is generally governed by the law of the country in which or from which the employee habitually carries out his work in performance of the contract. If no connection to the selected law exists, except of the selection itself, Rome I provides that the *ius cogens* of the country with the closest connection shall apply.

Where the standard terms of both parties contain contradicting choice-of-law clauses, article 4 of Rome I should apply. This means that the parties should be treated in this case as if no choice has been made.

If the parties selected the application of German law, the standard terms have to be incorporated into the contract. In B2B agreements, silence of the other party after reception of a commercial letter of confirmation does not imply acceptance of the choice-of-law clause if the law of the habitual residence of the other party does not have a similar mechanism for B2B relations. The validity of the choice-of-law clause is then determined by article 4 of Rome I.

In terms of B2B contracts, the CISG provisions take precedence over national law to the extent that the CISG contains exhaustive provisions in the given area. The law applicable to the other areas has to be determined by the private international law. The conditions for the incorporation of standard terms are exclusively governed by the CISG, except for the rules for the non-incorporation of surprising clauses since these concern the validity of the contract. Article 19 CISG provides for rules concerning the incorporation of colliding standard terms. In this context, the 'last shot rule' should apply. Content control is governed by national legislation which has to be determined by the private international law rules, and not by the CISG. The parties can also expressly or impliedly exclude the application of the CISG.

CHAPTER 3 – INCORPORATION OF STANDARD TERMS INTO THE CONTRACT

1. Incorporation agreement (§ 305(2)) or framework agreement (§ 305(3))

1.1 General remarks

a) Content and purpose of § 305(2)

Standard terms have, despite their often normative 'design' and their general purpose to regulate the legal relationship between the parties, no direct normative effect since they are no 'readily available legal order'³²⁶⁵ but 'contract terms' (§ 305(1) 1st sent.) that have been drafted by a party. Only if both parties agree on their application, they become part of the contract.³²⁶⁶

§§ 305(2) and (3)³²⁶⁷ set out the minimal conditions for the use of standard terms in B2C contracts. In order to be valid, and except for paragraph (3) concerning framework agreements, the user must explicitly refer the other party to the standard terms and the other party must have the opportunity to take notice of their content. Both conditions must exist at the time of the conclusion of the agreement.³²⁶⁸ In addition, the other party must agree to their applying.

With these provisions, the legislator aims to improve the protection of the user's clients as at the moment of the conclusion of the contract, both parties' wills must be concordant. This is only possible where the user discloses its standard terms and refers to them. Only then, the client is able to assess the scope of its declaration and protect itself against unfair conditions.³²⁶⁹ On the other hand, the legislator was aware that too harsh conditions for the incorporation, especially for mass contracts, would be an obstacle for legal transactions.³²⁷⁰ Hence, too strict conditions for the incorporation which hamper the legitimate rationalising effect, for instance, must be avoided. When interpreting § 305(2) and (3), one has to ask the question of whether

³²⁶⁵ 'Fertig bereitliegende Rechtsordnung' is a formulation often used by the courts. See, e.g., BGH NJW-RR 1997, 1253.

³²⁶⁶ Wendland in: Staudinger/Eckpfeiler E para 27.

³²⁶⁷ In terms of § 305(2), '[s]tandard business terms only become a part of a contract if the user, when entering into the contract, 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and 2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents, and if the other party to the contract agrees to their applying.' § 305(3) provides that '[t]he parties to the contract may, while complying with the requirements set out in subsection (2) above, agree in advance that specific standard business terms are to govern a specific type of legal transaction.'

³²⁶⁸ Stoffels *AGB-Recht* 94.

³²⁶⁹ BT-Drs. 7/3919 at 17.

³²⁷⁰ BT-Drs. 7/3919 at 13 and 17.

the conditions for the incorporation are reasonably justified in terms of customer protection.³²⁷¹ For certain contracts, a 'functional reduction' of § 305(2) must thus take place.³²⁷²

Contrary to the German regime, the South African legislator chose to apply similar incorporation requirements only for notices to consumers limiting the supplier's risk or liability, for instance.³²⁷³ These incorporation requirements³²⁷⁴ do therefore not apply in a general manner to South African terms and conditions. The given notice must be drawn to the attention of the consumer in a manner and form that satisfies certain formal requirements, i.e., the notice must be written in plain language and the fact, nature and effect of the notice must be drawn to the attention of the consumer in a conspicuous manner and form. Furthermore, the consumer must be given an adequate opportunity to receive and comprehend the provision or notice.³²⁷⁵

b) Relation between § 305(2) and general contract law

The incorporation of standard terms must be seen against the backdrop of the general provisions for contracts contained in the BGB. Hence, § 305(2) presumes the application of §§ 104 to 185 on legal transactions and contains only some small modifications. The fact that the user has to refer the other party *explicitly* to the standard terms in terms of § 305(2) no. 1 excludes the consideration of the surrounding circumstances of the conclusion of the agreement when assessing the incorporation of standard terms. It is thus not possible to assume, according to §§ 133³²⁷⁶ and 157,³²⁷⁷ that the other party agreed to the incorporation of the standard terms by the mere fact that it agreed to the conclusion of the contract because the intent to conclude a contract must include the incorporation of the given terms.³²⁷⁸ What is more, the minimal conditions for the conclusion of a contract under § 145 *et seq.* are modified in that it is not sufficient that the other party agrees to the application of certain terms without being informed

³²⁷¹ UBH/*Ulmer and Habersack* § 305 para 102 argues that a cautious interpretation closely related to the general contract law of the BGB is therefore necessary.

³²⁷² The BGH decided that for bond terms for securities a modified application of the standard business terms legislation is necessary in order to ensure a functional trading of securities (BGH *NJW* 2005, 2917). This presumes a standardised content of securities. If the content of a securitised right would depend on the circumstances of their acquisition, their transferability would not be possible. An implied incorporation of bond terms is therefore sufficient. See Stoffels *AGB-Recht* 42. Ekkenga *ZHR* 160 (1996) 59 *et seq* argues that the unrestricted application of §§ 305 *et seq* BGB for bond terms is not possible because standard business terms legislation falls short of the factual circumstances of the issuance of bonds and that bond terms cannot be assessed for the lack of a normative control standard. In addition, the assessment of standard terms does not consider the collective relations of the market.

³²⁷³ See s 49(1) in conjunction with subsection (3) to (5) CPA.

³²⁷⁴ As regards the incorporation requirements in South African law, see Part I ch 2 paras 3 and 4.

³²⁷⁵ See s 49 CPA.

³²⁷⁶ § 133 concerns the interpretation of a declaration of intent.

³²⁷⁷ § 157 concerns the interpretation of contracts.

³²⁷⁸ Stoffels *AGB-Recht* 95.

of their content beforehand. Thus, the legislator imposes in § 305(2) no. 2 that the user gives the other party the opportunity to take notice of their content.³²⁷⁹

c) Incorporation within the order of assessment of standard terms

The incorporation control takes place after the enquiry of the scope of application of §§ 305 *et seq.*, and before the actual content control. First, the positive minimal standards of §§ 305(2) and (3) have to be assessed before the negative incorporation conditions of § 305c(1) (surprising and ambiguous clauses) and § 305b (priority of individually agreed terms) are examined. The courts can deviate from this logical order if procedural economy requires so.³²⁸⁰ If, for instance, a standard clause obviously infringes one or several provisions set out in §§ 308 or 309, it would be idle to undergo a lengthy discussion on its incorporation. In institutional actions, this issue does not exist since there, the manner in which the individual contract has been concluded is irrelevant.³²⁸¹

1.2 Incorporation agreement

The incorporation conditions for standard clauses under § 305(2) applies to all kinds of standard terms³²⁸² and have to be fulfilled cumulatively.³²⁸³ Despite this fact, the BGH is of the view that in form contracts,³²⁸⁴ the customer's signature at the end of an agreement includes his or her agreement to the contract as a whole.³²⁸⁵ Since the AGBG came into force, it is generally accepted however that also form contracts contain standard clauses and therefore have to be assessed in terms of §§ 305 *et seq.*³²⁸⁶ The BGH's view according to which this provision does not apply to form contracts must thus be dismissed. The argument that the standard clauses are already integrated into the contract, that therefore the customer has the opportunity to take notice of their contents, and that he or she agrees to them by signing the contract is not sufficient for a non-application of § 305(2) to form contracts.³²⁸⁷ What is more, only the application of

³²⁷⁹ Stoffels *AGB-Recht* 96.

³²⁸⁰ Von Hoyningen-Huene *Inhaltskontrolle* § 9 AGBG para 73. See also BGH *NJW* 1989. 222 (223).

³²⁸¹ Stoffels *AGB-Recht* 96.

³²⁸² Stoffels *AGB-Recht* 96.

³²⁸³ Rüthers and Stadler *BGB-AT* 251.

³²⁸⁴ Form contracts are pre-formulated contracts, irrespective of whether all parts of the contract, the main obligations or merely ancillary agreements are pre-formulated. Typical form contracts are rental agreements of housing companies, agreements for the purchase or hire of vehicles, brokerage agreements, distant learning contracts or distribution agreements. See UBH/Ulmer and Habersack § 305 para 66 and Creifelds *Rechtswörterbuch* s.v. 'Vertrag' (2).

³²⁸⁵ See BGH *NJW* 1988, 2465 (2466 *et seq.*); 1995, 190. See also UBH/Ulmer and Habersack § 305 para 102.

³²⁸⁶ UBH/Ulmer and Habersack § 305 para 66.

³²⁸⁷ Stoffels *AGB-Recht* 96.

§ 305(2) affords the possibility of a transparency control. Besides, the BGH's view requires to apply (the presumably inapplicable) § 305(2) fractionally and inconsistently.³²⁸⁸

By the explicit reference to standard terms and the opportunity to take notice of them in an acceptable manner, the legislator wants to exclude that standard clauses are foisted on the consumer.³²⁸⁹ This risk also exists for form contracts after all.

a) Reference to standard terms

aa) Explicit reference

In general, in terms of § 305(2) no. 1, the user has to refer the other party to its standard terms explicitly.³²⁹⁰ By this 'formalisation'³²⁹¹ of the incorporation of the terms, a different interpretation of what the user has declared *vis-à-vis* the consumer is excluded. A reference that is not explicit thus has no legal meaning. The rationale of such an explicit reference is that the consumer should be informed that the user's standard terms will significantly govern the contract and that he or she has the opportunity to take notice of them.³²⁹²

The user's reference to its standard terms is only explicit if it is unequivocal and clearly understandable for the consumer, regardless of whether it is oral or written.³²⁹³ The reference must be related to specific standard terms. If the user has several versions of standard terms in circulation, it must individualise the ones that are valid *vis-à-vis* the consumer, for instance by handing out a copy.³²⁹⁴ If it is not clear which standard terms should apply, the contract comes into force without any standard provisions. In any event, the consumer cannot be expected to 'interpret' which standard clauses should apply.³²⁹⁵

When the contract is concluded orally or by phone, which is regarded as a conclusion between persons that are present in terms of § 147(1),³²⁹⁶ the user generally has to refer orally to its standard terms. In order to ensure a smooth transaction, one should not place too many

³²⁸⁸ Heinrichs *NJW* 1995, 1396.

³²⁸⁹ *Wendland* in: Staudinger/Eckpfeiler E para 28.

³²⁹⁰ Rüthers and Stadler *BGB-AT* 252, Brox and Walker *BGB-AT* 110.

³²⁹¹ Also the BGH refers to a 'formalisation' of the incorporation of standard terms in BGH *NJW-RR* 1987, 112. This formalisation is no formal requirement in the sense of § 125 (voidness resulting from a defect of form) though, which is the view of Schlosser in Staudinger/*Schlosser* (2006) § 305 para 102. The formalisation in terms of § 305(2) does not require a certain form, as also an oral reference suffices, but merely intensifies the meaning of it. In addition, the legal consequences of a violation of this incorporation requirement is set out in § 306, and not in § 125. See *WHL/Wolf* § 2 AGBG para 1.

³²⁹² BGH *WM* 1986, 1194 (1196).

³²⁹³ BGH *WM* 1986, 1194 (1196).

³²⁹⁴ *WHL/Wolf* § 2 AGBG para 8.

³²⁹⁵ Stoffels *AGB-Recht* 97.

³²⁹⁶ § 147(1): 'An offer made to a person who is present may only be accepted immediately. This also applies to an offer made by one person to another using a telephone or another technical facility.' See Schmidt *BGB-AT* 419.

obstacles in this regard. A 'gesture' of the user by which the other party can clearly understand that the standard terms should apply, is sufficient. This applies, for example, where the user personally hands over its standard terms to its client. It is however not sufficient that the standard terms are posted in the user's premises.³²⁹⁷ In the case of a written contract, the explicit reference to the standard clauses must be included in the offer. This is the case, e.g., where on the front page, above the field where the place, date and signature must be filled in, the sentence 'The standard terms printed on the back of this page apply' is inserted.³²⁹⁸ On the other hand, it would not be sufficient to print the standard terms on the back of the page without any reference on the front page.³²⁹⁹ If the agreement is concluded via the internet, the order form or the screen page before must contain a clearly visible reference so that the client can see it even when superficially reading the page. This can be done either by linking the standard terms text with the offer or by an unambiguous reference at a place that the customer has to pass in order to conclude the contract.³³⁰⁰ Also in other contracts that are concluded between persons that are absent in terms of § 147(2),³³⁰¹ the user must ensure that the other party can take notice of its standard terms, e.g., by sending them by post.³³⁰²

bb) Reference by posting a notice

§ 305(2) no. 1 2nd var. makes an exception from the explicit reference where this is possible only with disproportionate difficulty. In this case, the user is allowed to post a clearly visible notice at the place where the contract is entered into.³³⁰³ The legislator inserted this possibility for every-day transactions where the application of standard terms is to be expected, and where an explicit reference would be an obstacle or simply not possible,³³⁰⁴ for instance, in mass contracts that are often concluded in an implied and automated manner without any personal contact³³⁰⁵ (e.g., the use of a deposit box at the train station by inserting a coin).³³⁰⁶ Also for every-day transactions that do not have any significant monetary value, where an explicit reference would be possible but an obstacle for a smooth transaction, the exception of § 305(2)

³²⁹⁷ WHL/*Wolf* § 2 AGBG para 8.

³²⁹⁸ BGH *NJW-RR* 1987, 112.

³²⁹⁹ BGH *NJW-RR* 1987, 112, UBH/*Ulmer and Habersack* § 305 para 129.

³³⁰⁰ OLG Hamburg *WM* 2003, 581 (583).

³³⁰¹ § 147(2): 'An offer made to a person who is absent may be accepted only until the time when the offeror may expect to receive the answer under ordinary circumstances.'

³³⁰² Schmidt *BGB-AT* 419.

³³⁰³ Rüthers and Stadler *BGB-AT* 252.

³³⁰⁴ BT-Drs. 7/3919 at 18.

³³⁰⁵ Palandt/*Heinrichs* § 305 para 29.

³³⁰⁶ LG Essen *VersR* 1995, 955.

no. 1 2nd var. applies³³⁰⁷ (e.g., public swimming-pools or car-wash facilities).³³⁰⁸ Apart from that, the circumstances of the conclusion of the contract must be considered. Hence, the BGH accepted the reference to auction conditions by their posting at the premises where the auction took place.³³⁰⁹

The posting of the notice is only clearly visible if the client can see it without further ado.³³¹⁰ This presumes a certain visual design and the posting at a visible place.³³¹¹ The post merely has to replace the explicit reference to the standard terms, and does not need to contain them.³³¹² It is hence sufficient to post the following notice at the entrance of a car-wash facility in a clearly visible manner: 'Our standard business terms apply to all our contracts. These are available at the till booth'.³³¹³

b) Opportunity to take notice in an acceptable manner

In terms of § 305(2) no. 2, the standard terms user must give the other party, in an acceptable manner, the opportunity to take notice of their contents. This obligation goes beyond the general principles of the contract law set out in the BGB.³³¹⁴ In any event, the entire standard provisions must be made available to the client at the latest when concluding the contract. It is not relevant whether the latter actually takes notice of them or not.³³¹⁵

If the parties are both present when concluding the agreement, it is generally accepted that the user submits its standard terms to the client or offers at least their submission.³³¹⁶ Stoffels legitimately averts that this interpretation is not mandatory and might create an unnecessary obstacle for a smooth transaction.³³¹⁷ The client is already aware of the existence of the user's standard terms by the user's explicit reference to them or by the clearly visible posting of the notice on the user's premises. These circumstances show the user's readiness to make the standard terms available to the customer, and the client can thus be expected to ask for a copy.

³³⁰⁷ BGH NJW 1985, 850, UBH/*Ulmer* § 305 para 139.

³³⁰⁸ OLG Hamburg *DAR* 1984, 260 (261).

³³⁰⁹ BGH NJW 1985, 850.

³³¹⁰ Stoffels *AGB-Recht* 99.

³³¹¹ See discussion on plain and understandable language in Part I ch 2 para 3.2 a).

³³¹² UBH/*Ulmer and Habersack* § 305 para 142.

³³¹³ Stoffels *AGB-Recht* 99.

³³¹⁴ Stoffels *AGB-Recht* 99.

³³¹⁵ Stoffels *AGB-Recht* 99.

³³¹⁶ BGH NJW 1990, 715 *et seq.*, Staudinger/*Schlosser* (2006) § 305 para 145.

³³¹⁷ UBH/*Ulmer and Habersack* § 305 para 148.

The courts are stricter in this regard though and require that the VOB/B be issued to the other party in order to achieve their incorporation in the contract.³³¹⁸

For contracts that are concluded in writing, and where the parties are not both present when entering into the contract, the standard terms must be sent to the other party so that it can take notice of their contents. This can be done simultaneously with the offer. It should be sufficient if the customer is in possession of the supplier's catalogue or prospectus that contains the user's standard terms.³³¹⁹ It does not suffice though if the standard terms are available on the user's premises although the conclusion of the agreement takes place elsewhere.³³²⁰ The same applies to the user's notice that its standard terms can be purchased in a bookshop.³³²¹

The incorporation of standard terms in contracts concluded over the phone causes some problems. This applies above all for teleshopping where products are offered on television, the client has to contact a call centre to order them and pays by credit card. It would obviously not be practical to show the standard terms on the TV screen or to read them to the customer. Therefore, one should not be too strict so that the incorporation requirements do not hamper the conclusion of a contract. It is thus sufficient if the supplier's representative explicitly refers to the incorporation of the standard terms and offers their transmission. If the client does not want to wait with the conclusion of the contract until he or she receives the standard terms, this can be seen as a renunciation of the opportunity to take notice of their content.³³²²

If the contract is concluded via the internet, the standard terms are incorporated into the contract if the client can consult them by clicking on a link on the order page and print them out, if necessary.³³²³

For foreigners that are not able to understand standard terms written in German (although they might speak German), one has to distinguish between several cases. If the language of the contract is not German, the standard terms and the reference (notice) must also be drafted in this language too.³³²⁴ On the other hand, if the parties chose German as their language for the contract, the client accepts German as the contract language and the language in which the

³³¹⁸ BGH *NJW* 1990, 715 *et seq.*, *NJW-RR* 1999, 1246 (1247). VOB/B = Construction Tendering and Contract Regulations, Part B.

³³¹⁹ Staudinger/*Schlosser* (2006) § 305 para 145, UBH/*Ulmer and Habersack* § 305 para 147.

³³²⁰ OLG Saarbrücken *NJW-RR* 2001, 993 (994).

³³²¹ Faust *BGB-AT* 109.

³³²² UBH/*Habersack* § 305 para 149a.

³³²³ BGH *NJW* 2006, 2976 (2977).

³³²⁴ OLG Frankfurt/M. *NJW-RR* 2003, 704, PWW/*Berger* § 305 para 30.

standard terms are drafted. If necessary, the customer must obtain a translation of its own.³³²⁵ For transactions that have significant implications, the transparency requirement of the EU³³²⁶ is only satisfied though if the standard terms are drafted in the client's language.³³²⁷

Moreover, the other party must have the opportunity to take notice of the contents of the standard terms *in an acceptable manner*. This means that an average customer must be able to understand the standard terms. They must be presented in a clear manner and have a volume in proportion to the significance of the transaction, which is an aspect of the transparency requirement.³³²⁸ This is regularly not the case where the reading of standard terms is only possible by using a magnifying glass because of their typographical design (e.g., font size).³³²⁹ Transparency further requires that the user does not use technical terms that make the understanding of the standard terms difficult.³³³⁰ It is arguable if the requirement of 'an acceptable manner' is fulfilled if the standard terms refer to another instrument. Although it is possible to refer to other, general provisions, the user must ensure that its clients are able to take notice of all relevant contractual conditions. Hence, a simple reference to other conditions that are not contained in the submitted standard terms is not sufficient with respect to their incorporation into the contract.³³³¹

The merely 'clarifying addition'³³³² of the standard of reasonableness, according to which the user must also take into reasonable account any physical handicap of the other party that is discernible to the user, applies above all to the visually impaired. Where the user discerns that its client is visually impaired, e.g., because he or she is wearing a yellow armband, the user must offer a visual aid, suggest reading the standard terms loudly or offer a version in embossed printing or braille.³³³³ This provision has been inserted in the context of the modernisation of the law of obligations and aims to help people with handicaps to conclude transactions by themselves. In order to avoid that suppliers simply avoid transactions with disabled customers,³³³⁴ one should construe this provision restrictively. The fact that the 'discernibility'

³³²⁵ BGH NJW 1983, 1489. See also Schäfer JZ 2003, 879 *et seq.*

³³²⁶ Articles 4(2) and 5 of the Unfair Terms Directive. See Palandt/*Grüneberg* § 310 para 26, with further references.

³³²⁷ Palandt/*Heinrichs* § 305 para 40, Stöffels *AGB-Recht* 100.

³³²⁸ OLG Schleswig NJW 1995, 2858 (2859).

³³²⁹ Stöffels *AGB-Recht* 100. See discussion on the plain language requirement of s 22, Part I ch 2 para 3.2 a).

³³³⁰ Rüthers and Stadler *BGB-AT* 254.

³³³¹ BGH NJW 2005, 1183 (1184 *et seq.*); 1990, 3197. See also discussion on the plain and understandable language requirement in Part I ch 2 para 3.2 a).

³³³² This is at least the legislator's view. See BT-Drs. 14/6040 at 150.

³³³³ Stöffels *AGB-Recht* 101.

³³³⁴ Stöffels *AGB-Recht* 101.

and the 'reasonability' were inserted consciously in order to avoid excessive requirements speaks for this view.³³³⁵ Hence, the concrete circumstances of the situation must be considered. It is nonetheless deplorable that the legislator did not include illiterate persons and those who are not able to understand German, although these questions are largely discussed in German society (e.g., in the context of a better inclusion of disabled children in schools).³³³⁶ An application of this provision by analogy is unfortunately not possible because physical, mental or intellectual deficits cannot be regarded as being equal.³³³⁷

c) Relevant moment

The conditions set out in § 305(2) no. 1 and 2 must be met at the moment when the contract is concluded. This means that the user must explicitly refer to its standard terms when making a binding offer (no. 1), and the client must have had the opportunity to take notice of their content before accepting the offer (no. 2).³³³⁸ This is not the case where the notice is only printed on the invoice which has been sent to the client after the conclusion of the contract.³³³⁹ On the other hand, a transaction should not be artificially fragmented so that it is sufficient to hand over the vendor's standard terms at the till, together with the relevant invoice.³³⁴⁰ In this context, it is of importance that the client had the opportunity to take notice of the standard terms before concluding the agreement. If he or she decides not to read them, the standard terms are incorporated into the contract nonetheless. The same applies to tickets on which the standard terms are printed. This is sufficient if the front page contains a corresponding reference.³³⁴¹

If the previously mentioned conditions are not met, the standard terms are not incorporated into the contract.³³⁴² Amended or subsequently valid standard terms must also fulfil the incorporation requirements of § 305(2).³³⁴³ Hence, amended standard provisions are valid if the supplier sends them to the client, and the latter continues the commercial relationship and

³³³⁵ See BT-Drs. 14/6857 at 52.

³³³⁶ See, for instance, 'Inklusion ist keine Utopie' at <http://www.spiegel.de/lebenundlernen/schule/inklusion-warum-behinderte-kinder-regelschulen-besuchen-sollten-a-979079.html>.

³³³⁷ Palandt/*Heinrichs* § 305 para 38. Graf von Westphalen *NJW* 2002, 13 recommends an application by analogy for foreigners that are not able to understand German, and AnwK-Schuldrecht-*Hennrichs* § 305 para 11 argues in favour of an application for illiterate persons. For the above-mentioned reason, these views go too far though.

³³³⁸ Locher *Recht der AGB* 43.

³³³⁹ See BGH *NJW* 1978, 2243.

³³⁴⁰ OLG Hamm *NJW-RR* 1998, 199 (200).

³³⁴¹ MüKo/*Basedow* § 305 para 78, WLP/*Pfeiffer* § 305 para 77, Staudinger/*Schlosser* § 305 para 121, Palandt/*Grüneberg* § 305 para 28. See discussion on the so-called 'ticket cases' in Part I ch 2 para 4 d).

³³⁴² Stoffels *AGB-Recht* 102.

³³⁴³ See KG *NJW-RR* 1994, 1265. UBH/*Ulmer and Habersack* § 305 para 164.

thus impliedly agrees to the new standard terms.³³⁴⁴ Many standard terms already contain a clause in respect to the right of their modification.³³⁴⁵

It is noteworthy that a notice during a previous conclusion of an agreement is not sufficient because standard terms users must refer to them every time they conclude a new contract.³³⁴⁶ This also applies to current business relationships. The only exceptions are agreements concluded in advance under § 305(3) and subsequent and inter-related deliveries within a successive delivery agreement.³³⁴⁷

d) Agreement to the applying of the standard terms by the client

§ 305(2) *in fine* provides that the other party must agree to the applying of the standard terms.³³⁴⁸ This is merely a clarification of the requirement of consensus set out in §§ 145 *et seq.*³³⁴⁹ The client's consent does not need to be proved for every single clause. It is thus sufficient that it covers the contract as a whole.³³⁵⁰ If the contract is concluded via the internet, it is sufficient if the customer agrees to the standard terms by ticking an 'OK-box' after having had access to the terms ('click-wrap').³³⁵¹ A 'browse-wrap', i.e., a notice by which the user agrees to the standard terms by simply using the given site, is not sufficient though.³³⁵² As long as there is no requirement for a specific form, the agreement can be also impliedly expressed. A client who enters a car-wash facility with a clearly visible sign at the entrance on which the supplier's liability is restricted or excluded impliedly agrees to the provider's standard terms by entering the facility.³³⁵³

³³⁴⁴ UBH/Ulmer and Habersack § 305 para 164, Locher *Recht der AGB* 51.

³³⁴⁵ A clause by which the user reserves the right to amend its standard terms without restriction also for existing contracts is disadvantageous for the other party and therefore ineffective. This also applies if the terms are drafted by a third party, e.g., the Construction Tendering and Contract Regulations (VOB) (Staudinger/Schlosser § 305 para 173, Palandt/Heinrichs § 305 para 47). This is also applicable for so-called 'dynamic references' such as 'the standard business terms in their currently valid version apply' (Locher *Recht der AGB* 50). Schlosser is of the view that this clause refers to the standard terms that are valid at the moment of the conclusion of the contract, and not to subsequent versions. Because of the ambiguous formulation, this view must be dismissed though (Staudinger/Schlosser § 305 para 173). On the other hand, standard terms of banks pursuant to which the amendment becomes valid unless the client does not disagree within 6 weeks, and where the customer is informed of this possibility, are valid (UBH/Ulmer and Habersack § 305 para 165).

³³⁴⁶ Staudinger/Schlosser § 305 para 159; BGH NJW-RR 1987, 112 (113).

³³⁴⁷ Locher *Recht der AGB* 43 *et seq.*

³³⁴⁸ Brox and Walker *BGB-AT* 111.

³³⁴⁹ Staudinger/Schlosser § 305 para 159.

³³⁵⁰ Stoffels *AGB-Recht* 103.

³³⁵¹ Maxeiner *Yale J. Int. Law* 166.

³³⁵² Maxeiner *Yale J. Int. Law* 166.

³³⁵³ BGH NJW 1982, 1388 (1389), Staudinger/Schlosser § 305 para 161, Belke *JA* 1988, 479.

On the other hand, the silence of a non-commercial client after reception of an order confirmation in which reference is made to standard terms for the first time is no consent.³³⁵⁴ If the customer accepts the delivery without reservation afterwards, he or she impliedly agrees to the standard terms though, provided that the confirmation fulfils the conditions of § 305(2) no. 1 and 2, the standard terms are enclosed to the order confirmation and the client can be expected to disagree to their applying, if necessary.³³⁵⁵

e) Questions of proof

The burden of proof as to whether the conditions of § 305(2) are met has the party who invokes the incorporation of the given standard terms, i.e., usually the supplier.³³⁵⁶ Problems often arise where the contract has been concluded over the phone. The supplier's instruction to his or her staff to refer systematically to the standard terms or to make them available is regularly not sufficient to prove their incorporation.³³⁵⁷ A clause by which the customer confirms that he has taken notice of the terms and declares that he agrees to their application is ineffective in terms of § 309 no. 12.³³⁵⁸

1.3 Incorporation under facilitated conditions

a) Exceptions under § 305a

Under § 305a,³³⁵⁹ certain standard terms may become part of the contract even though they have not been incorporated according to the requirements set out in § 305(2), provided they meet the requirements of § 305a. This exemption does however not relieve the user from the fact that its counterpart must give its consent to the application of the given standard provisions

³³⁵⁴ BGHZ 18, 212 (215), MüKo/Kramer § 150 para 9.

³³⁵⁵ BGH NJW 1963, 1248, BGHZ 18, 212 (215), MüKo/Basedow § 305 para 84.

³³⁵⁶ BGH NJW 1991, 1750 (1753).

³³⁵⁷ UBH/Ulmer and Habersack § 305 para 167.

³³⁵⁸ Stöffels *AGB-Recht* 104. § 309 no. 12: '[A] provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or b) having the other party to the contract confirm certain facts (...)' is ineffective. See also discussion on s 51(1)(g)(ii) and reg 44(3)(w) CPA in Part I ch 3.

³³⁵⁹ § 305a: 'Even without compliance with the requirements cited in [§] 305 (2) no. 1 and 2, if the other party to the contract agrees to their applying the following are incorporated, 1. the tariffs and regulations of the railways issued with the approval of the competent transport authority or on the basis of international conventions, and the terms of transport approved under the Passenger Transport Act [Personenbeförderungsgesetz], of trams, trolley buses and motor vehicles in regular public transport services, 2. the standard business terms published in the gazette of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway [Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen] and kept available on the business premises of the user, a) into transport contracts entered into off business premises by the posting of items in postboxes, b) into contracts on telecommunications, information services and other services that are provided direct by the use of distance communication and at one time and without interruption during the supply of a telecommunications service, if it is disproportionately difficult to make the standard business terms available to the other party before the contract is entered into.'

in terms of § 145 *et seq.* ('if the other party to the contract agrees to their applying')³³⁶⁰ The other party can give its consent also impliedly, e.g., by accepting the supplier's delivery in the knowledge of its standard terms.³³⁶¹ The following are examples of these exceptions.

aa) Tariffs and regulations of regular passenger transportation services

For the transportation of passengers against a remuneration or in the context of a business by means of tramways, busses or motor vehicles, the provision of the Passenger Transport Act,³³⁶² read with the regulation for the general conditions for the transportation with tramways, buses and regular services with motor vehicles³³⁶³ that was enacted in terms of § 57(1) no. 5 PBefG,³³⁶⁴ are applicable. The regulation mentioned above has normative character, so that §§ 305 *et seq.* are not applicable.³³⁶⁵ Transportation companies can introduce particular conditions deviating from the general conditions with official approval in terms of § 39(6) PBefG, which fall under §§ 305 *et seq.* though.

For these particular conditions, § 305a no. 1 provides for facilitated incorporation which concerns the tariffs and regulations of the railways issued with the approval of the competent transport authority. This means that § 305(2) no. 1 and 2 do not apply in these cases. On the other hand, the parties still have to agree on the validity of these conditions, even impliedly, because only the incorporation of the terms has been facilitated.³³⁶⁶

The rationale behind this facilitated incorporation is that the previously mentioned tariffs and regulations are published in official gazettes, and that therefore the strict incorporation conditions of § 305(2) are not necessary for the protection of the other party to the contract.³³⁶⁷

bb) Standard terms for the posting of items

§ 305a no. 2 lit. a) provides for facilitated incorporation for transport contracts of the Deutsche Post AG and its competitors if the contracts have been concluded by posting items in post-boxes (i.e., the delivery of letters, parcels etc.). The given standard terms must have been published in the gazette of the Federal Network Agency for Electricity, Gas,

³³⁶⁰ *Wendland* in: Staudinger/Eckpfeiler E para 30, Stoffels *AGB-Recht* 104.

³³⁶¹ Graf von Westphalen *NJW* 2002, 14 *et seq.*

³³⁶² Personenbeförderungsgesetz (PBefG).

³³⁶³ Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen of 27/02/1970, BGBl. I at 230.

³³⁶⁴ PBefG = Personenbeförderungsgesetz (Passenger Transportation Act).

³³⁶⁵ Stoffels *AGB-Recht* 105.

³³⁶⁶ Stoffels *AGB-Recht* 105.

³³⁶⁷ BT-Drs. 7/3919 at 42. See also BGH *NJW* 1981, 569.

Telecommunications, Post and Railway³³⁶⁸ and kept available on the business premises of the user. The rationale of this provision is that the user of these standard terms is not able to refer to them and give the other party the opportunity to take notice each time it delivers an item. On the other hand, if a customer posts an item at the post office counter, § 305(2) still applies.³³⁶⁹ In addition, the rights and obligations of providers of postal services and their final customers are normatively regulated in the Post Service Regulation.³³⁷⁰ Agreements deviating from this regulation to the client's disadvantage are void in terms of § 1(2) of the regulation.³³⁷¹

cc) Standard terms for certain telecommunication services

§ 305a no. 2 lit. b) also refers to the manner in which the contract is concluded ('by the use of distance communication'). This provision is applicable for contracts on telecommunications, information services and other services that are concluded directly by means of distance communication³³⁷² and simultaneously during the supply of a telecommunications service. This applies to so-called 'call-by-call' services and contracts on 'added-value and information services'.³³⁷³ 'Added-value services' are special prefix numbers (e.g., 0900 for entertainment with or without adult content),³³⁷⁴ whereas information services are, e.g., directory enquiries. As is practically impossible to require that the conditions of § 305(2) be fulfilled in these cases, the incorporation of the given standard terms is facilitated.³³⁷⁵ It is important to note that § 305a no. 2 lit. b) does not apply to contracts for services concluded over the phone that are fulfilled only after termination of the call, e.g., the sending of a telegram.³³⁷⁶

b) Incorporation of standard terms in B2B contracts

In terms of § 310(1) 1st sent., the conditions set out in § 305(2) are not applicable to standard terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law. Instead, the laxer rules of the BGB governing the conclusion of a contract apply.³³⁷⁷ As discussed above, consent between the parties on the agreement *and* the

³³⁶⁸ Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen.

³³⁶⁹ Stoffels *AGB-Recht* 106.

³³⁷⁰ Postdienstleistungsverordnung (PDLV) of 21/08/2001, BGBl. I at 2178.

³³⁷¹ Stoffels *AGB-Recht* 106.

³³⁷² These are defined in § 312b(2): 'Means of distance communication within the meaning of this Code are all means of communication which can be used to initiate or to conclude a contract, without requiring the simultaneous physical presence of the parties to the contract, such as letters, catalogues, telephone calls, faxes, emails, text messages sent via the mobile telephone service (SMS) as well as messages broadcast and sent via teleservices.'

³³⁷³ BT-Drs. 14/1640 at 153.

³³⁷⁴ See '0900: Von sinnvoll bis Abzocke' at <https://www.teltarif.de/i/sonderrufnummern-0900.html>.

³³⁷⁵ Stoffels *AGB-Recht* 106.

³³⁷⁶ Graf von Westphalen *NJW* 2002, 16.

³³⁷⁷ Maxeiner *Yale J. Int. Law* 166. See §§ 145 *et seq* BGB.

standard terms is still necessary, which can also be given impliedly.³³⁷⁸ Such an implied consent exists, e.g., where the parties maintain an ongoing business relationship for which always the same standard terms were used, and where the user has made it unambiguously clear that it regularly undertakes transactions only on the basis of its standard terms.³³⁷⁹

It is generally accepted that where a custom of trade³³⁸⁰ exists according to which specific standard terms apply, these apply if the user's offer includes the standard terms, even if it does not expressly refer to them. The other party, who must be familiar with the customs of the given branch, must therefore expressly object to them if it wants to exclude their application.³³⁸¹ Generally, the courts are very hesitant to recognise certain practices as customs of trade.³³⁸²

Standard terms in the previously mentioned situations are also incorporated where the recipient does not respond to a commercial letter of confirmation.³³⁸³ If a party refers to its standard terms in such a letter after the negotiations with the other party, its standard terms become part of the agreement if the commercial client does not reject their incorporation immediately or made clear in its order that it only will conclude the contract if its own standard terms apply.³³⁸⁴ The constitutive effect of a commercial letter of confirmation also applies if the standard terms that are referred to had not been enclosed and were unknown to the client.³³⁸⁵

³³⁷⁸ BGH NJW 1992, 1232, NJW-RR 2003, 754 (755).

³³⁷⁹ BGH NJW-RR 2003, 754 (755).

³³⁸⁰ See also s 52(2)(h)(i) CPA.

³³⁸¹ UBH/Ulmer and Habersack § 305 para 173 *et seq.* The BGH recognised insofar the application of standard terms without explicit reference to them due to customs of trade for the General German Carrier Conditions (ADSp) and standard terms of the banks (BGH WM 2004, 1177). On the other hand, the BGH rejected this view for standard terms of utility companies (BGH NJW 2014, 1296).

³³⁸² For instance, the customs of the timber trade in the Tegernsee area (BGH BB 1986, 1395), or the conditions of the shipping companies for the shipping on the river Rhine (RheinSchiffahrtsOG Köln VersR 1978, 370).

³³⁸³ 'Schweigen auf ein kaufmännisches Bestätigungsschreiben'. Such a commercial letter of confirmation is a custom of trade (i.e., not regulated by law). Offers made over the phone are confirmed by letter by one of the parties in order to have a proof of the agreement. If the recipient does not oppose itself against the content ('silence') of this letter, the agreement is concluded. See Creifelds *Rechtswörterbuch* s.v. 'Bestätigungsschreiben'. A commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*) has to be distinguished from an acceptance or confirmation of order (*Auftragsbestätigung*). For an acceptance of order, the provision of § 150(2) applies, i.e., if the acceptance of order contains standard terms that were previously not submitted to the other party, the initial offer is refused, and this refusal entails a new offer in terms of § 150(2). If the (commercial) client accepts this modified offer by accepting delivery, this has to be construed as a confirmation of its intent to accept (BGH NJW 1995, 1671 (1672); NJW-RR 2000, 1154 (1155), Palandt/Grüneberg § 305 para 52. **§ 150(2)**: 'An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer.'

³³⁸⁴ BGHZ 7, 187 (190), Palandt/Grüneberg § 305 para 52.

³³⁸⁵ BGHZ 7, 187 (190), MüKo/Basedow § 305 para 104.

c) Incorporation of pre-formulated employment conditions

Under § 310(4) 2nd sent. 2nd subclause, § 305(2) does not apply either to pre-formulated employment conditions.³³⁸⁶ The legislator decided to preclude such conditions from the strict incorporation requirements by referring to the Evidence Act for Employment Relationships (NachwG)³³⁸⁷ by which the employer would be obliged to hand over to the employee all significant conditions of the contract or to refer to the applicable collective agreement(s).³³⁸⁸ The legislature misinterpreted thus the regulatory content of the NachwG.³³⁸⁹ Indeed, the employer has to present all the employment conditions that are essential for the employee and prove this fact, but he or she has no obligation to do this before the conclusion of the contract.³³⁹⁰ The NachwG thus aims at better legal security and clarity, but not at more transparency at the moment when the employment contract is concluded. Furthermore, the legal consequences of a violation of the NachwG is not the invalidity of the contract (as opposed to § 305(2)).³³⁹¹ Despite the legislator's misjudgement as regards the regulatory content of the NachwG, § 305(2) cannot be applied by analogy,³³⁹² so that the general legal provisions apply instead.³³⁹³

1.4 Framework agreement

a) Purpose and effect of framework agreements

According to § 305(3), '[t]he parties to the contract may, while complying with the requirements set out in subsection (2) (...), agree in advance that specific standard business terms are to govern a specific type of legal transaction.' If the parties conclude such a framework agreement, the parties need not negotiate the terms of the agreement each time they enter into a contract, and the provisions apply without any further incorporation under § 305(2).³³⁹⁴ This simplifies the relations between the parties, especially if they maintain a current business relationship with a multitude of similar contracts.³³⁹⁵ Particularly those agreements fall under subsection (3) for which the exception of § 305(2) no. 1 *in fine* does not apply (posting of a clearly visible notice). This is the case for standard terms of banks (AGB-

³³⁸⁶ Brox and Walker *BGB-AT* 110.

³³⁸⁷ Nachweisgesetz (NachwG) of 20/07/1995, BGBl. I at 946.

³³⁸⁸ BT-Drs. 14/6857 at 54.

³³⁸⁹ Stöffels *AGB-Recht* 108, Annuß *BB* 2002, 460, Richardi *NZA* 2002, 1058 *et seq.*

³³⁹⁰ See § 2(1) 1st sent. NachwG ('at the latest one month after the beginning of the employment relation'). My own translation.

³³⁹¹ Stöffels *AGB-Recht* 108.

³³⁹² BAG *NZA* 2008, 45 (47); 2013, 148 (150); *NZA-RR* 2009, 593 (594).

³³⁹³ BAG *NZA* 2013, 148 (150), Thüsing *AGB-Kontrolle im Arbeitsrecht* para 200.

³³⁹⁴ BGH *WM* 1986, 1194 (1195), Brox and Walker *BGB-AT* 112.

³³⁹⁵ WLP/Pfeiffer § 305 para 114

Banken) which simultaneously are embedded in the applicable general business relation contract.³³⁹⁶

b) Conditions of a valid framework agreement

In order to be valid, a framework agreement in the sense of § 305(3) must meet the general conditions for the conclusion of a contract, e.g., two concurrent declarations of intent. In B2C contracts, repeated incorporation of standard terms in a multitude of individual agreements, or a recurring reference to the standard terms in invoices or order forms is not an offer to conclude a framework agreement for future transactions though.³³⁹⁷ Furthermore, the conditions set out in § 305(2) no. 1 and 2 must be fulfilled. In practice, this is usually done in writing, although there is no formal requirement in this regard.³³⁹⁸

The framework agreement must also identify the type of transactions for which the standard terms shall apply. It is sufficient if it contains several types of related transactions.³³⁹⁹ In addition to that, the standard terms which shall be applicable for the transactions as mentioned above must be identified in the framework agreement. Such a concretisation does not exist if the agreement provides that the user's standard business terms in their currently valid version apply (dynamic reference).³⁴⁰⁰ The framework agreement must also meet the conditions set out in §§ 307 to 309 (general clause and prohibited terms).³⁴⁰¹

1.5 Colliding standard business terms in B2B contracts: The battle of forms

a) Presentation of the problem

Since §§ 305 *et seq.* are also applicable to B2B contracts,³⁴⁰² both parties to the contract usually use standard business terms in these cases. In most instances, this does not cause any problems, either because the parties agree whose standard terms should apply (the business partner with more leverage in terms of bargaining power will mostly prevail), or they simply do not negotiate on this topic in order to not jeopardise the transaction. Mostly, this inactivity is unproblematic because most transactions are executed smoothly. After all, the parties' main objective is to execute the transaction with or without the standard terms, which is why they

³³⁹⁶ WLP/Pfeiffer § 305 para 114. **Clause 1 AGB-Banken:** 'The standard business terms apply to the entire business relation between the client and the domestic branches of the bank.' (My own translation). See, for instance, 'Allgemeine Geschäftsbedingungen (AGB-Banken)' at psdbank-ht.de/mb314/AGB.pdf.

³³⁹⁷ BGH WM 1986, 1194 (1195).

³³⁹⁸ Stoffels *AGB-Recht* 110.

³³⁹⁹ UBH/Ulmer and Habersack § 305 para 207.

³⁴⁰⁰ UBH/Ulmer and Habersack § 305 para 208.

³⁴⁰¹ Stoffels *AGB-Recht* 110.

³⁴⁰² For the restrictions see § 310(3).

focus on the transaction itself and not on the content of their respective standard terms.³⁴⁰³ The problem of colliding standard terms in B2B contracts – in the English terminology this phenomenon is referred to as 'the battle of forms' – is significant though if the execution of the contract causes problems and the relevant clauses in the parties' standard terms would come to different results.³⁴⁰⁴

This begs the question of whether the contract between the parties comes into force, in spite of the contradicting declarations of intent (different standard terms), and if so, which content would the given agreement have. Although the problem of colliding standard terms had been discussed long before the AGBG came into force,³⁴⁰⁵ the legislator consciously did not solve this problem³⁴⁰⁶ because the incorporation of standard terms does only concern B2C contracts (§ 310(1) 1st sent.), and the regulation of an incorporation problem concerning B2B contracts would have been unsystematic.³⁴⁰⁷ Therefore, the solution has to be found in the general provisions of the law of contract.³⁴⁰⁸

b) Approach in case law

The courts base their decisions in this regard on § 150(2), in terms of which an acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer. Their objective is to keep alive the contract regardless of colliding standard terms.³⁴⁰⁹ The rulings of the judiciary have undergone the following development.

aa) Point of departure: Last shot doctrine

Older BGH decisions³⁴¹⁰ solve this problem by applying § 150(2) restrictively. They apply the last shot doctrine, which itself is based on the strict mirror approach in terms of which the acceptance must be a mirror image of the offer. If the acceptance is not congruent with the

³⁴⁰³ Eiselen/Bergenthal 2006 *CILSA* 215.

³⁴⁰⁴ Stoffels *AGB-Recht* 110 and 111.

³⁴⁰⁵ Raiser *Recht der AGB* 224 *et seq.*

³⁴⁰⁶ Schmidt *BGB-AT* 421.

³⁴⁰⁷ See the official statement in BT-Drs. 7/3919 at 17 *et seq.* The Bundesrat (at 47 *et seq.*) suggested a provision by which colliding standard business terms would be ineffective and **§ 5(2) and (3) AGBG (now § 306(2) and (3) BGB)** would be applicable by analogy, i.e., '[t]o the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions [**§ 306(2)**]. The contract is ineffective if upholding it, even taking into account the alteration provided in subsection (2) above, would be an unreasonable hardship for one party.' [**§ 306(3)**]. For the statement of the government, see BT-Drs. 7/3919 at 60. By contrast, other pieces of legislation have specific provisions dealing with the battle of form, such as §2-207 of the American Uniform Commercial Code (UCC). Also art 2.22 of the UNIDROIT Principles for International Commercial Contracts (UP) refers to this problem.

³⁴⁰⁸ Stoffels *AGB-Recht* 111.

³⁴⁰⁹ Stoffels *AGB-Recht* 113 and 114.

³⁴¹⁰ BGH *NJW* 1951, 271; 1955, 1794; 1963, 1248.

offer, it constitutes a counter-offer which the other party must accept unconditionally.³⁴¹¹ Hence, a contract is not concluded after the recipient of the offer (client) has accepted the conditions thereof and he or she refers to its own standard terms, which has to be construed as a new offer. If, on the other hand, the client accepts the delivery without objecting to the supplier's standard terms, it impliedly agrees to the other party's terms. This unreserved acceptance of the delivery would therefore be the implied acceptance of the modified offer of the other party. Since the party who refers at last to its standard terms prevails, this theory is referred to as 'last shot doctrine', or in the German terminology 'theory of the last word'.³⁴¹²

bb) Restrictions of this approach

Newer BGH rulings still apply § 150(2) and the last shot rule, but with the restriction that where the customer's standard terms contain a so-called 'protective clause', or 'defence clause', (*Abwehrklausel*) § 150(2) is not applicable because according to such a clause this party wishes to conclude contracts only if its own standard terms apply.³⁴¹³

Unlike the last shot approach, if the supplier refers then to its own standard terms and the client accepts the delivery without reservations, the newer BGH decisions do not construe this as an acceptance of the modified offer. If the parties agree to execute the contract nevertheless, this would not affect the validity of the contract though. The 'gap' created by the contradicting terms is then not filled by applying the statutory law to the entire contract, but by application of those terms that have identical content and that the parties wish to apply.³⁴¹⁴ Hence, the courts restrict the application of § 150(2) to cases in which the client's standard terms do not contain a defence clause, or where both parties' terms contain such a clause.³⁴¹⁵

c) Statement

Despite its advantage of providing legal certainty, some authorities³⁴¹⁶ legitimately assert that the last shot doctrine is not convincing because it is doubtful that the acceptance of delivery allows to conclude that the client actually accepts the supplier's standard terms.³⁴¹⁷

³⁴¹¹ Eiselen/Bergenthal 2006 *CILSA* 216 and 236, CISG-AC Opinion No. 13 Rule 10.5.

³⁴¹² *Theorie des letzten Wortes*. UBH/Ulmer and Habersack § 305 para 185.

³⁴¹³ BGH *NJW* 1991, 1604 (1606); *NJW-RR* 2001, 484, Faust *BGB-AT* 110. Such a clause could have the following content: 'Contrary standard terms, insofar they do not apply entirely to the present order, do not apply. According to the BGH, such a formulation excludes the supplier's standard terms entirely. See BGH *NJW-RR* 2001, 484. It seems that Brox and Walker (*BGB-AT* 111) apply the theory of the last word without restriction.

³⁴¹⁴ BGH *NJW* 1985, 1838 (1839 *et seq.*).

³⁴¹⁵ Stoffels *AGB-Recht* 113.

³⁴¹⁶ See Eiselen/Bergenthal 2006 *CILSA* 221.

³⁴¹⁷ Raiser *Recht der AGB* 224, Wertenbruch *BGB-AT* 146, Stoffels *AGB-Recht* 113.

Furthermore, this theory creates a 'ping-pong play'³⁴¹⁸ in which the parties' subsequent reference to their respective standard terms produces more or less accidental results, and where in most cases the supplier will prevail.³⁴¹⁹ In cases where the parties correspond extensively with each other, the proof of whose standard terms prevail might be difficult too.³⁴²⁰ What is more, from an economic point of view, the last shot doctrine is unrealistic and anti-economical since it does not reflect the economic reality of business partners who rather aim to execute their transaction instead of bothering with their respective set of standard terms.³⁴²¹ The newer court rulings that restrict this theory are more convincing but lack of a dogmatic foundation. A landmark decision of the BGH would be very welcomed in this regard by many authors.³⁴²² The problem of the battle of forms could be resolved by the following alternative solution.

aa) Coming into being of a contract

The courts correctly state that the collision of different standard terms itself does not prevent the conclusion of a valid contract. The point of departure for this jurisprudence should not be § 150(2), but rather an inverse application of § 154(1).³⁴²³ This is because in practice, the parties do not want to prevent a valid conclusion of their agreement merely because of contradictory standard terms but aim at an exchange of their respective performances (delivery, payment).³⁴²⁴ The application of the strict mirror approach or the last shot rule would destroy the contract though. Hence, it should be in the parties' interests to assume the valid conclusion of such a contract and to presume a dissent only where one party expressly wanted to have treated its standard terms as a condition for the validity of the contract. The crucial question of this approach is thus whether there is an agreement on the *essentialia negotii* and if the parties expressed their belief that the transaction is concluded.³⁴²⁵ For this purpose, a defence clause is not sufficient, however.³⁴²⁶

³⁴¹⁸ L/GvW/T/Löwe § 2 AGBG para 41.

³⁴¹⁹ Eiselen/Bergenthal 2006 *CILSA* 220.

³⁴²⁰ Striewe *JuS* 1982, 729.

³⁴²¹ Eiselen/Bergenthal 2006 *CILSA* 221.

³⁴²² Palandt/*Grüneberg* § 305 para 54, UBH/*Ulmer and Habersack* § 305 para 188 *et seq.*

³⁴²³ UBH/*Ulmer and Habersack* § 305 para 188, Palandt/*Grüneberg* § 305 para 54. § 154(1): 'As long as the parties have not yet agreed on all points of a contract on which an agreement was required to be reached according to the declaration even of only one party, the contract is, in case of doubt, not entered into. An agreement on individual points is not legally binding even if they have been recorded.'

³⁴²⁴ Kegel (*JZ* 1952, 501) describes the following scene in a London court: Judge: 'Why did you not make clear to each other whose terms and conditions should apply, yours or those of your counterpart?' Party: 'Because we would not be able to manage any conclusion of an agreement if we did so. Furthermore, we don't have time for such things.' Judge: 'But why do you have terms and conditions at all?' Party: 'Why? Because everybody has them!' My own translation.

³⁴²⁵ Eiselen/Bergenthal 2006 *CILSA* 237.

³⁴²⁶ Stoffels *AGB-Recht* 114. See also Comment 3 to art 2.1.22 of the UNIDROIT Principles.

§ 306(1)³⁴²⁷ speaks for this point of view because the remainder of the contract would be valid even if the standard terms of a party would not have been validly incorporated in a B2C contract under § 305(2).³⁴²⁸

bb) Content of a contract (principle of congruency)

The content of a contract is determined by taking into account the parties' consent. Their agreement does include not only the principal obligations but also parts of their respective standard terms which, after their comparison, might contain congruent clauses. This 'principle of congruency'³⁴²⁹ is concordant with the principle of freedom of contract. Only where their standard terms are different, § 306(2) should apply,³⁴³⁰ pursuant to which the *ius dispositivum* applies to the extent that the terms have not become part of the contract or are ineffective.³⁴³¹ In other words, colliding terms are deemed to knock each other out and therefore do not become part of the agreement.³⁴³² When ascertaining the congruent clauses of the parties' respective standard terms, the rationale and objective of the given clause and the common interest of the parties should be considered when interpreting the clauses.³⁴³³ It is noteworthy that 'congruent clauses' are not submitted to content control since none of the parties has 'presented' such clauses in the sense of § 305(1) ('*Stellen*') to the other party in this form.

Example: The client's standard terms provide that the supplier will *repair* any defective items, *exchange* them against faultless goods or *take them back* against the issuance of a voucher *free of charge*. On the other hand, the supplier's standard terms provide that it will *repair* any defective items or *redeliver* them *free of charge* and at the choice of the supplier.

In the example above, both standard clauses are congruent insofar that the supplier is not allowed to charge money for any repairs etc. of defective goods. Furthermore, they are identical with respect to the supplier's obligation to repair or redeliver defective goods. Only the client's clause providing that the supplier may take defective goods back against a voucher is not part of the supplier's terms. Therefore, the supplier must repair or redeliver the defective goods free of charge.³⁴³⁴

³⁴²⁷ § 306(1): 'If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.'

³⁴²⁸ Stoffels *AGB-Recht* 114.

³⁴²⁹ *Prinzip der Kongruenzgeltung*.

³⁴³⁰ § 306(2): 'To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions.'

³⁴³¹ WLP/Pfeiffer § 305 para 143, UBH/Ulmer and Habersack § 305 para 193.

³⁴³² Eiselen/Bergenthal 2006 *CILSA* 216 and 238.

³⁴³³ Stoffels *AGB-Recht* 114.

³⁴³⁴ BGH *NJW* 1991, 1604 (1606).

It is submitted that the application of a consensual approach by which the parties' standard terms are excluded in their entirety, irrespective of whether they conform to each other or are in conflict,³⁴³⁵ would be too harsh. The commercial partners (tacitly) agree on the *essentialia negotii* and their similar standard terms. In other words, the actual content of the parties' agreement is formed by the *essentialia negotii* and the corresponding standard terms.

On the other hand, the knockout approach³⁴³⁶ assures that the transaction is not destroyed because of conflicting standard terms, and that colliding terms are replaced by statutory provisions so that there is a viable contract in which the corresponding standard terms are upheld. Furthermore, this approach reflects the parties' intentions in commercial relations and leads to fair and predictable results by avoiding an arbitrary choice as it is the case for the last shot rule.³⁴³⁷ This contributes to legal certainty.³⁴³⁸ This is probably why, from an international point of view, the majority of the commentators and case law show a preference for this approach.³⁴³⁹

2. Exclusion of surprising clauses

2.1 General remarks

As discussed further above,³⁴⁴⁰ customers often do not read the supplier's standard business terms and accept them without further ado because of the high transaction costs. Consumers often assume that the user's standard terms contain the usual clauses for the given kind of transaction without any surprises.³⁴⁴¹ Nonetheless, consumers deserve protection in this regard because it would be unfair to apply the same standards in respect of the conclusion of contracts and individually negotiated agreements.³⁴⁴² For this reason, § 305c provides that provisions in standard terms which in the circumstances, in particular with regard to the content or outward appearance of the contract, do not form part of the contract if they are so unusual that the

³⁴³⁵ See Eiselen/Bergenthal 2006 *CILSA* 224 *et seq.*

³⁴³⁶ In terms of this approach, the parties' standard terms that are not in conflict form part of the agreement, and conflicting terms are replaced by the *ius dispositivum*. See Eiselen/Bergenthal 2006 *CILSA* 216.

³⁴³⁷ CISG-AC Opinion No. 13 Rule 10.6.

³⁴³⁸ Eiselen/Bergenthal 2006 *CILSA* 227.

³⁴³⁹ See CISG-AC Opinion No. 13 Rule 10.6, with further references. The knockout approach is also applied in terms of **art 2.22 of the UNIDROIT Principles**: '(Battle of forms) Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.'

³⁴⁴⁰ See the introduction to content control in Part I ch 3 para 1.

³⁴⁴¹ Wertenbruch *BGB-AT* 148, *Wendland* in: Staudinger/Eckpfeiler E para 34.

³⁴⁴² BT-Drs. 7/3919 at 19, Palandt/*Grüneberg* § 305c para 2. Medicus reminds of Canaris' statement according to which agreements that have been entirely negotiated are 'a ridiculous chimera' that are more suited for a bazaar than for a modern market and competitive economy. See Medicus *BGB-AT* 161, citing Canaris *FS Steidorff* (1990) 519 and 548.

consumer need not expect to encounter them.³⁴⁴³ This even applies if the given terms have been properly included in the contract under § 305(2). If the customer can assert the existence of a surprising clause, he or she does not have to prove its ineffectiveness in terms of the general clause of § 307 or §§ 308, 309.³⁴⁴⁴ On the other hand, the user does not deserve any protection since it tries to throw its customers off their guard by using such standard terms.³⁴⁴⁵

Therefore, § 305c is also an emanation of the transparency requirement³⁴⁴⁶ and of the general principle of good faith.³⁴⁴⁷ For instance, in 1996, the BAG³⁴⁴⁸ decided that a contractual preclusion period does not become part of the employment contract if it appears under a wrong or ambiguous heading and is not emphasised by a special notice or typographic means (bold and/or bigger font, different colour etc.).³⁴⁴⁹

2.2 Position of § 305c(1) in the content control system

§ 305c is a negative incorporation condition ('do not form part of the contract')³⁴⁵⁰ and must be distinguished from content control and the question of the 'unreasonableness' of a clause in terms of §§ 307 *et seq.*³⁴⁵¹

Note should be taken that surprising clauses need not necessarily also be 'unreasonably disadvantageous' with regard to content control, and *vice versa*, although there is an overlap in most cases.³⁴⁵² Hence, the disadvantageous character of a clause must be distinguished from its unusualness.³⁴⁵³ Nonetheless, the enquiry under § 305c, as part of the incorporation control, must strictly be distinguished from content control.³⁴⁵⁴ However, § 305c, as a provision treating

³⁴⁴³ Rüthers and Stadler *BGB-AT* 256.

³⁴⁴⁴ BT-Drs. 7/3919 at 19.

³⁴⁴⁵ Stoffels *AGB-Recht* 116.

³⁴⁴⁶ WLP/Hau § 305c paras 11-17. It should be noted that before the AGBG came into force surprising clauses were treated as an aspect of content control (BGHZ 17, 1 (3); 33, 216 (219); 38, 183 (185); 54, 106 (109); BGH *BB* 1976, 157). § 3 AGBG (now § 305c(1) BGB) treated surprising clauses as a separate stage to be assessed prior to content control (Stoffels *AGB-Recht* 117). See also § 307(1) 2nd sent. where the transparency requirement is codified in terms of the content control: 'An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.' The AGBG did not contain a similar provision to § 307(1) 2nd sent. For consumer contracts, the transparency requirement of art 5 of the Unfair Terms Directive was however applied in the past by interpreting § 3 AGBG (surprising clauses) in the light of art 5 of the Directive. The codification of the transparency requirement in § 307(1) 2nd sent. did however not aim at modifying this (Stoffels *AGB-Recht* 118). The fact that German consumers benefit from an additional requirement in terms of §§ 305 *et seq* protects them better than the Directive requires (Stoffels *AGB-Recht* 118).

³⁴⁴⁷ BGH *NJW* 1993, 779 (780).

³⁴⁴⁸ In terms of § 310(4), §§ 305 *et seq* are also applicable for employment contracts.

³⁴⁴⁹ BAG *NJW* 1996, 2117. See also discussion on s 22 in Part I ch 2 para 3.2 a).

³⁴⁵⁰ UBH/Ulmer and Schäfer § 305c para 5.

³⁴⁵¹ Stoffels *AGB-Recht* 118.

³⁴⁵² Locher *Recht der AGB* 57.

³⁴⁵³ Wendland in: Staudinger/Eckpfeiler E para 34.

³⁴⁵⁴ In cases where a clause obviously infringes § 307, the BGH sometimes leaves the question of incorporation open and directly assesses § 307 for reasons of procedural economy (e.g., BGH *NJW* 1989, 222 (223), or it bases

more formal aspects, should not be applied too strictly in order to make possible an 'open' content control treating more material questions.³⁴⁵⁵ In institutional actions though, this order has no importance because questions of incorporation do not arise.³⁴⁵⁶

In terms of § 305c(2), any doubts in the interpretation of standard business terms are resolved against the user. The surprising effect of a clause must be assessed by interpreting its content first. If ambiguities remain, these must be solved by means of the ambiguity rule of § 305c(2). Hence, a clause that seemed to be surprising at first sight might be not surprising at all after applying paragraph (2) of this provision.³⁴⁵⁷

The prohibition of surprising clauses of § 305c must be distinguished from the transparency requirement set out in § 307(1) 2nd sent. ('unreasonable disadvantage' due to a 'provision not being clear and comprehensible'). Wolf legitimately points out that both provisions have a different protective function. While transparency during the negotiations shall enable the customer to reach an informed decision, transparency in the context of content control aims to ensure an adequate balancing of the parties' interests and transparency during the execution of the contract.³⁴⁵⁸ This leads to different fields of application for both provisions. A clearly visible, not surprising clause that hence has been properly incorporated under § 305c can nonetheless infringe the transparency requirement of § 307(1) 2nd sent. because it falsely sets out the legal situation between the parties.³⁴⁵⁹ On the other hand, a clause with a completely unusual content may lose its surprising effect if the user explicitly draws the other party's attention to it.³⁴⁶⁰

§ 305c also applies to B2B contracts. Since business people can be expected to have more experience in commercial matters, the threshold for assuming a surprising effect should be set higher for them.³⁴⁶¹

its decision both on § 305c and § 307 (e.g., BGH *NJW* 1995, 2553). It is submitted that this approach should however not be applied by other practitioners in order to allow for a proper content control.

³⁴⁵⁵ MüKo/Kötz 3rd ed § 3 AGBG para 2.

³⁴⁵⁶ Stoffels *AGB-Recht* 119.

³⁴⁵⁷ See, for instance BGHZ 103, 72 (80).

³⁴⁵⁸ WLP/Pfeiffer § 307 para 239.

³⁴⁵⁹ WLP/Pfeiffer § 307 para 240.

³⁴⁶⁰ Faust *BGB-AT* 110.

³⁴⁶¹ BGH *NJW* 1988, 558 (560), UBH/*Ulmer and Schäfer* § 305c para 54.

2.3 Conditions of § 305c(1)

The prevailing view in literature³⁴⁶² requires that the clause in question is 'objectively unusual', and from a subjective point of view surprising. Whether a clause is unusual is determined by taking into consideration the overall picture of the contract and the typical expectations in legal relations of the same kind or based on the user's conduct when concluding the contract. Subjectively, the other party must have been taken by surprise.³⁴⁶³

Although the BGH does not expressly split the conditions of § 305c into an objective and a subjective component, it comes quite close to such a distinction. The BGH takes the view that a clause is surprising if it differs significantly from the other party's expectations and that it does reasonably not anticipate such a clause.³⁴⁶⁴ The consumer's expectations are determined by general and individual surrounding circumstances, such as the degree in which they differ from statutory law and the provisions that are usually set out in contractual relations of the same kind (general circumstances),³⁴⁶⁵ as well as the progress and content of the negotiations, or the formal appearance of the contract (individual circumstances).³⁴⁶⁶ According to the BGH, the other party's individually existing or possible knowledge of the surrounding circumstances is significant, and the conclusions must be drawn from an objective-typifying standard.³⁴⁶⁷

The division mentioned above into an objective and a subjective component is not convincing though. Stoffels³⁴⁶⁸ correctly alleges that the advocates of the prevailing view do not sharply confine both aspects. According to them, for the determination of whether a clause is objectively unusual, the course of the negotiations and the circumstances of the concrete conclusion of the contract must be considered.³⁴⁶⁹ This means however that the 'objective' element comes so close to subjectivity that a differentiation is not possible anymore. What is more, for the assessment of the subjective 'surprising' element, the prevailing view asserts that this determination is to be carried out by considering the understanding of a typical, average consumer,³⁴⁷⁰ which is an objective standard though.

³⁴⁶² UBH/*Ulmer and Schäfer* § 305c para 11 *et seq.*, L/GvW/T/Löwe § 3 AGBG para 10 *et seq.*, Palandt/*Grüneberg* § 305c para 3 *et seq.*

³⁴⁶³ BGH *NJW-RR* 2004, 1397 (1398), BAG *NZA* 2006, 37 (38); 2008, 170 (171).

³⁴⁶⁴ BGH *NJW-RR* 2012, 1261.

³⁴⁶⁵ BGH *NJW-RR* 2001, 195 (196).

³⁴⁶⁶ BGH *NJW* 2001, 1416 *et seq.*

³⁴⁶⁷ BGH *NJW-RR* 2002, 485 (486).

³⁴⁶⁸ Stoffels *AGB-Recht* 120.

³⁴⁶⁹ L/GvW/T/Löwe § 3 AGBG para 12. UBH/*Ulmer and Schäfer* § 305c para 12 and Palandt/*Grüneberg* § 305c para 3 even want to take into account the user's conduct during the conclusion of the contract.

³⁴⁷⁰ L/GvW/T/Löwe § 3 AGBG para 13, UBH/*Ulmer and Schäfer* § 305c para 13, Palandt/*Grüneberg* § 305c para 4.

Stoffels thus suggests the following alternative solution: In a first step, one has to determine whether a clause is *objectively unusual*. This is done by considering the understanding of a *typical consumer* in the context of a contract that is concluded for the same kind of transactions. The understanding of an expert, such as a lawyer, is irrelevant in this regard.³⁴⁷¹ Elements to be considered are the outer appearance of the agreement, such as the typical characteristics and the noticeable special provisions for the given type of agreement. In doing so, the content of the clause as well as its position within the contract (concealed or typographically highlighted) must be considered. The concrete circumstances of the conclusion of the agreement are not taken into account at this stage.

In a second step, one has to distinguish two cases:

1.) If the conclusion of the aforementioned scrutiny is that the clause is objectively unusual, one has further to enquire if the client's *concrete expectations* have been disappointed, i.e., whether the contractual relationship contains a surprising element. This is regularly not the case if he or she already was acquainted with the given type of clause due to contractual relations with the supplier in the past. Here, the concrete circumstances of the conclusion of the agreement are considered, for example, if the user had orally pointed out an unusual clause so that it loses its surprising effect to the other party.³⁴⁷² What is more, a clause that has been typographically highlighted and positioned in a manner that one may expect so that the consumer takes notice of it is not surprising.³⁴⁷³

2.) If the result of the enquiry is that the clause is not objectively unusual because it corresponds to the expectation of a typical client, one has to assess if the objective assessment can be amended by *subjective circumstances of the individual case*. Such subjective and concrete circumstances are considerations such as whether the given clause could not be expected in the course of the negotiations. Then, even the typographical accentuation of the clause in the written contract is not sufficient to 'extinguish' its surprising effect.³⁴⁷⁴

Stoffel's argumentation is sound and duly draws the line between objective and subjective elements. It is also coherent with the wording of § 305c which is wide enough to support his view. In practice though, the different views have no relevance. Stoffels himself admits that

³⁴⁷¹ BGH *NJW-RR* 2012, 1261.

³⁴⁷² BGH *NJW* 1997, 2677, BAG *NZA* 2008, 1208.

³⁴⁷³ BGH *NJW-RR* 2002, 485 (487).

³⁴⁷⁴ BGH *NJW-RR* 2002, 485 (487).

the results, especially in jurisprudence, are 'consistently convincing', despite the lack of a logical structure.³⁴⁷⁵

As already discussed in the South African part of this thesis,³⁴⁷⁶ the South African legislator did not provide for a clause concerning surprising terms and conditions in the Consumer Protection Act, although the common law already recognises such a principle.³⁴⁷⁷ Such a principle is also discussed in South African literature.³⁴⁷⁸

2.4 Case groups

Since all the previously mentioned views require that also the circumstances of the conclusion of the contract be taken into account for the enquiry of whether a clause is surprising, it is not possible to establish general rules. Nevertheless, some recurrent case groups can be identified when analysing the BGH rulings. These will be presented in the following.

a) Establishment or significant modification of principal obligations

Surprising are clauses that establish further principal obligations for the consumer, modify principal obligations or restrict the user's contractual obligations in a manner that is not to be expected in the view of the object and appearance of the contract.

Hence, a clause in a sales agreement of a lightning protection system by which a long-term maintenance contract for this device is established is surprising because the consumer is forced to accept a further performance that is different from what he had expected. The same applies to a sales contract for a coffee maker containing a clause by which the customer is obliged to buy coffee of a certain brand on a regular basis.³⁴⁷⁹ Clauses in a security agreement by which the surety's liability is extended to future obligations also infringe § 305c as the surety cannot

³⁴⁷⁵ Stoffels *AGB-Recht* 120.

³⁴⁷⁶ See discussion on the incorporation requirements under the CPA, Part I ch 2 paras 3 and 4.

³⁴⁷⁷ *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para [19]. In this case, the court held that an adhering party would not be bound by a[n unusual] contract term to which it did not and could not reasonably have been thought to agree.

³⁴⁷⁸ Naudé/Lubbe 2005 *SALJ* 454 and 459. In Naudé's and Lubbe's opinion, a contract clause is unexpected or surprising where it purports to vary the consequences of the contract in a manner contrary to the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties. For the determination of the 'essence' of the contract, the obligations which are essential in the light of the basic contractual purpose of the parties to the contract, must be examined. In their mind, the nature of the policy considerations with regard to each sub-type of contract must be taken into account.

³⁴⁷⁹ These two examples are mentioned in BT-Drs. 7/3919 at 19.

be expected to be liable for these debts. Such a liability with all personal assets is unpredictable and unusual and goes beyond the bank's need for protection.³⁴⁸⁰

b) Modification of the character of the contract

Surprising are also clauses modifying the character of a contract in a way that is fundamentally different from what one can expect from the appearance of the agreement, and by which a different regime from the one that had been expected applies partly or entirely to the agreement.³⁴⁸¹

For instance, a clause in a time-sharing contract which excludes the inscription of the buyer's permanent occupancy right in proportion to his or her share in the title register, and by which instead, a third is registered as a fiduciary is surprising. The contract is meant to be a time-sharing agreement, and the clause modifies its character in a manner that is not compatible with the very essence of such a contract.³⁴⁸²

c) Atypical accessory agreements

A standard clause that serves as an accessory agreement in order to concretise the contract can also be surprising if it is atypical. Since accessory agreements interfere less with the consumer's rights than the clauses contained in the frame contract, the threshold for assuming a surprising effect is higher.³⁴⁸³

A contract for the purchase of a house to be built includes a (surprising) standard clause concerning development costs that have nothing to do with the construction of the building.³⁴⁸⁴ What is more, a standard clause in a lease by which the tenant assigns his or her salary to the landlord is completely unusual and goes far beyond the securities the tenant has to provide (a deposit).³⁴⁸⁵ On the other hand, a clause by which the buyer of a plot of land must pay interests for the use of the property after the transfer of possession (not ownership) and until the purchase price is due is not surprising because it is customary in business matters to pay interests or rent for the use of things if one is not the owner.³⁴⁸⁶

³⁴⁸⁰ BGH *NJW* 1994, 2145; 1997, 3230 (3232). The BGH is also of the view that such a clause infringes the general clause of § 307. This is important for cases where the user has pointed out such a liability clause to the surety so that it is not surprising anymore. See discussion on § 307 in ch 5.

³⁴⁸¹ Locher *AGB-Recht* 59.

³⁴⁸² BGH *NJW* 1995, 2637 (2638).

³⁴⁸³ UBH/*Ulmer and Schäfer* § 305c para 33 *et seq.*

³⁴⁸⁴ BGH *NJW* 1984, 171.

³⁴⁸⁵ LG Lübeck *NJW* 1985, 2958.

³⁴⁸⁶ BGH *NJW-RR* 2001, 195.

d) Concealed clauses

The courts consider that also standard clauses, due to the unusual appearance of the contract or the unexpected positioning of a clause within the contract might lead to the consequences set out in § 305c.³⁴⁸⁷

The BGH decided that a standard clause on the backside of an advertising order according to which the contract is automatically extended if the other party does not cancel it in due time is surprising if the front side, bearing the parties' signatures, contains a typographically highlighted clause saying that the duration of the contract is one year.³⁴⁸⁸ What is more, a not highlighted clause in an employment contract stipulating a further time limitation besides the six-month trial period, which in turn is highlighted in the contract in bold print, is surprising.³⁴⁸⁹ A receipt in full discharge³⁴⁹⁰ by which the employer certifies that the employee has received all necessary papers and payments after termination of the employment contract and that no further entitlements exist can contain surprising clauses too, especially when the employer inserts this receipt in a document by using a misleading heading, or without further notice or typographical accentuation.³⁴⁹¹ Some authors already consider surprising the fact that the receipt contains a clause by which the employee waives his or her right to claim further payments (salary etc.).³⁴⁹² With a view to the fact that it is usual practice in Germany to insert such a waiver, this opinion goes too far because employees usually know this practice.³⁴⁹³

A clause by which the client has to pay for the basic entry of its professional contact details in an online business directory, although the insertion of such basic information is usually free of charge with other providers, is surprising if the given clause is not highlighted and the other party cannot spot this clause right away due to its position in the order form.³⁴⁹⁴

3. Priority of individually agreed terms

Although most agreements take the form of standard form contracts, many contain boxes to tick or blanks for insertions in order to enable the parties to insert individually agreed conditions, e.g., on the price or the specification of the performance. Sometimes, the parties

³⁴⁸⁷ BGH *NJW* 1982, 2309 (2310); 1989, 2255; *NJW-RR* 2012, 1261, BAG *NZA* 2006, 37 (39), UBH/*Ulmer and Schäfer* § 305c para 17. See also discussion on the plain language requirement of s 22 in Part I ch 2 para 3.2 a).

³⁴⁸⁸ BGH *NJW* 1989, 2255 (2256).

³⁴⁸⁹ BAG *NZA* 2008, 876.

³⁴⁹⁰ *Ausgleichsquittung*.

³⁴⁹¹ BAG *NZA* 2005, 1193 (1198 *et seq.*).

³⁴⁹² Preis/Bleser/Rauf *DB* 2006, 2812 *et seq.*

³⁴⁹³ See Creifelds *Rechtswörterbuch* s.v. 'Ausgleichsquittung'.

³⁴⁹⁴ BGH *NJW-RR* 2012, 1261.

agree on terms deviating from the pre-formulated text. Such agreements can be made in writing or verbally, but also impliedly.³⁴⁹⁵ In practice, the parties often renounce to amend the wording of the contract (especially when the individual agreement is oral), or simply forget to modify it.³⁴⁹⁶

For these cases, § 305b³⁴⁹⁷ provides that the individually agreed terms prevail over the pre-formulated standard terms. Hence they are *lex specialis* to pre-formulated terms.³⁴⁹⁸ This 'functional priority relation'³⁴⁹⁹ takes into account that pre-formulated standard terms that are set up for a multitude of contractual transactions do not consider the parties' individually agreed terms, but that there must be a simple way to make such terms valid.³⁵⁰⁰ Furthermore, individually agreed terms mirror the parties' will better than pre-formulated ones.³⁵⁰¹

3.1 Dogmatic foundation of the 'priority principle'

In literature, the dogmatic foundation of § 305b is subject of controversial discussion,³⁵⁰² and one can identify two main opinions: According to one view, this provision is a rule of interpretation for the validity of terms that have been incorporated into the contract.³⁵⁰³ When terms are individually agreed, the interpretation would lead to the result that pre-formulated terms would step back behind individually agreed clauses. Hence, § 305b is an aspect of the principles of interpretation that are partially codified in the ambiguity rule of § 305c(2).³⁵⁰⁴ Indeed, § 305b aims to resolve the 'contradiction' between pre-formulated standard provisions and individually agreed terms in favour of the latter. The application of § 305b is mandatory though, and its application cannot be agreed by the parties; § 305b unambiguously sets out that individually agreed terms prevail.³⁵⁰⁵

³⁴⁹⁵ BGH NJW 1986, 1807.

³⁴⁹⁶ Stöffels *AGB-Recht* 125.

³⁴⁹⁷ § 305b: 'Individually agreed terms take priority over standard business terms.'

³⁴⁹⁸ Wendland in: Staudinger/Eckpfeiler E para 35.

³⁴⁹⁹ *Funktionales Rangverhältnis*. This is how this priority rule is almost unanimously designated. See WLP/Hau § 305b para 1, UBH/Ulmer and Schäfer § 305b para 7. The principle that individually agreed terms take priority over pre-formulated terms is a general principle of contract law which is valid without limitations in B2B contracts (BGH NJW-RR 1990, 613; NJW 2013, 2745) and applied by the BAG for employment contracts as well (see Stöffels *AGB-Recht* 125, with further references). Furthermore, **art 21.1.21 of the UNIDROIT principles** stipulates: 'In case of conflict between a standard term and a term which is not a standard term the latter prevails.'

³⁵⁰⁰ Stöffels *AGB-Recht* 125.

³⁵⁰¹ BGH NJW 2013, 2745 (2747), PWW/Berger § 305b para 1.

³⁵⁰² See overview of the discussion in Zoller JZ 1991, 850.

³⁵⁰³ UBH/Ulmer and Schäfer § 305b para 7 *et seq*, Soergel/Stein (1987) § 4 AGBG para 1.

³⁵⁰⁴ UBH/Ulmer and Schäfer § 305b para 8.

³⁵⁰⁵ Zoller JZ 1991, 852.

Another view thus argues that § 305b concerns a question of validity and that the interpretation of the standard terms and the individually agreed terms has already taken place,³⁵⁰⁶ without resolving the problem which ones prevail.³⁵⁰⁷ Hence, the validity of the colliding terms can only be resolved within the incorporation control. An argument for this view is the position of § 305b between other provisions concerning the incorporation of terms into the contract (§§ 305(2), 305a and 305c(1)). This position was identical in the AGBG.³⁵⁰⁸ In addition, the parties do not wish that the pre-formulated terms that collide with the individually agreed ones be incorporated into the contract. Thus, their agreement on the terms that should be valid for their agreement should only extend to the individually agreed provisions from the beginning as far as they deviate from the pre-formulated terms.³⁵⁰⁹ The second view is more convincing.

3.2 Conditions of the priority

a) Existence of individually agreed terms

Individually agreed terms are contractual terms that do not fall under the definition of standard business terms of § 305(1) 3rd sent. because they are not pre-formulated.³⁵¹⁰ Company practices, on the other hand, are no individually agreed terms.³⁵¹¹ Individually agreed terms can be stipulated in writing, orally or impliedly.³⁵¹² They do not need to be agreed upon at the moment of the conclusion of the contract. If the parties agree on individually agreed terms after they have entered into the contract, it does not matter if they are aware of the contradiction between the standard terms and the individually agreed clauses.³⁵¹³ In order to be valid, they must however not infringe any form requirements, or be negotiated by a person having no power of representation, for instance.³⁵¹⁴

What is more, individually agreed terms can be invalid for other reasons than the ones above.

³⁵⁰⁶ As will be discussed below in the chapter on the interpretational control (ch 4), the interpretation of standard terms takes place between the incorporation control and the content control. Only then, one can assess if the given clauses are valid in terms of the content control. See BGH *NJW* 1999, 1108; 1633 (1634); 1993, 2369, Stöffels *AGB-Recht* 131. It is submitted that 'interpretation' within the incorporation control simply means that it is determined which clauses (pre-formulated/standard clauses) of the agreement are valid and should find application. It is further submitted that at this stage the interpretation does not go any further in order to avoid any anticipated interpretation of the content of the given clauses.

³⁵⁰⁷ MüKo/*Basedow* § 305b para 2.

³⁵⁰⁸ See §§ 2 to 6 AGBG.

³⁵⁰⁹ WLP/*Hau* § 305b para 2, Zoller *JZ* 1991, 853. BGH *NJW* 1984, 2468 comes to a similar conclusion.

³⁵¹⁰ WLP/*Hau* § 305b para 6. § 305(1) 3rd sent.: 'Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.'

³⁵¹¹ BAG *NJW* 2009, 316.

³⁵¹² BGH *NJW* 1986, 1807.

³⁵¹³ BGH *NJW* 2006, 138, BAG *NZA* 2007, 801 (803).

³⁵¹⁴ Stöffels *AGB-Recht* 126.

Example: D, a second-hand car dealer, sells a used vehicle to B. Upon B's solicitation, D inserts a handwritten clause into its standard term contract according to which he will repair any defects free of charge that appear within one month after the purchase. Three weeks afterwards, B brings the car to D because of defective breaks. D repairs the vehicle but requires payment with reference to his standard terms in which exclusion of liability is stipulated. At first sight, one could assume that the individually agreed clause replaces D's standard clause providing for exclusion of liability. However, the individually agreed clause already infringes § 475 according to which in consumer contracts, an entrepreneur may not invoke an agreement that deviates, to the disadvantage of the consumer, from the provisions governing material and legal defects. Hence, the limitation period for used goods cannot be shorter than one year in terms of § 475(2).³⁵¹⁵ Therefore, the individually agreed clause is invalid under § 475(2) and cannot replace D's pre-formulated exclusion of liability (which is also void in terms of § 475).³⁵¹⁶

b) Differing contents from standard terms

§ 305b comes into play when, after the interpretation of which clauses shall apply, it is still not clear which terms are applicable. In most cases, the individually agreed provisions will be in favour of the consumer. § 305b does not aim at consumer protection however but aims to resolve a contradiction between standard and individually agreed terms. Consequently, § 305b also applies in cases where terms are individually agreed in favour of the user. Not only apparent deviations between the pre-formulated and the individually agreed terms but also logical contradictions that come to light when comparing the regulatory content of both contractual parts fall under § 305b.

Therefore, the clause 'delivery deadlines and dates are not binding' does not become part of the contract if the parties agreed on a certain delivery deadline or date.³⁵¹⁷ Furthermore, an individually agreed and handwritten clause in a pre-formulated 'exclusive brokerage agreement', according to which the owner of the house is entitled to sell the house also by himself or by commissioning another broker, prevails over the standard term that excludes this

³⁵¹⁵ § 475(2): 'The limitation of the claims cited in [§] 437 [rights of the buyer in case of defects] may not be alleviated by an agreement reached before a defect is notified to an entrepreneur if the agreement means that there is a limitation period of less than two years from the statutory beginning of limitation or, in the case of second-hand things, of less than one year.'

³⁵¹⁶ Example from Schmidt *BGB-AT* 424.

³⁵¹⁷ BGH *NJW* 1983, 1320; 1984, 48 *et seq*; 2007, 1198 (1199).

possibility.³⁵¹⁸ Besides, an individually agreed clause for a fixed price in a gas delivery contract replaces a pre-formulated revision clause in the standard contract.³⁵¹⁹

3.3 Written-form clauses

a) Usage and forms

As discussed above, individually agreed terms can take the form of a written or oral, or even implied agreement. If not agreed in writing, in practice this often causes problems of proof, especially if the contract has not been concluded with the user itself but with a representative. Therefore, standard business terms users often insert clauses stipulating that oral agreements are void or only valid under certain conditions.³⁵²⁰ If clauses requiring the written form are valid is subject to discussion. Two problems have to be distinguished in this regard, namely the priority principle of § 305b on the one side, and whether such a clause creates an unreasonable disadvantage in the sense of § 307(1) and (2), on the other.³⁵²¹ In addition, the validity of a written-form clause depends on its legal content, which has to be assessed by interpretation due to their different forms.³⁵²²

b) Priority of oral agreements

The BGH has made clear that a written-form clause cannot prevent the validity of an individually agreed term if the parties expressly agreed that their oral agreement shall prevail over the pre-formulated written-form clause.³⁵²³ This even applies if the written-form clause is valid in terms of the general clause of § 307.³⁵²⁴ This is also the view in literature.³⁵²⁵

³⁵¹⁸ BGHZ 49, 84 (87).

³⁵¹⁹ BGH NJW 2013, 2745.

³⁵²⁰ See discussion on the *caveat subscriptor* rule in Part I ch 2 para 4.1 c).

³⁵²¹ Stöffels *AGB-Recht* 128.

³⁵²² Examples: 'Oral agreements need to be in writing in order to be valid' (so-called 'simple written-form clause', see *AGB-Klauselwerke/Graf von Westphalen*, *Schriftformklauseln*, para 1); 'Any modification of or addition to the present agreement, even if it was agreed orally, is only valid if it is in writing and signed by both parties. This also applies to a waiver of the written form requirement' (so-called 'qualified written-form clause', see BAG NZA 2008, 1233); 'For accessory agreements our express written confirmation is required ('qualified written-form clause in the form of a confirmation clause', see BT-Drs. 7/3919 at 20). (My own translations). On the other hand, clauses by which the client declares that he or she has not made any oral declarations besides the written contract and that the user has not made any representations are not considered written-form clauses, but assessed in terms of § 309 no. 12 (see discussion of this provision in ch 5). See also the discussion on s 51(1)(g)(i) in Part I ch 3.

³⁵²³ BGH NJW 1985, 320 (322). The **UNIDROIT principles** take a different approach. **Article 2.1.17** reads: 'A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.' **Article 2.1.18**: 'A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.'

³⁵²⁴ BGH NJW 2006, 138 *et seq*; NJW-RR 1995, 179 (180); UBH/Ulmer and Schäfer § 305b para 33.

³⁵²⁵ WLP/Hau § 305b para 33, with further references.

This only applies though if the individually agreed terms are valid, which is not the case if the user's staff was not empowered to negotiate individual terms but had to stick to the pre-formulated standard terms. Such a limitation of the power of representation must be apparent to the customer when concluding the agreement, however.³⁵²⁶ An additional 'representative clause'³⁵²⁷ by which such a power of representation is discernible is not necessary though.³⁵²⁸

In this regard, persons holding a general commercial power of representation³⁵²⁹ are treated as if the principal had individually agreed on terms with the other party so that a contrary written-form clause does not apply.³⁵³⁰ On the other hand, if the contract contains a qualified written-form clause in the form of a prohibition to amend a concluded agreement, the power of representation of the supplier's agent might be limited in the sense of §§ 54³⁵³¹ and 55 HGB.³⁵³² Hence, oral representations made by an agent without a sufficient power of representation are generally invalid.³⁵³³

c) Validity of written-form agreements

As exposed above, a written-form clause does not prevail over orally and individually agreed terms if the parties have unambiguously expressed their wish that the oral agreement shall prevail.³⁵³⁴ Written-form clauses that aim to undermine individually agreed terms after the conclusion of the contract are invalid, particularly if they give the impression that oral

³⁵²⁶ UBH/Ulmer and Schäfer § 305b para 35.

³⁵²⁷ Such a 'representative clause' can read as follows: 'Our agents are only authorised to make written representations. Oral agreements require a written confirmation in order to be valid' See Stoffels *AGB-Recht* 129. See also discussion on reg 44(3)(c) in Part I ch 3.

³⁵²⁸ Stoffels *AGB-Recht* 129.

³⁵²⁹ *Prokura*. See § 54 HGB.

³⁵³⁰ UBH/Ulmer and Schäfer § 305b para 34.

³⁵³¹ **§ 54 HGB:** '(1) Where a person is authorised, without conferment of a general commercial power of representation, to operate a commercial business, to undertake a particular kind of transaction relating to a commercial business or to undertake individual transactions relating to a commercial business, such power of attorney (commercial authority to act) shall extend to all transactions and legal acts which are normally involved in the operation of such a commercial business or in the undertaking of such transactions. (2) The holder of a commercial authority to act shall have authority to dispose of or encumber real property, to enter into bill of exchange commitments, to take out loans and to conduct litigation only if such authority has been specifically conferred on him. (3) A third party must allow other limitations on the commercial authority to act to be asserted against him only if he knew or ought to have known of such limitations.'

³⁵³² **§ 55 HGB:** '(1) The provisions of [§] 54 shall also apply to holders of a commercial authority to act who are commercial agents or who in their capacity as commercial employees are entrusted with concluding transactions in the principal's name outside of the principal's business premises. (2) The authority conferred on such persons to conclude transactions shall not empower them to amend concluded agreements, especially as regards extending periods for payment. (3) Such persons shall be authorised to accept payments only if they have been specifically granted such authority. (4) Such persons shall be deemed to have authority to accept notice of defective goods, to accept declarations that goods will be made available and to accept similar declarations by which a third party asserts or reserves his rights arising from defective performance; they can assert rights of the entrepreneur (principal) to preserve evidence.'

³⁵³³ Stoffels *AGB-Recht* 129.

³⁵³⁴ BGH *NJW* 1985, 320 (322).

agreements are invalid in general.³⁵³⁵ What is more, clauses by which justified claims of the consumer are repelled by giving an incorrect presentation of the client's legal rights create an unreasonable disadvantage in terms of § 307.³⁵³⁶

For instance, the 'conditions of sale and delivery' of a furniture store providing that 'any modification or addition needs to be in writing'³⁵³⁷ give the impression that any oral agreement is invalid and that the consumer's rights based on such oral agreements cannot be enforced.³⁵³⁸ On the other hand, a clause in a life insurance contract according to which 'communications concerning the relationship between the insurer and the insured must always be in writing'³⁵³⁹ does not inadequately infringe the insured person's right to exercise his or her rights. The BGH is of the opinion that in this case, the requirement of the written form serves the need for clarification and proof. Furthermore, in terms of the written and oral declarations that have to be made after the conclusion of the insurance contract, the problem of simultaneously existing written and oral declarations (which is a typical characteristic for the moment of the conclusion of the life insurance policy with an agent) does not exist.³⁵⁴⁰

Written-form clauses can be valid in terms of § 307 if they concern oral agreements made before or at the moment of the conclusion of the contract. The user may have a legitimate interest to protect itself from agreements made by its agents that go beyond their power of representation, or against uncontrollable oral representations made by its representatives.³⁵⁴¹ In any event, the user's and the other party's interests have to be balanced against each other. Therefore, the BGH decided that a clause by which all delivery deadlines and dates have to be 'made in writing' and providing a special and clearly visible space for the insertion of the delivery date does not constitute an unreasonable disadvantage in terms of § 307.³⁵⁴²

d) Effects of the Unfair Terms Directive

Item (n) of the Annex of the Unfair Terms Directive provides that terms which have the object or effect of limiting the supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality are regarded as

³⁵³⁵ BGH *NJW* 1995, 1488 (1489); 2001, 292.

³⁵³⁶ BGH *NJW* 1995, 1488 (1489).

³⁵³⁷ My own translation.

³⁵³⁸ BGH *NJW* 1995, 1488. See also BGH *NJW* 2001, 292 *et seq* concerning a written-form clause in the standard terms of a new cars dealer.

³⁵³⁹ My own translation.

³⁵⁴⁰ BGH *NJW* 1999, 1633 (1634 *et seq*).

³⁵⁴¹ BGH *NJW* 1991, 2559.

³⁵⁴² BGH *NJW* 1982, 331 (333).

unfair in terms of article 3(3) of the Directive.³⁵⁴³ This confirms the restrictive tendency of German jurisprudence. It is unclear though if the validity of written-form clauses has to be further restricted in German law. Courts that consider the validity of a written-form clause in a consumer contract will have to refer the question to the ECJ for a preliminary ruling.³⁵⁴⁴

4. Legal consequences of non-incorporation

If standard clauses have not been properly incorporated into the contract or are ineffective, the remainder of the contract remains in effect. With this legal consequence set out in § 306(1), the German legislator decided to 'erase' merely ineffective terms. Only where an upholding of the contract would be an unreasonable hardship³⁵⁴⁵ for one party, the contract as a whole is ineffective under § 306(3).³⁵⁴⁶

Pursuant to § 306(2), to the extent that the terms have not become part of the contract or are ineffective, the contents of the contract is determined by the statutory provisions. The residual rules can nonetheless only apply for contracts that are governed by statutory norms. An analogous application of these provisions suffices if the given agreement is somehow similar to a regulated contract-type though. Besides, unwritten legal principles, case law and customary law are functionally equal in this regard.³⁵⁴⁷

Where no statutory provisions exist, one has to ask the question of whether the contract may be upheld without the incriminated standard clause, or if the judge has to fill the gap with a replacement provision. Such a replacement is dispensable where the subject covered by the invalid clause was not relevant for the contract. Where, for instance, a standard provision stipulates a contractual penalty, and it is void under § 309 no. 6 or § 307(1) and (2), the contract simply is upheld without the penalty clause. There is no need to 'correct' the parties' presumed will by means of a complementary interpretation³⁵⁴⁸ of the contract.³⁵⁴⁹

If one or several standard clauses do not become part of the contract because of the existence of individually agreed clauses, § 306 is not applicable though because according to the parties' will, individually agreed clauses prevail over the standard terms from the beginning.³⁵⁵⁰

³⁵⁴³ See discussion on s 44(3)(c) in Part I ch 3.

³⁵⁴⁴ *MüKo/Basedow* § 305b para 15 *et seq.*

³⁵⁴⁵ 'Unzumutbare Härte'.

³⁵⁴⁶ *Stoffels AGB-Recht* 249.

³⁵⁴⁷ *Wendland* in: *Staudinger/Eckpfeiler* E para 70.

³⁵⁴⁸ See also discussion on complementary interpretation in ch 4 para 3.3 b).

³⁵⁴⁹ *Wendland* in: *Staudinger/Eckpfeiler* E para 71.

³⁵⁵⁰ *Wertenbruch BGB-AT* 150.

The principle set out in § 306(1) is that the remainder of the agreement is upheld. § 306(1) is therefore a reverse application of § 139, according to which the entire legal transaction is void if a part of it is void, unless it is to be assumed that it would have been undertaken even without the void part.³⁵⁵¹ If the provision of § 306 would not exist, the contract could be partially invalid under § 139.³⁵⁵² In other words, in terms of § 139, the principle is the invalidity of an agreement, whereas the principle of § 306(1) is its upholding. The reason for this reversal of the rationale of § 139 is that consumers regularly have an interest in upholding the agreement, and having cut out only ineffective clauses.³⁵⁵³ A customer who buys a second-hand car, for example, is interested in the execution of the contract, even if single standard clauses are ineffective. Otherwise, the client would have to require the rescission of the agreement and the refund of the money already paid. This solution would be not only burdensome but also contrary to its interests, even more when considering that the reason for the ineffectiveness lies with the user.³⁵⁵⁴ The same rationale can be found in some other contracts for which the application of § 305(2) is excluded, e.g., employment contracts,³⁵⁵⁵ where the employee has no interest to nullify the contract because of invalid clauses contained therein.³⁵⁵⁶ The courts thus apply the harsh consequences of § 139 more and more *cum grano salis*, by taking into consideration the protective purpose of the given contract. For standard terms that need to be incorporated in terms of § 305(2), the legislator has already considered this in § 306(1). Insofar, § 306 is *lex specialis* to § 139.³⁵⁵⁷

§ 306(1) does however not only provide for the legal consequences of non-incorporated clauses in terms of § 305(2) or § 305c(1) (surprising clauses) but also applies in cases where a clause is invalid under §§ 307 to 309 or other legal provisions, such as §§ 11 UKlaG,³⁵⁵⁸ or 475, 487, 506, 651h and k BGB or 38(1) ZPO.³⁵⁵⁹ The reason for the invalidity of the given clauses is

³⁵⁵¹ Stoffels *AGB-Recht* 249.

³⁵⁵² § 139: 'If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part.'

³⁵⁵³ Already before the AGBG came into force, the BGH restricted the cases where the entire contract was ineffective in order to honour the parties' will. See BGH *NJW* 1957, 17; 1969, 230. See also Raiser *Recht der AGB* 320 *et seq.* who already saw this problem.

³⁵⁵⁴ Example from Stoffels *AGB-Recht* 249.

³⁵⁵⁵ See § 310(4) 2nd sent.

³⁵⁵⁶ Zöllner *et al Arbeitsrecht* 131.

³⁵⁵⁷ BGH *NJW* 2007, 3568 (3569), Wertenbruch *BGB-AT* 149.

³⁵⁵⁸ § 11 UKlaG (Effect of the judgment): 'If the user against whom judgment has been given fails to comply with an injunction based on § 1, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. However, this party cannot invoke the effect of the injunction if the user against whom judgment has been given could contest the judgment under § 10.'

³⁵⁵⁹ UBH/Schmidt § 306 para 9.

irrelevant so that § 306(1) and (3) also apply where a clause is ineffective because it is against public policy or *contra legem*.³⁵⁶⁰

If the contract shall be maintained except for the non-incorporated or invalid clauses, it must be able to be split up into a valid and an invalid part.³⁵⁶¹ The two parts must each form a sensible and comprehensible instrument. This is not the case where significant parts for the entering into a contract, i.e., the *essentialia negotii*, are affected by this splitting (e.g., an invalid price agreement due to a violation of the transparency requirement).³⁵⁶² This problem regularly does not arise in standard term contracts because they typically contain ancillary agreements, which do not affect the *essentialia negotii*. On the other hand, where the statutory provisions do not offer a legal model for a certain type of agreements, especially for newer contract forms, and where this gap must be filled by the judge, the ineffectiveness of such a 'torso contract'³⁵⁶³ must be assumed.³⁵⁶⁴

In some cases, the courts try to split up complex individual clauses into a valid and an invalid part. This is only acceptable though where the remainder of the provision still makes sense semantically and in terms of the content, e.g., where the word 'irrevocable' is erased in a power of attorney. The courts do not use this possibility where the remainder of the clause has to be reformulated completely as this is beyond their power.³⁵⁶⁵

§ 306(3) provides that the contract is ineffective if upholding it, even taking into account the replacement of ineffective clauses by statutory provisions, would be an unreasonable hardship for one party. Contrary to § 139, the criterion for invalidity in § 306(3) is not the assumed will of the parties but an 'unreasonable hardship' should the contract be maintained.³⁵⁶⁶ It is subject to discussion whether § 306(3) applies to agreements that are entirely invalid because an upholding of the remainder of the contract is not possible because it is impossible to determine the (ineffective) contents of the contract by the *ius dispositivum*. Some authors suggest that a contract which cannot be upheld because the remainder does not make any sense is logically invalid as a whole. Hence, a subsequent hardship assessment in terms of § 306(3) would be

³⁵⁶⁰ *Wendland* in: Staudinger/Eckpfeiler E para 69.

³⁵⁶¹ BGH *N/JW* 1995, 2553 (2556 *et seq.*).

³⁵⁶² UBH/*Schmidt* § 306 para 10, Erman/*Roloff* § 306 para 4.

³⁵⁶³ Stoffels refers to such agreements as *Torsoverträge*, whereas Lindacher calls them *Rumpfverträge*. Both mean the same (torso contracts). See Stoffels *AGB-Recht* 251 and WLP/*Lindacher* § 306 para 54.

³⁵⁶⁴ Stoffels *AGB-Recht* 251.

³⁵⁶⁵ *Wendland* in: Staudinger/Eckpfeiler E para 72.

³⁵⁶⁶ Stoffels *AGB-Recht* 250.

unnecessary.³⁵⁶⁷ Others are of the opinion that § 306(3) is applicable because both parties have an interest in not maintaining the contract, which these authors qualify as an 'unreasonable hardship' ('*unzumutbare Härte*').

The scrutiny of 'hardship' requires a balancing of the parties' interests by considering the adverse effects the remaining contract would have. Since both parties are unlikely to have an interest in executing a 'fragmented' contract that in the worst case is very far from their initial agreement, hardship can be assumed in these cases.³⁵⁶⁸ Although both views come to the same result, the first opinion is more convincing. Logic requires that an agreement that cannot survive *per se* is invalid. Therefore, it would be idle to assess whether the continuation of the contract would be an unreasonable hardship under § 306(3).

Where numerous clauses of a pre-formulated contract are ineffective, it is disputable whether not the agreement as a whole is invalid because a 'gap-filling' might lead to an illegitimate intervention and a substitution of the parties' will by the court. This is above all the case where no statutory provisions exist because the contract form has been developed *praeter legem*, and the content of the contract is mainly determined by standard terms. The courts had to decide on the validity of some newer contract forms, such as time-sharing contracts. Stoffels³⁵⁶⁹ criticises that the standard terms drafter's (lawyer's) objective seems to be the safeguarding of the user's position at any cost, even by accepting obvious legal violations.³⁵⁷⁰ The courts have soon been confronted with this problematic in connection with vending machine installation contracts.³⁵⁷¹ The BGH decided in these cases that invalidity of single clauses of a pre-formulated contract does in principle not affect the applicability of the remaining standard clauses and the validity of the contract *per se*. Where the given agreement is however not regulated by legal provisions, and its essential content is determined by standard terms, the nonconsideration of single invalid clauses or their restricted application by means of interpretation could give a whole new meaning to the agreement. Such a remodelling of the contract is not the court's role, however. Hence, the BGH declared such contracts – with some reservations – void in terms of § 138(1) as they are against public policy.³⁵⁷² The BGH's approach has lately seen a renaissance for intransparent time-sharing contracts that the courts

³⁵⁶⁷ WLP/Lindacher § 306 para 54, Stoffels *AGB-Recht* 251, Koch/Stübing § 6 AGBG para 8.

³⁵⁶⁸ UBH/Schmidt § 306 para 42.

³⁵⁶⁹ Stoffels *AGB-Recht* 251.

³⁵⁷⁰ For time-sharing contracts see OLG Cologne *NJW* 1994, 59; *NJW-RR* 1995, 1333.

³⁵⁷¹ *Automatenaufstellungsverträge*.

³⁵⁷² See above all BGH *NJW* 1969, 230 (231 *et seq*); 1983, 159 (162).

declared invalid entirely.³⁵⁷³ Although a parallel application of § 138(1) and §§ 307 to 309 for intransparent contracts is possible as both have different objectives, the courts now rather apply § 139 to declare the entire agreement void. This is because it is difficult to assume a contract void as a whole in terms of § 138(1) on the basis of transparency violations, which probably also explains the BGH's former hesitations.³⁵⁷⁴ The invalidity of the entire agreement in these cases is thus the logical consequence³⁵⁷⁵ and can thus be reached by recourse to § 139 and a teleological reduction of § 306(3).³⁵⁷⁶

The BGH opposes to a 'partial retention',³⁵⁷⁷ i.e., the preservation of the invalid clause with the content that is still permissible. The reason is that otherwise the user's risk of ineffectiveness would be minimised as the courts would 'reduce' incriminated clauses to their valid part. This would incite users to formulate their standard clauses illegally in the hope that the courts will 'correct' them where necessary (provided that these clauses are challenged). Then, § 306 would have no deterrent effect.³⁵⁷⁸ The prohibition of partial retention is necessary also because otherwise, the courts would be in the parties' shoes and reformulate their contract. What is more, the legal consequences set out in § 306(2) would be reversed as not the statutory provisions would apply, but the clause would be reformulated due to the court's intervention.³⁵⁷⁹

Courts may also intervene by applying the principles of complementary interpretation. These have already been discussed elsewhere.³⁵⁸⁰

Ineffectiveness due to non-incorporation or invalidity of a standard clause also has other consequences. If the other party had paid the user because the former did not know about the invalidity of the standard clauses, he or she might be entitled to reclaim the monies in terms of

³⁵⁷³ OLG Cologne *NJW* 1994, 59; *NJW-RR* 1995, 1333.

³⁵⁷⁴ See Stoffels *AGB-Recht* 252.

³⁵⁷⁵ MüKo/*Basedow* § 306 para 29, WLP/*Lindacher* § 306 para 54.

³⁵⁷⁶ Stoffels *AGB-Recht* 252.

³⁵⁷⁷ *Geltungserhaltende Reduktion*. BGH *BB* 2017, 2254; *NJW* 2016, 560. See also Hager *JZ* 1996, 175.

³⁵⁷⁸ See ECJ *EuZW* 2017, 148 ('Naranjo'); *BB* 2015, 257 ('Unicaja Banco').

³⁵⁷⁹ *Wendland* in: Staudinger/Eckpfeiler E para 73.

³⁵⁸⁰ See discussion on interpretational control, ch 4.

the provisions on unjust enrichment (§§ 812³⁵⁸¹ and 818³⁵⁸²).³⁵⁸³ The use of ineffective standard terms may also entitle to a *culpa in contrahendo* claim under 311(2)³⁵⁸⁴ which might lead to damages in terms of § 241(2),³⁵⁸⁵ read with § 280,³⁵⁸⁶ if the occurrence of the damage is due to the invalid clause.³⁵⁸⁷ Finally, the use of ineffective standard clauses might constitute unfair competition in terms of § 3a UWG³⁵⁸⁸ and lead to injunctive relief in favour of competitors.³⁵⁸⁹

³⁵⁸¹ **§ 812:** 'Claim for restitution - (1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. (2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.'

³⁵⁸² **§ 818:** 'Scope of the claim to enrichment - (1) The duty to make restitution extends to emoluments taken as well as to whatever the recipient acquires by reason of a right acquired or in compensation for destruction, damage or deprivation of the object obtained. (2) If restitution is not possible due to the quality of the benefit obtained, or if the recipient is for another reason unable to make restitution, then he must compensate for its value. (3) The liability to undertake restitution or to reimburse the value is excluded to the extent that the recipient is no longer enriched. (4) From the time when the action is pending onwards, the recipient is liable under the general provisions of law.'

³⁵⁸³ BGH NZM 2011, 478; NJW 2009, 2590.

³⁵⁸⁴ **§ 311(2):** 'An obligation with duties under [§] 241 (2) also comes into existence by 1. the commencement of contract negotiations 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts.'

³⁵⁸⁵ **§ 241(2):** 'An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.'

³⁵⁸⁶ **§ 280:** 'Damages for breach of duty - (1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of [§] 286. (3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of [§§] 281, 282 or 283.'

³⁵⁸⁷ BGH NJW 2014, 854.

³⁵⁸⁸ **§ 3a UWG:** 'Breach of law - Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors.'

³⁵⁸⁹ Stoffsels AGB-Recht 153 and 154.

5. Conclusion

Despite their often normative appearance, standard business terms are contractual provisions and therefore do not have a direct normative effect. In order to strengthen the other party's position *vis-à-vis* the user, § 305(2) modifies the general contract law for standard terms in that the conclusion of an agreement not only requires consent but also the formal incorporation of these provisions. The protective purpose of the incorporation requirements for B2C contracts is softened though where they would be an obstacle to the legitimate rationalising effect of mass contracts. In order to ensure transparency control, also form contracts should be subject to the incorporation requirements in terms of § 305(2) as the legislator intends to avoid that standard terms are foisted on the consumer.

The incorporation is formalised by the fact that the user must *refer* to its standard terms *explicitly* so that the consumer is aware of them. For orally concluded contracts (e.g., teleshopping), the user must refer orally to its standard terms. In written agreements, the explicit reference must be found in the offer. In cases where the contract is concluded via the internet, there must be a clearly visible reference to the user's standard terms on the order form or the screen page. Where the agreement is concluded between persons that are absent in terms of § 147(2), the user must send its standard terms by post. In cases where an explicit reference is disproportionately difficult, especially for every-day transactions or mass contracts, the incorporation is facilitated, and a reference to the standard terms by posting a clearly visible notice at the user's premises, is sufficient.

What is more, the user must give the other party the *opportunity to take notice* of the content of its standard terms. In every-day transactions, this requirement should not be interpreted too strictly though. For written contracts where both parties are not present at the moment of the conclusion, the user must send its standard terms to the other party, e.g., with the offer. It should be sufficient though if the consumer is in possession of the supplier's catalogue or prospectus containing such terms. As regards the language of the reference to the user's standard terms, one has to distinguish between cases where the language of the contract is German or in another language. Notwithstanding this, the transparency requirement of the Unfair Terms Directive necessitates the drafting in the client's language in transactions with significant implications.

The consumer must be able to take notice of the standard terms *in an acceptable manner*, i.e., they must be presented clearly and understandably, without any unnecessary technical terms. With respect to the addition in § 305(2) no. 2 in terms of which the user must also take into

reasonable account any physical handicap of the other party, it is unfortunate that the legislator did not include illiterate persons and those who do not understand German.

The incorporation requirements must be met *at the moment when the parties enter into the agreement*, although practical aspects should be considered so that a transaction is not artificially fragmented (ticket cases, transactions over the counter). Amended and subsequently valid standard terms must fulfil the incorporation requirements too. The user must refer to its standard terms each time it concludes a new contract, even in a current business relationship, except for subsequent and inter-related deliveries within a successive delivery agreement.

The other party also has to *agree* to the application of the user's standard terms. This agreement can cover the contract as a whole. For contracts concluded via the internet a 'click-wrap' by ticking an OK-box is sufficient, as opposed to a 'browse-wrap'. The agreement can also be expressed in an implied manner. Nonetheless, a non-commercial customer's silence after reception of an order confirmation in which the user refers to its standard terms for the first time is not to be considered consent.

§ 305a contains exemptions from the strict incorporation requirements of § 305(2). These concern, amongst others, the tariffs and regulations for the transportation of passengers by tramways, busses and motor vehicles. As these regulations have normative character and have been published in official gazettes, there is no need for the protection offered by the incorporation requirements. The parties still have to agree on the validity of these conditions though. Also for the posting of items into post-boxes, the incorporation of standard terms of the Deutsche Post AG and its competitors is facilitated for practical reasons. The same applies to standard terms for certain telecommunication services.

In B2B contracts, the incorporation requirements of § 305(2) are not applicable, and the laxer rules of the BGB governing the conclusion of the contract (§§ 145 *et seq.*) apply. Where a custom of trade exists for a specific branch according to which certain standard terms apply, the other party must actively oppose their application as otherwise, they are applicable. The BGH is however hesitant in recognising certain customs of trade. If a B2B client does not immediately oppose to a commercial letter of confirmation, the user's standard terms apply.

The legislator also excluded pre-formulated employment conditions from the strict incorporation requirements of § 305(2). This exemption is based on a misjudgement of the regulatory content of the Nachweisgesetz (NachwG).

For simplification, especially in ongoing business relations, the parties can agree on a framework agreement according to which specific standard terms govern a specific type of legal transactions.

Since the legislature did not regulate the problem of colliding standard business terms in B2B contracts for dogmatic reasons, the courts have developed several solutions to solve this problem. The last shot rule produces accidental results and can lead to a 'ping-pong play'. The more recent BGH decisions restricting this theory where a party uses a defence clause' lack dogmatic foundation. Therefore, the point of departure should not be § 150(2) but rather an inverse application of § 154(1) BGB. The parties ultimately want that their agreement is valid and exchange their performances, even if their standard terms are incongruent. § 306(2) speaks for this solution too.

In terms of § 305c, surprising terms do not form part of the contract. This negative incorporation provision is an emanation of the transparency requirement as well as the general *bona fides* principle. A surprising term must not necessarily be disadvantageous though, which is why the enquiry under § 305c must be distinguished from content control. Literature, and ultimately also jurisprudence, apply a test in order to determine whether a term is objectively unusual and subjectively surprising. As it is difficult to establish general rules, one can identify several case groups: Surprising are clauses that significantly modify the principal obligations, or that fundamentally alter the character of the contract so that ultimately a different regime applies. Atypical accessory agreements or clauses that are concealed in the contract due to their unexpected positioning might be surprising too.

§ 305b provides that individually agreed terms prevail over pre-formulated standard terms. Company practices do not fall under this category, however. As § 305b does not aim at consumer protection, a possible contradiction between pre-formulated and individually agreed terms may also favour the user.

Jurisprudence and literature agree that the validity of individually agreed terms cannot be questioned by a written-form clause if the parties expressly agreed that their oral agreement should prevail over the pre-formulated written-form clause. This presumes that the individually agreed terms are valid and that the user's representative was empowered to negotiate with the other party. If the user's agent has a general commercial power of representation, he or she is treated as if the supplier itself had negotiated with the customer, except where the power of representation is limited in terms of §§ 54 and 55 HGB. Written-form clauses with the objective

to undermine individually agreed terms after the conclusion of the contract are invalid. They may nonetheless be valid if the user has a legitimate interest to protect itself from agreements made by its agents that exceed their power of representation. When assessing such clauses, the parties' interests must be balanced against each other in order to achieve fair results. In any event, the Unfair Terms Directive confirms the rather restrictive tendency of German jurisprudence in respect of the recognition of written-form clauses.

The legal consequences of non-incorporated terms are set out in §§ 306(1) to (3). The legislator chose to favour an upholding of the contract if single standard clauses are ineffective, instead of applying § 139 because the parties regularly are interested in maintaining the agreement even with single invalid clauses. § 306(1) not only applies to non-incorporated clauses but also to those that are invalid under §§ 307 to 309 or other legal provisions or principles.

For the upholding of the agreement, it must be able to be split up in two comprehensible contracts, without affecting the *essentialia negotii*. This problem regularly does not exist in 'classical' standard term contracts where the standard terms merely contain ancillary agreements. In newer contract forms that are not based on an existing legal model, the ineffectiveness of the 'torso contract' must be assumed as otherwise, the judge would have to fill the gaps which would create another contract contents than the one the parties wanted.

Contracts for which the ineffective content cannot be substituted by the statutory law are invalid *per se*, and it is not necessary to assess whether an unreasonable hardship under § 306(3) exists.

Newer contract forms that have been developed *praeter legem* and which contain invalid clauses are void as otherwise, the courts would have to 'remodel' the whole agreement through interpretation. Invalidity can be reached in these cases by applying § 139 and a teleological reduction of § 306(3).

The BGH rejects 'partial retention' of the still permissible remainder of invalid clauses with good reason. Otherwise, the deterrent effect of § 306 would be lost and standard terms users would attempt to formulate illegal clauses in the hope that the courts would 'correct' them.

Ineffectiveness of standard clauses may also have further implications. The other party might reclaim the monies already paid in terms of the unjust enrichment provisions, and the user might be subject to a *culpa in contrahendo* claim which might lead to the payment of damages. Furthermore, competitors might demand an injunctive relief for unfair competition.

CHAPTER 4 – INTERPRETATIONAL CONTROL

1. Introduction

Contracts and declarations of intent are interpreted according to §§ 133 and 157 BGB. For standard business terms, this standard is modified, however. In this chapter, the natural and the normative interpretation will be discussed as well as the objective interpretational standard for standard business terms. In a first step, some general principles applicable for the interpretation of the law will be presented as in both cases – statutory interpretation and interpretation of legal transactions – the intention of the legislator or the person issuing a declaration of intent must be investigated, respectively. Moreover, the techniques used in statutory interpretation can also be applied to the interpretation of agreements. What is more, both the law and contractual provisions may contain gaps that must be filled by applying the techniques of complementary interpretation.³⁵⁹⁰

2. Statutory interpretation

2.1 Meaning and method

a) Investigation of the provision's objective

Statutory interpretation not only takes place where a legal provision is ambiguous, but every time a lawyer (judge, advocate etc.) has to investigate whether a provision applies to specific facts (subsumption).³⁵⁹¹ For this, he or she has to investigate the meaning of the given provision. This might sometimes be challenging as the law not always applies terms that can be distinguished by logic, but also technical and colloquial terminology.³⁵⁹²

b) Approach

For statutory interpretation, different approaches are applied in order to investigate the law's objective and meaning, namely the grammatical, the systematic, the historical and the teleological interpretation. These will be discussed in the following.

aa) Grammatical interpretation

The starting point of statutory interpretation is always the wording of the given legal provision. Elements to be taken into account are the general meaning of the given word(s), the specific (legal or technical) jargon as well as grammatical rules (grammatical interpretation). Thus, editorial errors of the legislator become visible, i.e., words that differ from those that the

³⁵⁹⁰ Brox and Walker *BGB-AT* 60.

³⁵⁹¹ This also applies to the interpretation of contracts. See *Schiemann* in: Staudinger/Eckpfeiler C para 45.

³⁵⁹² Brox and Walker *BGB-AT* 33.

legislator wanted to use for the provision. For instance, § 919(1) regulates that '[t]he owner of a plot of land may require from the owner of a neighbouring plot of land that the latter cooperates in erecting fixed boundary markers and, if a boundary marker has *moved* or become unrecognisable, in the restoration.'³⁵⁹³ In the German text, the verb used for '(has) moved' is '*verrückt (geworden ist)*'. It is obvious that the choice of this German verb that also means '(has become) insane' is an editorial slip.³⁵⁹⁴

Contrary to the German approach (and other South African pieces of legislation), section 2(1) of the Consumer Protection Act provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3 of the Act. This more paternalistic attitude towards the consumer can be explained by the fact that the Consumer Protection Act primarily is – as its title indicates – a consumer protection statute, unlike §§ 305 *et seq.* BGB. The German provisions primarily do not have the purpose of protecting the weaker party and of balancing the supplier's stronger bargaining power.³⁵⁹⁵ They rather aim at preventing abuse of freedom of contract-drafting and therefore protect all parties against the misuse of standard terms.³⁵⁹⁶ Hence, §§ 305 *et seq.* BGB cannot be qualified as pure consumer protection provisions, with the exception of § 310(3) (consumer contracts).³⁵⁹⁷

The South African approach of purposive interpretation seeks to look for the purpose of the legislation before interpreting the words. Other interpretative rules require the courts to apply the literal rule (grammatical interpretation) first and to analyse the wording of a statute, whereas the purposive approach starts with the mischief rule in seeking the legislator's purpose or intention. It is a much more flexible approach giving courts more freedom to develop the law in line with what they perceive to be the legislator's intention. The purposive approach readily embraces the use of extrinsic aids to work out Parliament's intention.³⁵⁹⁸

In some cases, the BGB itself defines certain terms. The term 'negligently' in § 823(1)³⁵⁹⁹ is defined in § 276(2) in that 'a person acts negligently if he fails to exercise reasonable care'. The

³⁵⁹³ Emphasis added.

³⁵⁹⁴ Better synonyms are, e.g., '*an eine andere Stelle setzen*' or '*versetzen*'.

³⁵⁹⁵ Stoffels *AGB-Recht* 29.

³⁵⁹⁶ Eith *NJW* 1974, 16, 17.

³⁵⁹⁷ Locher *JuS* 1997, 390. See discussion in Part II ch 1 and in Part I ch 4.

³⁵⁹⁸ 'The Purposive Approach to Statutory Interpretation' at <http://e-lawresources.co.uk/Purposive-approach.php>.

³⁵⁹⁹ **§ 823(1):** 'A person who, intentionally or *negligently*, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.' Emphasis added.

same applies to 'ought to have known' ('*Kennenmüssen*') in § 166³⁶⁰⁰, which is defined in § 122(2) as 'not knowing as a result of negligence'.³⁶⁰¹ Another example is the legal definition of 'prior approval' or 'consent' ('*Einwilligung*') which is defined in § 183 1st sent.³⁶⁰² 'Subsequent approval' or 'ratification' ('*Genehmigung*') is defined in § 184(1).³⁶⁰³ On the other hand, the term 'approval' ('*Zustimmung*') is not defined in § 182(1).³⁶⁰⁴ Since prior and the subsequent approval are both defined, one can nevertheless conclude that '*Zustimmung*' is the generic term. As one can see, the German words '*Zustimmung*', '*Genehmigung*' and '*Einwilligung*' have no resemblance like in English where the translations all contain the word 'approval'. Hence, these legal definitions are important for lawyers in order to distinguish the moment when the approval has been given.

Moreover, the use of certain formulations, such as 'must' ('*müssen*') or 'shall' ('*sollen*') indicates different legal consequences in case of non-compliance of the legal provision. If the provision contains the word 'must' the legal consequence in case of non-compliance is invalidity, whereas a violation of a provision where one 'shall' do or not do something does not impact the validity of the legal act. § 8 BeurkG³⁶⁰⁵ sets out that in the case where a testator wants to establish his or her last will with a notary public, the will *must* be recorded in the minutes of the notary public. The minutes *must* contain the name of the notary public and the name of the testator (§ 9(1) BeurkG). Non-compliance with these provisions thus leads to the invalidity of the last will. On the other hand, § 9(2) BeurkG provides that the minutes *shall* contain the place and date of the meeting. Hence, if the notary public's minutes does not contain the place and/or date, the last will is still valid.

On the other hand, the South African approach is quite different in that definitions often precede the actual legislative provisions of a statute³⁶⁰⁶ and are not scattered in the given piece of

³⁶⁰⁰ § 166(2): 'If, in the case of a power of agency granted by a legal transaction (authority), the agent has acted in compliance with certain instructions given by the principal, then the latter may not invoke the lack of knowledge of the agent with regard to circumstances of which the principal himself knew. The same rule applies to circumstances which the principal *ought to have known*, insofar as constructive notice is equivalent to knowledge.' Emphasis added.

³⁶⁰¹ § 122(2): 'A duty to pay damages does not arise if the injured person knew the reason for the voidness or the voidability or did not know it as a result of his negligence (ought to have known it).'

³⁶⁰² § 183 1st sent.: 'Prior approval (consent) may be revoked until the legal transaction is undertaken, unless the legal relationship on which this consent is based leads to a different conclusion.'

³⁶⁰³ § 184(1): 'Subsequent approval (ratification) operates retroactively from the point of time when the legal transaction was undertaken, unless otherwise provided.'

³⁶⁰⁴ § 182(1): 'If the effectiveness of a contract, or of a unilateral legal transaction to be undertaken in relation to another, depends on the approval of a third party, the grant and refusal of approval may be declared either to one party or to the other.'

³⁶⁰⁵ Beurkundungsgesetz.

³⁶⁰⁶ See s 1 CPA, for instance.

legislation. As discussed in the South African part of this thesis,³⁶⁰⁷ this approach has certain advantages, but also disadvantages. The South African approach is certainly convenient in that all definitions can be easily located and referred to. This method is only efficient though if the list of definitions is complete, well-drafted and does not contain too many cross-references.

bb) Systematic interpretation

In terms of § 133, when a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration. This principle is also valid for the interpretation of legal provisions.³⁶⁰⁸ For the enquiry of the legislator's true intention, one has to put the given provision into relation with other provisions and its position within a certain division in the statute. By this so-called 'systematic interpretation' the interpreter can ascertain whether the wording of the provision is too wide, for instance.³⁶⁰⁹

Under § 495(1), in a consumer credit agreement,³⁶¹⁰ the borrower has a right of withdrawal. From the simple reading of this provision results that the right of withdrawal applies for all non-gratuitous credit agreements between an entrepreneur (lender) and a consumer (borrower). The position of §§ 491 *et seq.* in Subtitle 1 (Loan contract) Chapter 1 of Title 3 reveals though that only loan contracts against a sum of money (*Gelddarlehen*) but not loans of fungible things (*Sachdarlehen*) are concerned. For the latter, §§ 607 *et seq.* apply.³⁶¹¹

cc) Historical interpretation

Historical interpretation concerns the history of a provision or statute in order to assess its intention. For this approach, legislative materials are drawn upon, such as legislative drafts, parliamentary protocols or even former legislative provisions that were in force in the various German monarchies before the BGB came into effect. For subsequent legislative changes, the official records of the two chambers of parliament, the Bundestag and the Bundesrat,³⁶¹² can provide precious insights. Furthermore, the development of a legal provision with its subsequent modifications in the course of time can be significant for interpretation.

Since the Consumer Protection Act promotes a purposive interpretation for which the use of extrinsic aids, such as legislative material, is necessary in order to assess the legislator's

³⁶⁰⁷ See Part I ch 4.

³⁶⁰⁸ Brox and Walker *BGB-AT* 35.

³⁶⁰⁹ Brox and Walker *BGB-AT* 35.

³⁶¹⁰ §§ 491 *et seq.* BGB.

³⁶¹¹ Example from Brox and Walker *BGB-AT* 35.

³⁶¹² Bundestagsdrucksache (BT-Drs.), Bundesratsdrucksache (BR-Drs.).

intention, it is suggested that historical interpretation is a necessary technique to carry out purposive construction.

dd) Teleological interpretation

Another approach is the teleological interpretation according to which one searches the meaning and the objective of a legal provision, the *ratio legis*. In doing so, one can assess, for instance, whether a provision has to be interpreted widely or narrowly.

In terms of § 3 EFZG³⁶¹³ in which the conditions for a continued remuneration of employees in the case of illness and other instances are set out, employees have a right of continued remuneration if they are unable to work due to illness and they are not responsible for this inability to work. The wording of this provision indicates that employees lose their right of remuneration in the case of a fault, even when causing their incapacity by negligence. This provision does however not aim to restrict employees unnecessarily from leisure activities. The term 'fault' in this provision rather includes activities that differ considerably from those that employees usually have to undertake in their own interest (e.g., respecting certain safety rules at work). If an employee hurts himself while exercising in his spare time, he thus keeps his right of continued remuneration in terms of § 3 EFZG.³⁶¹⁴

2.2 Gap-filling

a) Complementary interpretation

Statutory interpretation does not merely concern the assessment of the legislature's intention. Sometimes the legislator did not regulate a specific question, or it unconsciously did not consider it. The filling of such a gap – or lacuna – is referred to as 'complementary interpretation'.

b) Determination of a lacuna

A lacuna exists where the legislator did not consider a particular question or did not consider it correctly (primary lacuna),³⁶¹⁵ or where the gap arose only after enacting the statute (secondary lacuna).³⁶¹⁶ A court is not entitled though to close this gap by its own valuations but must take the legislator's standpoint and close the loophole in the law's spirit instead. Hence, the court must consider how the legislator would have regulated the question. By doing so, the

³⁶¹³ EFZG = Entgeltfortzahlungsgesetz (Act on Continued Employment Remuneration).

³⁶¹⁴ Example from Brox and Walker *BGB-AT* 35.

³⁶¹⁵ *Primäre Lücke*.

³⁶¹⁶ *Sekundäre Lücke*.

court must not only consider the legislator's imperatives but also take into account its motivations and weighing of interests.³⁶¹⁷

Complementary interpretation might lead to an extensive construction of a legal provision if the given question is not covered by the provision (*Gesetzesanalogie*). In other cases, a gap can be closed by applying a principle that is contained in several legal provisions so that several provisions are applied by analogy (*Rechtsanalogie*).

An example of extensive application is § 442(1) 2nd sent. In terms of § 442(1), the rights of the buyer due to a defect are excluded if he has knowledge of the defect at the time when the contract is entered into. If the buyer does not know of a defect due to gross negligence, the buyer may assert rights concerning this defect only if the seller fraudulently concealed the defect or gave a guarantee of the quality of the thing. This provision does not regulate the question though whether the buyer can assert his or her rights if the seller fraudulently gave the false impression that the *merx* is free of defects. The (not regulated) case where the seller fraudulently makes believe the purchaser that the sold item is free of defects, and the (regulated) case where he or she fraudulently concealed the defect, are similar, however. In both cases, the seller consciously takes advantage of the purchaser's ignorance with respect to the actual condition of the sold thing. The law thus contains a gap concerning this unregulated question. Had the legislator seen this problem, it would have regulated it in the same way as for concealed defects. Hence, § 442(1) 2nd sent. must be interpreted extensively.³⁶¹⁸

Several legal provisions are applied by analogy in the following example: Under § 1004(1), if the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. A prohibitory injunction can also be required where a right to a name is infringed in terms of § 12,³⁶¹⁹ or where a possessor is disturbed in his or her possession by unlawful interference under § 862(1).³⁶²⁰ If the violation of another right, e.g., of general personal rights by untrue claims in the press media,³⁶²¹ or a

³⁶¹⁷ Brox and Walker *BGB-AT* 37.

³⁶¹⁸ Example from Palandt/*Weidenkaff* § 442 para 18.

³⁶¹⁹ § 12: 'If the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction.'

³⁶²⁰ § 862(1): 'If the possessor is disturbed in his possession by unlawful interference, he may require the disturber to remove the disturbance. If further disturbances are to be feared, the possessor may seek a prohibitory injunction.'

³⁶²¹ Brox and Walker *SchuldR-BT* § 45 para 21 *et seq*, Brox and Walker *BGB-AT* 37.

disturbance of an established and operating business³⁶²² by an unlawful strike,³⁶²³ is to be feared, there is no expressly regulated legal basis for stopping such an interference though. In this case, the interests are the same for the owner, name holder or possessor since it is not acceptable that the person in question must wait until a violation of its rights becomes a fact in order to claim damages under § 823(1). Hence, as §§ 1004, 12 and 862 are based on the same principle, they are applied by analogy with regard to a preventive right to an injunction.³⁶²⁴

Moreover, a gap can also exist where a specific problem has not been regulated, although one would have expected that it has (open lacuna). Such an open gap is closed by an analogous application of other provisions. If in the example mentioned earlier concerning § 442 the seller fraudulently makes the false impression that the sold item has specific characteristics (instead of fraudulently concealing a defect or making believe that the *merx* is free from defects), this gap is closed by an analogous application of § 442.³⁶²⁵

In other cases, a legal provision contains rules that do not fit all the problems the law is supposed to regulate. In these cases, the legislator did not consider particularities that some instances may present. Insofar there is a so-called 'concealed gap' which can – and must - be closed by the court. Then, the judge may derive from the unambiguous wording of the provision by restricting its application in the spirit of the law (restrictive interpretation or teleological reduction).

Example: In terms of § 398,³⁶²⁶ A can assign the purchase price he can claim from B to C. However, § 400 provides that a claim may not be assigned to the extent that it is not subject to pledge. Hence, A would not be allowed to assign his unseizable wage entitlements (salary) that he has against his employer. The reason of this provision is to ensure a minimum subsistence level and to prevent that the person in question becomes a burden for the general public in terms of social welfare. The legislator assumed that these reasons exist for all assignments. It did not consider cases though where the norm's protective purpose is not jeopardized, e.g., where A transfers his claims to C and the latter pays him regularly a certain amount which is equal to the transferred claim. Therefore, § 400 must be interpreted restrictively in the sense that the assignment of an unseizable claim is not prohibited if the assignee receives equal payment.³⁶²⁷

³⁶²² *Eingerichteter und ausgeübter Gewerbebetrieb.*

³⁶²³ Brox and Walker *SchuldR-BT* § 45 para 15 *et seq*, Brox and Walker *BGB-AT* 37.

³⁶²⁴ Brox and Walker *SchuldR-BT* § 53 para 5 *et seq*, Brox and Walker *BGB-AT* 37.

³⁶²⁵ Brox and Walker *BGB-AT* 38.

³⁶²⁶ § 398: 'A claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is entered into, the new obligee steps into the shoes of the previous obligee.'

³⁶²⁷ BGHZ 4, 153 (163); 13, 360 = BGH *NJW* 1954, 1153.

3. Interpretation of contractual provisions

3.1 Objective of interpretation

Although generally, standard terms are sophisticated provisions that have been formulated by experts, certain formulations may not be clear or ambiguous, or the contract concluded on the basis of standard business terms is incomplete. Then, the terms have to be interpreted according to the rules of interpretation.³⁶²⁸ In the following, the interpretation of contractual provisions will be discussed before we will have a closer look at the interpretation of standard business terms.

3.2 Distinction between interpretation and content control

The German legislature favoured 'open content control',³⁶²⁹ i.e., the reasons for the inadequacy of standard terms must be unfolded within the content control, and not 'concealed' within the interpretational control, which then would serve as a 'correction' of standard terms. Hence, in German law, interpretational control takes place before content control.³⁶³⁰ This order can be explained by the fact that one can only assess the content of contract terms when knowing their meaning.³⁶³¹ The opposite approach had been applied before the AGBG came into force.³⁶³² Inadequate interpretations of a clause were simply not taken into account which often led to the result that the focus was not the content that the parties 'wanted'³⁶³³ but the content that 'ought to be'³⁶³⁴ according to the legal order.³⁶³⁵

3.3 Objective standard of interpretation - The standard of the BGB

As standard terms are of contractual nature, they are subject to the general rules of interpretation of contracts and declarations of intent set out in §§ 133³⁶³⁶ and 157.³⁶³⁷ On the basis of these provisions, certain principles have been developed over time.³⁶³⁸

In terms of § 133, when a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration. In other words,

³⁶²⁸ Stoffels *AGB-Recht* 131.

³⁶²⁹ *Offene Inhaltskontrolle*.

³⁶³⁰ BGH *NJW* 1999, 1633 (1634).

³⁶³¹ Stoffels *AGB-Recht* 131.

³⁶³² See Historical Overview in Part II ch 1.

³⁶³³ *'Das Gewollte'*.

³⁶³⁴ *'Das Gesollte'*.

³⁶³⁵ Fastrich *Inhaltskontrolle* 21.

³⁶³⁶ § 133: 'Interpretation of a declaration of intent — When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.'

³⁶³⁷ § 157: 'Interpretation of contracts — Contracts are to be interpreted as required by good faith, taking customary practice into consideration.'

³⁶³⁸ For an overview of these principles, see Larenz and Wolf *BGB-AT* §§ 28 and 33.

interpretation serves the assessment of the intention of a party. In order to be relevant in legal transactions, this (interior) intention must be 'communicated' to the exterior by means of a declaration, however. Therefore, the mere intention of a party can neither be the object nor the objective of interpretation.³⁶³⁹ This also applies for last wills which also must be 'declared' and even require a certain form (§ 2231).³⁶⁴⁰

a) Simple interpretation

aa) Objective, application and significance

The interpretation has the objective to assess the parties' intention which is expressed in the contract by means of their declarations. This intention is relevant because of the principle of freedom of contract.³⁶⁴¹ The point of departure of the interpretation of declarations of intent or contracts is the declaration of the party in question. Taking into consideration merely the wording of a party's declaration is not sufficient though, which is why § 133 sets out that it 'is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.' The enquiry of a party's true intention does not suffice though since it is important to ascertain the sense of a declaration by interpretation, and not – contrary to the wording of § 133 – the unilateral intention of the declarant. Interpretation must thus take into consideration the interests of the recipient of the declaration.³⁶⁴² By doing so, all circumstances beyond the declaration have to be considered, such as linguistic characteristics of the person, prospects, contractual negotiations and customary practice.³⁶⁴³ Seemingly unambiguous declarations must be interpreted too by taking into consideration all surrounding circumstances. If A sells '100 pianos' to B, and from the negotiations one can conclude that A and B deal with weapons which for confidentiality reasons they name after music instruments (whereby 'pianos' stands for 'machine guns'), the 'unambiguous' declaration of '100 pianos' must be interpreted as '100 machine guns'.³⁶⁴⁴ Interpretation is significant because it shows whether or not there is a declaration of intent.³⁶⁴⁵ Furthermore, it will show if a contract has been established, i.e., if the

³⁶³⁹ *Schiemann* in: Staudinger/Eckpfeiler C para 41.

³⁶⁴⁰ *Schiemann* in: Staudinger/Eckpfeiler C para 41.

³⁶⁴¹ Brox and Walker *BGB-AT* 60.

³⁶⁴² *Schiemann* in: Staudinger/Eckpfeiler C para 42.

³⁶⁴³ Brox and Walker *BGB-AT* 60. If it is not clear if a price in a contract of sale expressed in 'Dollars' means U.S.-American, Australian or Canadian Dollars, and the seller acquired the items in Canada, one can conclude that the stipulated price is expressed in Canadian Dollars.

³⁶⁴⁴ Example from Brox and Walker *BGB-AT* 61.

³⁶⁴⁵ If X replies to Y's question with 'yes', it very much depends on the question of whether this 'yes' means the acceptance of an offer or not. This is the case where Y asked X if he wanted to purchase his car for EUR 5,000, but not where Y asked X if he was at the zoo yesterday. Example (slightly modified) from Brox and Walker *BGB-AT* 61.

offer and the acceptance of the offer are congruent.³⁶⁴⁶ Finally, it serves to establish the legal consequences of an agreement.³⁶⁴⁷

There is a tension between the subjective standard of § 133 (true intention) and the objective standard of § 157 though which requires the consideration of good faith and which seems to apply only to contracts, whereas § 133 applies to all declarations of intent. The leading view aims to resolve this contradiction by applying § 157 beyond its wording to all declarations of intent that have to be received by the other party (e.g., an employer's notice), and § 133 only to those that need not to be received by another. This view does however not consider that also for contracts, the parties' true intention is relevant which is expressed by the *falsa demonstratio non nocet* principle. It would therefore not be appropriate not to apply § 133 also to contracts.³⁶⁴⁸ The relevance of the true intention is restricted for declarations that require a certain form (e.g., a last will), or for declarations of intent that need to be received by the other party in order to be effective. The same applies where the good faith principle of § 157 comes into play, i.e., the consideration of how the other party had to understand the declaration.³⁶⁴⁹ By and large, the scope of application of §§ 133 and 157 is overlapping and cannot be separated in most cases.³⁶⁵⁰

On the other hand, the controversy concerning the question of whether § 133 or § 157 takes priority over the other norm, as well the functional relation between these two norms are irrelevant in practice because the courts have developed a 'canon of interpretative principles' or 'canon of construction'³⁶⁵¹ that will be discussed in the following.³⁶⁵²

bb) Method of interpretation

The natural interpretation takes into consideration only the real intention of the party issuing a declaration of intent. In contrast, the normative interpretation also considers the interests of the recipient of the declaration.³⁶⁵³ If the parties' intentions cannot be concluded from their declarations through natural interpretation, declarations of intent that have to be received by

³⁶⁴⁶ Medicus *BGB-AT* 159 and 160. This is for instance not the case if both parties had a different currency for payment in mind.

³⁶⁴⁷ Interpretation will come to the result that the tenant who writes to his landlord that he has found a better and cheaper apartment and therefore will move out by the end of the month means that he gives notice by the end of the month. Example from Brox and Walker *BGB-AT* 61.

³⁶⁴⁸ *Schiemann* in: Staudinger/Eckpfeiler C para 43.

³⁶⁴⁹ *Schiemann* in: Staudinger/Eckpfeiler C para 44.

³⁶⁵⁰ Palandt/*Ellenberger* § 133 para 2.

³⁶⁵¹ *Kanon von Auslegungsgrundsätzen*.

³⁶⁵² Palandt/*Ellenberger* § 133 para 1.

³⁶⁵³ Brox and Walker *BGB-AT* 62.

the other party to become effective are to be interpreted from the standpoint of the recipient of the declaration, i.e., by applying the standard of the normative interpretation. Where the contract contains an unintentional gap – or lacuna –, an objective-generalising standard taking into account the parties' hypothetical intention is applied (complementary interpretation).³⁶⁵⁴ These different methods of construction as well as the modified interpretational standard for standard business terms will be presented below.

(i) Natural interpretation

Natural interpretation of a declaration of intent takes place when only the intention of the party issuing a declaration of intent is taken into account (§ 133) and the recipient's interests are not, because the latter does not deserve or need protection. This is the case, for instance, for a last will, where only the testator's interests are worthy of protection.³⁶⁵⁵

In most legal transactions however, also the other party's interests must be considered. This is namely the case where a declaration of intent has to be received by the other party in order to become effective,³⁶⁵⁶ such as the cancellation of a contract, or an offer or the acceptance of an offer for the conclusion of an agreement. In these cases, the recipient of the declaration of intent must be able to take measures in order to adjust to the legal situation created by the declaration of intent. However, if the declaration deviates from the real intention of the party issuing the declaration, one has to ask whether the recipient has to be protected and if the declaration is binding. This is not the case if the recipient realises what the other party meant. It is not important if he or she chose another formulation consciously or erroneously (*falsa demonstratio non nocet*).³⁶⁵⁷ The recipient of the declaration also deserves no protection if it does not recognise the actual intention of the other party, but could do so by applying reasonable care. The parties have an obligation of mutual consideration, which is why the recipient of a declaration of intent has to interpret the other party's declaration.³⁶⁵⁸ If this interpretation gives some indication that the other party's declaration does not correspond with

³⁶⁵⁴ Stoffels *AGB-Recht* 132.

³⁶⁵⁵ Brox and Walker *BGB-AT* 62.

³⁶⁵⁶ *Empfangsbedürftige Willenserklärung*.

³⁶⁵⁷ See the example above where the parties consciously designated weapons by music instruments. Brox and Walker *BGB-AT* 63.

³⁶⁵⁸ Palandt/*Ellenberger* § 133 para 9.

its actual intention, the recipient cannot rely on the declaration and has to require clarification.³⁶⁵⁹

(ii) Normative interpretation

Contrary to natural interpretation, normative interpretation does not aim to assess the actual intention of the party issuing a declaration of intent, but the objective meaning of the declaration in order to consider the interests of the recipient of the declaration.³⁶⁶⁰ Hence, it is significant how the recipient could understand or must have understood the meaning of the declaration.³⁶⁶¹

Unlike the natural interpretation which has its basis in the wording of § 133 ('real intention'), the legal basis for normative interpretation cannot be found in § 157 (nor in § 133) but results from the principle of legitimate expectations³⁶⁶² and §§ 119 *et seq.*³⁶⁶³

Like for statutory interpretation, the wording of the given declaration (provision in a contract) is the starting point for interpretation. This also applies to declarations that are assumingly unambiguous and clear, because only by interpretation one can ascertain that the declaration is congruent with the true intention. If not, the *falsa demonstratio non nocet* principle applies.³⁶⁶⁴

The objective of grammatical interpretation is to find out the grammatical and ordinary meaning of the words of the contract.³⁶⁶⁵ This rationale is based on the assumption that the use of certain words or phrases of a language is based on a convention and that the parties to a contract, who know the conventional meaning of the words contained therein, will use them accordingly in order to be understood.³⁶⁶⁶ The language of an agreement offers a 'firmer

³⁶⁵⁹ If for instance, a seller from Cologne writes to the purchaser in Munich that he offers a certain painting for 5,000 Dollars, the purchaser has to ask the seller if he means American or Canadian Dollars and cannot choose the currency that is more favourable for him. Example from Brox and Walker *BGB-AT* 63 and 64.

³⁶⁶⁰ Stoffels *AGB-Recht* 132.

³⁶⁶¹ Schiemann in: Staudinger/Eckpfeiler C para 52.

³⁶⁶² *Vertrauensschutz*.

³⁶⁶³ Palandt/*Ellenberger* § 133 para 7.

³⁶⁶⁴ Schiemann in: Staudinger/Eckpfeiler C para 45.

³⁶⁶⁵ In South African common law, this is known as Lord Wensleydale's golden rule from *Grey v Pearson* (1857) 10 ER 1216 at 1236, according to which '(...) the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.' In this regard, see *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947 (4) SA 521 (A) at 543; *N&B Clothing Manufacturers (Pty) Ltd v British Trading Insurance Co Ltd* 1966 (2) SA 522 (W) at 525C; *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 556D; *Western Credit Bank Ltd v Van der Merwe* 1970 (3) SA 461 (C) at 463H.

³⁶⁶⁶ Hutchison *et al Law of Contract* 256. See also *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 (A) at 624G-625B, *Hirt & Carter (Pty) Ltd v Mansfield* 2008 (3) SA 512 (D) at para [63]-[70]; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) at para [13].

footing' for the assertion of the parties' common intention at the time when they contracted than the assertion of their actual intention locked up in their minds, or what they maintain being their intention when a dispute arises.³⁶⁶⁷ Difficulties arise where the parties attribute different meanings to the same word or phrase.³⁶⁶⁸ In addition, the meaning of words changes over time or in different circumstances. The 'ordinary meaning' therefore describes the meaning of a word or phrase in the given contractual context. When reading the contract as a whole, this might be the everyday meaning, or a more unusual, technical one.³⁶⁶⁹

Words have to be seen in their context and use of the parties in question,³⁶⁷⁰ and never in isolation (*in vacuo*).³⁶⁷¹ Laypersons will use different terminology than business people or lawyers. If the recipient of a declaration of intent is someone familiar with legal terminology, it can be assumed that he or she understands the terminology with the meaning that the courts and legal literature attach to it. Laypersons too must research legal terminology to a certain extent (unlike, e.g., medical terminology) though because by concluding a contract they participate in a legal transaction (and not in a medical conversation) that by its mere nature involves legal terminology.³⁶⁷²

Hence, similar to statutory interpretation, the context of the declaration has to be taken into consideration (systematic interpretation).³⁶⁷³ This is 'the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the

³⁶⁶⁷ Christie and Bradfield *Law of Contract* 215. See *Hansen, Schrader & Co v De Gasperi* 1903 TH 100 at 103.

³⁶⁶⁸ This is the case, for instance, where the parties usually use the same word in different circumstances or domains. One party might use a term in its all-day meaning, whereas the other uses it in its meaning that it has acquired by trade usage or law. For instance, in every-day language 'owner' and 'possessor' have the same meaning, whereas their meaning is different in legal terminology.

³⁶⁶⁹ Christie and Bradfield *Law of Contract* 216. Jansen JA's statement in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B, in words adopted in *List v Jungers* 1979 (3) 106 (A) 119A-B are very instructive in this regard.

³⁶⁷⁰ Palandt/*Ellenberger* § 133 para 14. See also *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-727A, Hefer JA remarked: 'Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of the words. (...) But judicial interpretation cannot be undertaken (...) by excessive peering at the language to be interpreted without sufficient attention to the contextual scene.' In *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) at 196E-F, Nicholas stated in connection to the interpretation of a patent specification: 'A dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. And, where a word has more than one meaning, the dictionary does not, indeed it cannot, prescribe priorities of meaning.'

³⁶⁷¹ See Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

³⁶⁷² Staudinger/*Singer* § 133 para 52, with further references, *Schiemann* in: Staudinger/Eckpfeiler C para 46.

³⁶⁷³ Palandt/*Ellenberger* § 133 para 14. See also *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

contract.³⁶⁷⁴ Grammatical and systematic interpretation cannot be separated however since the grammatical or literal meaning of words can only be assessed in their context.³⁶⁷⁵

The recipient has to interpret the declaration in order to find out the actual intention of the other party (§ 133) and use all accessible material, such as negotiations, correspondence, preliminary information and even the *invitatio ad offerendum* etc.³⁶⁷⁶ For the recipient, it will not always be possible though to assess the other's intention. If the actual intention of the party issuing a declaration of intent is not congruent with the issued declaration, and the recipient cannot conclude from other material that the other party meant something different, the content of the declaration as expressed is valid. If A writes to B that he wants to sell a painting for 890 Euros, but actually means 980 Euros, and the potential purchaser cannot conclude from outside material that the price contains a typo and accepts this offer, the painting is sold for 890 Euros. If, on the other hand, the purchaser has corresponded with the seller before the sale, and in the seller's correspondence he always indicated 980 Euros as the sales price, the painting is sold for 980 Euros.³⁶⁷⁷ Where the recipient of the declaration of intent cannot assess the other party's real intention for lack of other indications outside the declaration, it is justified that the recipient's interests take precedence. This is because the deviation of the declaration and the actual intention of the other party originated in the other party's sphere.³⁶⁷⁸ In this case, it is not relevant what the party who issued the declaration of intent actually meant, but how the recipient had to understand the declaration (interpretation from the standpoint of the recipient of the declaration).³⁶⁷⁹ If a client calls a travel agency in order to book a trip to Porto in Portugal, and the agent understands 'Bordeaux' (in France) due to the client's Saxon accent (in which hard consonants are pronounced softly), the customer booked a trip to Bordeaux.³⁶⁸⁰ This result is supported by §§ 157 and 119(1) as '[c]ontracts are to be interpreted as required by good faith, taking the customary practice into consideration', and the party issuing the declaration can void

³⁶⁷⁴ *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768. Schreiner JA referred to this as 'linguistic treatment' in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454-455.

³⁶⁷⁵ See also discussion in Part I ch 4 para 4.1 a).

³⁶⁷⁶ See BGH NJW 2003, 1317.

³⁶⁷⁷ Brox and Walker BGB-AT 64.

³⁶⁷⁸ Brox and Walker BGB-AT 64.

³⁶⁷⁹ *Auslegung nach dem Empfängerhorizont*. See BGH NJW 2013, 598 (599); 2008, 2702 (2704); 1984, 721.

³⁶⁸⁰ Example from Brox and Walker BGB-AT 65.

its declaration pursuant to § 119(1).³⁶⁸¹ Then, the contract is void from the outset in terms of § 142(1).³⁶⁸²

Other surrounding circumstances must be taken into account too when assessing the true intention, such as the genesis of the contract (pre-negotiation),³⁶⁸³ or the fact that the given parties have developed certain practices over time from former business relations.³⁶⁸⁴

The South African approach³⁶⁸⁵ also includes extra-textual elements, i.e., the extended context of a contract, or the background circumstances so that useful conclusions with regard to the intended meaning from the nature of the contract, its purpose and background can be drawn.³⁶⁸⁶

The consideration of extra-textual elements is restricted by the parol evidence rule though. This rule provides that where the parties intended to lay down their agreement fully and finally in writing, evidence to contradict, vary, add to or subtract from the terms of the writing is inadmissible.³⁶⁸⁷

The interpretation of a contract normally requires a reference to extraneous facts. In order to draw a line, South African courts traditionally distinguished between background circumstances and surrounding circumstances.³⁶⁸⁸ This distinction is blurred and artificial, however. This is why the courts no longer apply this distinction³⁶⁸⁹ and tend to allow all

³⁶⁸¹ § 119(1): 'A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.'

³⁶⁸² § 142(1): 'If a voidable legal transaction is avoided, it is to be regarded as having been void from the outset.'

³⁶⁸³ Palandt/Ellenberger § 133 para 16.

³⁶⁸⁴ Palandt/Ellenberger § 133 para 17.

³⁶⁸⁵ See the discussion in Part I ch 4.

³⁶⁸⁶ Hutchison *et al* *Law of Contract* 257.

³⁶⁸⁷ *Union Government v Vianini Ferr Concrete Pipes (Pty) Ltd* 1941 AD 47; *Johnston v Leal* 1980 (3) SA 927 (A) 938; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA). The parol evidence rule was first stated in *Lowrey v Steedman* 1914 AD 532 at 543: 'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.'

³⁶⁸⁸ Hutchison *et al* *Law of Contract* 260.

³⁶⁸⁹ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165. See also *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Boerne v Harris* 1949 (1) SA 793 (A); *Johnston v Leal* 1980 (3) SA 927 (A).

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, Wallis JA summarises the development as follows at para [12]: 'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. *The former*

evidence in order to determine the meaning of a word or phrase. This is because the relevance of evidence cannot be determined before the end of a case, which of course defies the purpose of the parol evidence rule.³⁶⁹⁰

What is more, the imprecise definition of background and surrounding circumstances made it difficult for a judge not to consider also extrinsic evidence, such as previous negotiations and correspondence between the parties, their subsequent conduct, or direct evidence of their own intentions.³⁶⁹¹ Extrinsic evidence can be a valuable source though. Often extrinsic documents, such as correspondence, are clear enough to read the parties' intentions, without digging in their respective state of minds at the time when the contract was concluded.³⁶⁹²

For normative interpretation, one has to take the perspective of an honest and reasonable recipient.³⁶⁹³ According to the prevailing view, the recipient has an obligation to interpret the other's declaration diligently.³⁶⁹⁴

The objective standpoint of the recipient is irrelevant though where the recipient is aware of the actual intention of the other.³⁶⁹⁵ If a client in a restaurant orders food on the basis of a wrong menu (e.g., the lunch menu with lower prices instead of the dinner menu) and is aware of this fact (e.g., because it is clearly written on the menu or the client knows the restaurant's policy), the client's actual standpoint is relevant, i.e., his or her knowledge of the owner's actual intention to sell food at the 'dinner prices'.³⁶⁹⁶

Where the parties issue their respective declarations of intent by means of electronic communication, e.g., in an automatic booking system, it is not relevant for the interpretation how the system processes these declarations. It is relevant though how a human recipient understands it as required by good faith, taking the customary practice into consideration.³⁶⁹⁷

distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach'. In the summary, one can concisely read: '[I]nterpretation a unitary process commencing with the words and construing them in the light of all relevant circumstances – no distinction to be drawn between background and surrounding circumstances.' Emphasis added.

³⁶⁹⁰ Hutchison *et al* *Law of Contract* 260.

³⁶⁹¹ Hutchison *et al* *Law of Contract* 261, *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767-768.

³⁶⁹² For the contrary view, see Hutchison *et al* *Law of Contract* 265.

³⁶⁹³ Schiemann in: Staudinger/Eckpfeiler C para 52.

³⁶⁹⁴ See Schiemann in: Staudinger/Eckpfeiler C para 52, with further references, Staudinger/*Singer* § 133 para 18 *et seq.*

³⁶⁹⁵ Schiemann in: Staudinger/Eckpfeiler C para 53.

³⁶⁹⁶ See Jhering school case in Staudinger/*Singer* § 133 para 20, with further references.

³⁶⁹⁷ See § 157. BGH ZIP 2017, 928 para 23, with notes by Dornis JZ 2017, 637. Therefore, no contract of transportation has been established where a person fills in the indispensable case for the passenger's name with the indication 'not known yet'. BGH NJW 2013, 598 *et seq.*, with notes by Hopperditzel and Schinkels LMK

Even if the party issuing a declaration of intent is not aware that he or she issues such a declaration, and the recipient must conclude, by applying a reasonable standard of care, that the other party has the intention to enter into a legal transaction, the recipient deserves protection. Therefore, the transaction is concluded.³⁶⁹⁸

The formulation that interpretation is superfluous where both parties' true intentions are concordant is mistakable in that the enquiry that the parties had the same intention inevitably necessitates an interpretation. What is more, their concordant intention might have a gap that requires to be filled.³⁶⁹⁹

b) Complementary interpretation

aa) Definition

If the parties did not stipulate one or several points in their agreement — either consciously because they were believed that the contract does not need to provide for this issue, or unconsciously because they overlooked the issue, or it did not exist at the time when they concluded their agreement — complementary interpretation comes into play. Complementary interpretation requires an unintentional lacuna, or loophole, which has to be filled by the court. In certain cases, the law itself is of help by providing for dispositive provisions.³⁷⁰⁰ For instance, if the contract of sale between the parties does not contain a provision for the case of a defective *merx* because the parties assumed that it was faultless, §§ 434 *et seq.* BGB provide for the legal consequences. The court therefore does not have to apply the principles of complementary interpretation.³⁷⁰¹ Where these legal provisions are not suited in the particular circumstances, the judge has to fill the gap by applying the principles of complementary interpretation.³⁷⁰²

2013, 343553. In another case, the seller offered an e-bike on Ebay and indicated EUR 100 next to the buy-it-now button. Next to the price he added the indication 'New Pedelec EUR 2,600 — read description!!' At the end of this description one could read: 'Attention! Since I cannot put more than EUR 100 for this auction (because of the high transaction costs), you agree that by clicking on the offer for EUR 100 with the actual price of EUR 2,600.' The BGH decided that the purchaser had to interpret this offer insofar as the e-bike cost EUR 2,600, as from his standpoint he could assess the actual price (BGH ZIP 2017, 928 para 12 *et seq.*).

³⁶⁹⁸ In the (fictional) case of the wine auction of Treves, A rises his hand in order to wave his friend B, without knowing that this gesture in this particular auction taking place in Treves means that he is making an offer of EUR 100 above the previous offer. The auctioneer must conclude that A made an offer as from his standpoint, he could not know that A had no intention to enter into a legal transaction. This case is cited, e.g., in Brox and Walker *BGB-AT* 45 and 66. See also BGHZ 91, 324 = BGH NJW 1984; 2279; BGHZ 109, 171 (177) = BGH NJW 1990, 454; 2010, 861 (862); 2011, 1434 *et seq.* (normative interpretation of a certain conduct as implied approval).

³⁶⁹⁹ Palandt/*Ellenberger* § 133 para 8, *Schiemann* in: Staudinger/*Eckpfeiler* C para 45.

³⁷⁰⁰ Brox and Walker *BGB-AT* 67.

³⁷⁰¹ Example from Brox and Walker *BGB-AT* 67.

³⁷⁰² Brox and Walker *BGB-AT* 67.

bb) Lacuna

In order to perform complementary interpretation, there must be an unintentional lacuna which has to be assessed by the interpretation of the legal transaction. Not only the intention to enter into a legal transaction is to be assessed, but also the reasons and circumstances which led to this intention. Therefore, an unintentional lacuna only exists where the party issuing the declaration of intent did not consider — or considered wrongly — certain circumstances.³⁷⁰³ It is not relevant whether a party did not take into account certain circumstances which existed at the time of the conclusion of the contract (primary lacuna) or which came into being afterwards (secondary lacuna).³⁷⁰⁴

cc) Gap-filling

If the judge has established that the transaction contains an unintentional lacuna, he or she has to fill it by assessing what the parties would have agreed if they had considered the particular circumstance by applying the principles of good faith and customary practice in terms of § 157. Therefore, not the parties' actual intention is relevant, but what they would have reasonably stipulated if they had known of the loophole in their contract.³⁷⁰⁵ In doing so, the court has to take into consideration the particular circumstances of the case, such as the parties' reasons to enter into the contract, their interests as well as the customary practice.³⁷⁰⁶

The term 'hypothetical intention' of the party that is often used to describe the objective of interpretation is misleading though as it insinuates that the parties' intention has to be assessed empirically. In reality, gap-filling by interpretation is very far from finding this intention since in fact, the explanatory value of the party's conduct must be found.³⁷⁰⁷ The same applies to statutory interpretation, where the analogous application of legal norms has nothing to do with

³⁷⁰³ If A and B, who both own bookstores in different cities, decide to swap their establishments, and B returns after a couple of months to his former city in order to open a new bookstore next to his old one (which now belongs to A), there is no lacuna if both parties anticipated B's return and B had made clear to A during their negotiations that he reserved his right to return and open a new bookstore next to his old shop. On the other hand, there is a lacuna if the parties both did not anticipate B's return and thus did not provide for a non-competition clause in the contract. For similar cases, see BGH *NJW* 2002, 2310, BGHZ 127, 138 (142) = BGH *NJW* 1994, 3287.

³⁷⁰⁴ Brox and Walker *BGB-AT* 67.

³⁷⁰⁵ BGH *NJW* 2013, 678 (679).

³⁷⁰⁶ Brox and Walker *BGB-AT* 68. In the aforementioned bookstore case, the judge has to consider that if the parties had anticipated B's speedy return, they had taken into account that for A it would be impossible to consolidate the commercial relationships and customers that previously were B's partners and clients in such a short time without suffering commercial losses due to B's return. Since B's speedy return jeopardizes the contractual objective, the parties would have stipulated a non-competition clause, and the lacuna has to be filled in this regard. See BGHZ 16, 71 (*77 et seq*) = BGH *NJW* 1955, 337.

³⁷⁰⁷ Palandt/Ellenberger § 133 para 9, *Schiemann* in: Staudinger/Eckpfeiler C para 51.

the intention of the historical legislator. Both the interpretation of contractual provisions and statutory interpretation are a legal assessment and not fact-finding.³⁷⁰⁸

Sometimes, a gap is filled by the application of the *ius dispositivum*. Applying this approach systematically would infringe the principle of private autonomy though because the parties' intention is not necessarily that statutory provisions fill a gap. The fact that they did not positively find a provision to fill the given gap does not mean that they did not wish to exclude the *ius dispositivum*. This applies above all for atypical or mixed-type contracts where it is difficult to find appropriate legal provisions that regulate this type of agreements. What is more, by choosing such an atypical contract type, the parties expressed their intention to submit their legal transaction to another order than the one expressed in the law. It is thus more appropriate to develop this order further and to use it as a model for the filling of the existing gap than drawing on statutory provisions.³⁷⁰⁹

c) General principles of interpretation

Besides the principles as mentioned above, several other principles and maxims exist that will be presented below. In South African terminology, these belong to the so-called 'secondary rules of interpretation'.

In certain cases, the BGB provisions set out how a contractual provision has to be interpreted in case of doubt. This is usually expressed by the term 'unless'.³⁷¹⁰ Hence, one can assume that § 139 serves as an interpretational rule according to which certain transactions are void in their entirety, and that for contracts, the contrary is the case since § 2085³⁷¹¹ provides only partial ineffectiveness for last wills.³⁷¹² In practice, the application of these clauses is circumvented by severability clauses³⁷¹³ and for contracts containing standard business terms, §§ 306(1) and 310(3) set out that the agreement is effective (which is the contrary legal consequence of

³⁷⁰⁸ Schiemann in: Staudinger/Eckpfeiler C para 51.

³⁷⁰⁹ Schiemann in: Staudinger/Eckpfeiler C para 50.

³⁷¹⁰ § 139: 'If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part.' ('*wenn nicht*'); § 145: 'Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it' ('*es sei denn*'); § 149: 'If a declaration of acceptance received late by the offeror was sent in such a way that it would have reached him in time if it had been forwarded in the usual way, and if the offeror ought to have recognised this, he must notify the acceptor of the delay after receipt of the declaration without undue delay, unless this has already been done. If he delays the sending of the notification, the acceptance is deemed not to be late' ('*sofern*'), to mention but a few.

³⁷¹¹ § 2085: 'The ineffectiveness of one of a number of dispositions contained in a will results in the ineffectiveness of the other dispositions only if it is to be assumed that the testator would not have made them without the ineffective disposition.'

³⁷¹² Schiemann in: Staudinger/Eckpfeiler C para 54.

³⁷¹³ Staudinger/Roth § 139 para 22, with further references.

§ 139).³⁷¹⁴ Other provisions that prescribe a certain interpretation are §§ 311c,³⁷¹⁵ 328(2)³⁷¹⁶ and 364(2).³⁷¹⁷

Moreover, jurisprudence has developed some interpretational maxims. The *falsa demonstratio non nocet* principle according to which an erroneous declaration is irrelevant if the declarant's real intention was visible or could be ascertained by the other,³⁷¹⁸ has already been discussed. Strictly speaking, the *falsa demonstratio* principle is no maxim in itself, but merely what § 133 sets out: the true intention must be ascertained, and the literal meaning of a declaration is irrelevant.³⁷¹⁹

According to the *protestatio facto contraria* maxim, a declaration cannot be restricted by a reservation that has not been expressly declared.³⁷²⁰ Reversely, a party that impliedly conducts unambiguously cannot destroy its declaration by a verbal counter-declaration.³⁷²¹ In the second case however, one can put forward the argument against the application of the *protestatio* principle that an express declaration must be taken into account because of the principle of party autonomy.³⁷²² Therefore, by a reservation to make a certain performance by a legal transaction, e.g., the agreement that the ownership shall pass onto the other party in terms of § 929,³⁷²³ the legal consequence set out in § 814³⁷²⁴ (knowledge that the debt is not owned) can be avoided.³⁷²⁵

³⁷¹⁴ Schiemann in: Staudinger/Eckpfeiler C para 54.

³⁷¹⁵ § 311c: 'If a person agrees to dispose of or charge a thing, that duty, in case of doubt, also applies to accessories of the thing.'

³⁷¹⁶ § 328: '(1) Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly. (2) In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.'

³⁷¹⁷ § 364: '(1) The obligation expires if the obligee accepts, in lieu of performance of contract, performance other than that owed. (2) If the obligor assumes a new obligation to the obligee for the purpose of satisfying the latter, it is not to be assumed, in case of doubt, that he is assuming the obligation in lieu of performance of contract.'

³⁷¹⁸ See Creifelds *Rechtswörterbuch* s.v. 'falsa demonstratio non nocet'.

³⁷¹⁹ Schiemann in: Staudinger/Eckpfeiler C para 56.

³⁷²⁰ See Creifelds *Rechtswörterbuch* s.v. 'protestatio facto contraria', which refers to 'Willenserklärung' (1b bb).

³⁷²¹ Schiemann in: Staudinger/Eckpfeiler C para 57.

³⁷²² Staudinger/Singer § 133 para 60, with further references.

³⁷²³ § 929: 'For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. If the acquirer is in possession of the thing, agreement on the transfer of the ownership suffices.'

³⁷²⁴ § 814: 'Restitution of performance rendered for the purpose of performing an obligation may not be demanded if the person who rendered the performance knew that he was not obliged to do so or if the performance complied with a moral duty or consideration of decency.'

³⁷²⁵ Schiemann in: Staudinger/Eckpfeiler C para 57.

According to another interpretational principle, where declarations are set out in a contract or another agreement only the written declarations apply.³⁷²⁶ For individuals that are not business people, evidence of the contrary, i.e., a differing intention, is permitted, however.³⁷²⁷ Where the law requires a certain form, the principle of the 'entirety of authentication'³⁷²⁸ applies.³⁷²⁹ Therefore, agreements that are not contained in the contracts are ineffective, except for the cure set out in § 311b(1) 2nd sent., for instance.³⁷³⁰

The rule that any doubts in the interpretation of standard business terms are resolved against the user (§ 305c) applies by analogy where a declaration of intent is transmitted by modern communication methods or where the text of the contract has been drafted by the party who is intellectually and economically superior to the other.³⁷³¹

In case of doubt, the interpretation that avoids the contract to be ineffective is to be preferred, or³⁷³² that the parties aimed to stipulate legally relevant provisions without contradictions,³⁷³³ or that they wanted to abide to the law and did not strive to agree to unlawful conduct.³⁷³⁴

d) Result of interpretation

If the result of the interpretational enquiry is that the declaration of intent remains unclear as regards crucial points and is thus not sufficiently definite or unambiguousness, it is void.³⁷³⁵ By making an ineffective declaration, the declarant might infringe the pre-contractual relationship of trust that was built up during the negotiations. In this case, he or she is liable for damages according to §§ 311(2) no. 1, 241(2), 280(1).³⁷³⁶

³⁷²⁶ See the discussion on the parol evidence rule above, as well as in Part I ch 2 para 4.1.b) and ch 4 para 4.1 a).

³⁷²⁷ *Schiemann* in: Staudinger/Eckpfeiler C para 58.

³⁷²⁸ *Grundsatz der Gesamtbeurkundung*.

³⁷²⁹ Staudinger/*Hertel* § 125 para 58.

³⁷³⁰ **§ 311b(1):** 'A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary. A contract not entered into in this form becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected.' In this regard, see the discussion on the parol evidence rule above, as well as in Part I ch 2 para 4.1 b) and ch 4 para 4.1 a).

³⁷³¹ Palandt/*Ellenberger* § 133 para 23 and 26a.

³⁷³² *Hutchison et al Law of Contract* 267.

³⁷³³ See, for instance, *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 429-430.

³⁷³⁴ Palandt/*Ellenberger* § 133 para 26.

³⁷³⁵ Staudinger/*Singer* § 133 para 23.

³⁷³⁶ **§ 311(2) no. 1:** '(2) An obligation with duties under section 241 (2) also comes into existence by (...) the commencement of contract negotiations (...);' **§ 241(2):** 'An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.'; **§ 280(1):** 'If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.'

On the other hand, if the result of the interpretation differs from the real intention of the declarant, the declaration is voidable for mistake in terms of § 119(1).³⁷³⁷ Then, the person declaring voidability might be liable in damages under § 122.³⁷³⁸ The principle that interpretation takes precedence over voidability³⁷³⁹ applies though.³⁷⁴⁰

3.4 The modified interpretational standard for standard business terms

For the interpretation of standard terms, some particularities concerning the standard of interpretation exist. When interpreting standard terms, not the recipient's standpoint, i.e., how he or she had to interpret a clause or a contract while applying reasonable care, is relevant. Instead, one has to consider the standpoint of an average customer without legal knowledge, and under consideration of the relevant public who is normally confronted with these terms and conditions.³⁷⁴¹ This means that the interpretation does not take into account the circumstances of an individual case or the individual understanding of a party.³⁷⁴² In other words, certain means for the interpretation of standard terms are not applicable, such as the history of the instrument. On the other hand, the wording of a clause becomes more important.³⁷⁴³ Therefore, standard terms of an investment company are to be interpreted indifferently, irrespective of whether the other party is inexperienced in investment matters or a shrewd investor.³⁷⁴⁴

If the parties both attach a meaning to a clause which differs from the objective meaning, the meaning attached by the parties is relevant. The courts often motivate this outcome by applying § 305b (priority of individually agreed terms).³⁷⁴⁵ Stoffels legitimately averts that this

³⁷³⁷ § 119: '(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. (2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.'

³⁷³⁸ § 122(1): 'If a declaration of intent is void under section 118, or avoided under sections 119 and 120, the person declaring must, if the declaration was to be made to another person, pay damages to this person, or failing this to any third party, for the damage that the other or the third party suffers as a result of his relying on the validity of the declaration; but not in excess of the total amount of the interest which the other or the third party has in the validity of the declaration.'

³⁷³⁹ 'Auslegung geht vor Anfechtung'.

³⁷⁴⁰ Schiemann in: Staudinger/Eckpfeiler C para 59.

³⁷⁴¹ BGH NJW 2002, 285 (286); 2007, 504 (505); 2008, 2172 (2173).

³⁷⁴² BGHZ 33, 216 (218); 84, 268 (272), BGH NJW 1992, 2629; 2001, 2165 (2166), BAG NZA 2006, 324 (327), UBH/Ulmer and Schäfer § 305c para 73 *et seq.*, Roth WM 1991, 2126.

³⁷⁴³ UBH/Ulmer and Schäfer § 305c para 73. The courts have different views on this point though. For an objective interpretation oriented towards the wording of a clause: BGH NJW 1988, 3149 (3150); 2002, 441. Standard terms of insurance companies have to be interpreted in line with the understanding of an average insured applying reasonable care when reading carefully the terms, taking into account how he or she had to understand them in their context: BGH NJW 1993, 2368; 1999, 1633, 1634; 2001, 3406.

³⁷⁴⁴ BGH NJW 1980, 1947.

³⁷⁴⁵ § 305b: 'Individually agreed terms take priority over standard business terms.'

reasoning is unnecessarily complicated since this is a case for natural interpretation which also for standard terms takes precedence over normative-objective interpretation. After all, also the interpretation of standard terms is rooted in §§ 133 and 157.³⁷⁴⁶

There are good reasons for the modification of the interpretational standard for standard terms. The use of standard terms is characterised by the lack of individual particularities because they are designed for a great number of customers.³⁷⁴⁷ This becomes particularly clear in institutional actions where there is no reference to individual circumstances. In the context of individual proceedings too, usually no individual circumstances have to be taken into consideration for interpretational purposes.³⁷⁴⁸ In addition, the rationalising effect of standard terms would be jeopardised if the user had to fear that its instrument would not be applied in a unified manner because of differing interpretations.³⁷⁴⁹ The objective standard of interpretation does not restrict the parties unduly because they can agree on individual terms under § 305b or on a different meaning on which they exchange their standpoint during their negotiations. In the latter case, the principles of natural interpretation apply.³⁷⁵⁰

4. The interpretation of clauses in consumer contracts

It is arguable if the objective standard of interpretation must also be applied to consumer contracts since in terms of § 310(3) no. 3 'in judging an unreasonable disadvantage under section 307(1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.' Some authors thus assert that the particular-personalised circumstances must also be considered for the interpretational control.³⁷⁵¹ The wording and the position of this provision do not support the view that the objective standard is inapplicable in this case. Furthermore, § 310(3) no. 3 is a provision in the context of content control, and not interpretational control. Interpretational and content control have to be carried out separately, though. This means that the consideration of 'other circumstances' belongs to content control. What is more, the opposite view has the effect that the interpretational standards differ according to the type of proceeding. In institutional actions, § 310(3) no. 3 does not apply, whereas this provision applies to individual actions.³⁷⁵²

³⁷⁴⁶ Stoffels *AGB-Recht* 133.

³⁷⁴⁷ Roth *WM* 1991, 2126.

³⁷⁴⁸ Stoffels *AGB-Recht* 134.

³⁷⁴⁹ UBH/Ulmer and Schäfer § 305c para 75.

³⁷⁵⁰ Stoffels *AGB-Recht* 134.

³⁷⁵¹ Locher *Recht der AGB* 61, Schmidt-Salzer *JZ* 1995, 230 *et seq.*

³⁷⁵² Stoffels *AGB-Recht* 134, PWW/Berger § 305c para 15.

5. Interpretational control by means of an appeal on points of law

From a procedural point of view, one has to distinguish between the determination of the facts of the case in question and the interpretation based on these facts.³⁷⁵³ A court deciding on an appeal on points of law (*Revision*)³⁷⁵⁴ is only allowed to decide on questions of law, but not on those pertaining to the facts or to customary practice. Interpretational questions, on the other hand, are a matter of legal appreciation. They are reserved for the lower courts which are competent for the determination of the facts though. The court of appeal (*Revisionsgericht*) is only competent in these cases if a legal provision, a general rule of logic or an empirical principle have been incorrectly applied. It is furthermore competent where substantial material for the interpretation (negotiations, prospects, correspondence etc.) has not been considered, or a procedural rule has been infringed.³⁷⁵⁵ The reason for the lack of jurisdiction of the court of appeal for questions of fact is that the lower courts are much more familiar with the facts, e.g., because they heard evidence.³⁷⁵⁶

The interpretation of standard terms is subject to the scrutiny by the BGH deciding on questions of law if certain conditions with regard to the territorial competence are fulfilled, whereby § 545 ZPO³⁷⁵⁷ is applied by analogy. It is to be feared that several courts of appeal (which might be simultaneously competent for factual questions) could construe standard terms differently, the BGH is competent for the interpretation of standard terms in order to ensure a uniform interpretation.³⁷⁵⁸ The Bundesarbeitsgericht (BAG) even goes further by stating that 'typical clauses' are subject to an appeal on points of law (*Revision*) without restriction.³⁷⁵⁹

6. Special rules of interpretation

Besides the principles of interpretation mentioned earlier, special rules of interpretation exist. These will be discussed in the following.

³⁷⁵³ Palandt/*Ellenberger* § 133 para 29.

³⁷⁵⁴ In German civil procedure, an appeal on points of law (*Revision*) may only be based on the reason that the contested decision is based on a violation of the law (§ 545(1) ZPO). See Creifelds *Rechtswörterbuch* s.v. 'Revision', Musialak ZPO 289. In terms of § 542(1) ZPO, '[s]ubject to the following provisions, an appeal on points of law may be filed against the final judgments delivered by the appellate instance on fact and law.' Hence, an appeal on points of law is permitted against appeal judgments of the Landgerichte (LG) and Oberlandesgerichte (OLG). In labour jurisdiction, they are permitted against decisions of the Landesarbeitsgerichte (LAG).

³⁷⁵⁵ BGH NJW 1995, 45 (46); 1995, 1212 (1213); 2002, 3232 (3233), BAG NZA 2007, 940 (941).

³⁷⁵⁶ Stoffels *AGB-Recht* 135.

³⁷⁵⁷ § 545 ZPO (Grounds for an appeal on points of law): ' (1) An appeal on points of law may only be based on the reason that the contested decision is based on a violation of the law. (2) An appeal on points of law may not be based on the fact that the court of first instance was wrong in assuming that it had or did not have jurisdiction.'

³⁷⁵⁸ BGH NJW 2005, 2919, MüKo/*Basedow* BGB § 305c para 45. According to the BGH, foreign standard terms are not subject to the assessment of the court of appeal stating on points of law. See BGH NJW 1994, 1408.

³⁷⁵⁹ BAG NZA 2006, 324 (326).

6.1 Rule of ambiguity

a) Meaning of the rule

According to § 305c(2), any doubts in the interpretation of standard business terms are resolved against the user.³⁷⁶⁰ If the content of a clause cannot be clearly determined, the user bears the risk. This means that the user has the responsibility for the content of its standard terms. Furthermore, this means that § 155,³⁷⁶¹ according to which a contract risks not being concluded in case of a hidden dissent, does not apply.

§ 305c(2) sets out an interpretational rule which prepares content control, but which cannot serve as a content control standard.³⁷⁶²

Even though the practical relevance of the ambiguity rule³⁷⁶³ of § 305c(2) cannot be overestimated,³⁷⁶⁴ there is a certain tendency to side-line this rule by the application of the 'transparency requirement'³⁷⁶⁵ of § 305c(1).³⁷⁶⁶ Where an inadequate disadvantage arises from an ambiguous term, there is no need to interpret this term according to § 305c(2). Hence, the scope of application of the rule of ambiguity in terms of § 305c(2) is limited to cases in which an objective ambiguity of a clause does not also infringe the transparency requirement.³⁷⁶⁷

§ 305c(2) cannot be waived or circumvented by standard terms, which is made clear in § 307(2) no. 1.³⁷⁶⁸ The ambiguity rule is applicable without restrictions to B2B contracts,³⁷⁶⁹ and the Bundesarbeitsgericht consequently applies this rule to employment contracts.³⁷⁷⁰

b) Priority of the methods of interpretation

Since the legislator favoured an open content control, a too wide application of the rule of ambiguity of § 305c(2) would encumber this principle. Too many problematic clauses would already be mitigated at this stage in favour of the other party, without the possibility to assess

³⁷⁶⁰ This provision corresponds to art 5 2nd sent. of the Unfair Terms Directive.

³⁷⁶¹ § 155: 'If the parties to a contract which they consider to have been entered into have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is applicable if it is to be assumed that the contract would have been entered into even without a provision concerning this point.'

³⁷⁶² Report of the Law Commission BT-Drs. 7/5422 at 5, Roth *WM* 1991, 2086. Therefore, the BGH wrongly states in BGH *NJW* 1985, 53 that a certain clause 'infringes' § 305c(2).

³⁷⁶³ *Unklarheitenregel*.

³⁷⁶⁴ Roth *WM* 1991, 2086, Stoffels *AGB-Recht* 136.

³⁷⁶⁵ *Transparenzgebot*.

³⁷⁶⁶ Thamm/Pilger *AGBG* § 5 para 4.

³⁷⁶⁷ Stoffels *AGB-Recht* 137, BGH *NJW* 1994, 1060 (1062), where the rule of ambiguity was applied and an infringement of the transparency requirement negated.

³⁷⁶⁸ BGH *NJW* 1999, 1865 (1866 *et seq.*).

³⁷⁶⁹ BGH *NJW-RR* 1988, 113 (114).

³⁷⁷⁰ See, for example, BAG *DB* 1992, 383 (384).

their adverse impact within the content control.³⁷⁷¹ Therefore, a cautious application of this rule is advised.³⁷⁷² Hence, the courts apply § 305c(2) only in cases where despite the application of all other interpretational methods an irremovable doubt and at least two legally justifiable interpretational possibilities remain.³⁷⁷³ Schlechtriem, on the other hand, contends that a customer-friendly interpretation must be applied where the wording is unclear and several interpretational results are possible in the view of an objective interpretation which is oriented towards the comprehension of an average customer.³⁷⁷⁴ This view has the disadvantage that it encumbers an open content control and a real assessment of the clause in question. It is thus submitted that the courts' application of this rule is correct. What is more, § 305c(2) does not necessarily favour a customer-friendly interpretation, but rather an interpretation 'against the user'.³⁷⁷⁵

On the other hand, where the parties agreed on a certain meaning of a particular clause, the rule of ambiguity does not apply since the parties' intentions are congruent (*falsa demonstratio non nocet*).³⁷⁷⁶ Apart from this application of the *falsa demonstratio* rule, one has to focus on the abstract comprehension of customers who typically conclude the concerned type of contracts, and not on the individual parties.³⁷⁷⁷ Therefore, § 305c(2) can be seen as a secondary interpretational standard with regard to the hierarchy of the interpretational maxims.³⁷⁷⁸

For instance, the content of the clause 'purchased as seen, with the exclusion of any warranties' can be clearly interpreted by applying an objective standard (i.e., without the application of § 305c(2)). The phrase 'as seen' normally refers to visible defaults that can be detected without difficulty. Nonetheless, the clause in general ('with the exclusion of any warranties') makes it sufficiently clear that the seller is not liable for any hidden defaults.³⁷⁷⁹ On the other hand, a clause contained in a standard contract for second-hand cars, in terms of which 'the seller warrants: ... that the vehicle has a mileage status, according to his [the seller's] knowledge, of ... km' cannot be clearly determined, according to the BGH, as the phrase 'according to his [the seller's] knowledge' contradicts the (objective) characteristics referring to the mileage. Hence,

³⁷⁷¹ This problem had already be seen by Raiser in *Recht der AGB* 264 *et seq.*, and later in BT-Drs. 7/3919 at 15 and 60.

³⁷⁷² Stein *AGBG* § 5 para 14.

³⁷⁷³ BGH *NJW-RR* 1995, 1303 (1304); *NJW* 1997, 3434 (3435); 2002, 3232 (3233); 2007, 504 (506), BAG *NZA* 2006, 923 (926). See also Palandt/*Heinrichs* § 305c para 18.

³⁷⁷⁴ Schlechtriem *FS Heinrichs* 503 *et seq.*

³⁷⁷⁵ Stoffels *AGB-Recht* 138. This problem will be discussed further below.

³⁷⁷⁶ BGH *NJW* 2002, 2102 (2103), Palandt/*Ellenberger* § 133 para 8.

³⁷⁷⁷ BGH *WM* 1984, 1228 (1229).

³⁷⁷⁸ Raiser *Recht der AGB* 262, Roth *WM* 1991, 2086 *et seq.*

³⁷⁷⁹ BGH *NJW* 1979, 1886 (1887), UBH/*Ulmer and Schäfer* § 305c para 95.

the application of § 305c(2) comes to the result that the seller has warranted the indicated mileage.³⁷⁸⁰

The Consumer Protection Act seems to apply a harsher approach in this regard. Section 4(4) provides that the Tribunal or court must interpret any standard form, contract or other document of the supplier *to the benefit of the consumer* so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved *to the benefit of the consumer*. In other words, as the Act does not favour an open content control, many clauses are interpreted in favour of the consumer at the stage of interpretational control. Thus, their disadvantageous consequences cannot be assessed within the content control.³⁷⁸¹

Section 4(4)(a) of the Consumer Protection Act must be read with the *contra proferentem* rule in mind in terms of which the terms of a contract, if capable of more than one meaning, must be interpreted against the party who proposed them.³⁷⁸² The rationale of this rule is that the party who formulated or imposed the rule should suffer from an adverse construction as it had the opportunity to articulate the terms clearly.³⁷⁸³ The same rationale can be found in the *quod minimum* rule in terms of which ambiguous words must be interpreted narrowly in order to encumber the debtor or promisor (i.e., the consumer) as little as possible.³⁷⁸⁴ These rules normally serve as a last resort³⁷⁸⁵ since they do not consider the parties' actual intentions. In standard form contracts, this consideration is of no importance though because the terms included in such agreements are rarely negotiated or even read by the consumer.³⁷⁸⁶

³⁷⁸⁰ BGH *NJW* 1998, 2207. KG *NJW-RR* 1998, 131 is of the view that the clause 'insofar he has knowledge of it' is surprising in terms of § 305c(1).

³⁷⁸¹ See discussion in Part I ch 4.

³⁷⁸² Hutchison *et al Law of Contract* 268.

³⁷⁸³ Hutchison *et al Law of Contract* 268, De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17. This is often the case, for instance, with insurance companies or public utilities. As regards insurance companies, see *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38E. A good example where the Supreme Court of Appeal applied the *contra proferentem* rule is *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA). In this case, the court held that the term 'driving' in the terms and conditions of a tour operator where any liability in connection with a loss experienced was excluded 'due to the nature of hiking (...), driving and the general third-world conditions on our tour/ventures', must be interpreted narrowly. The court held (at 88J-89A) that the condition quoted above was not intended to cover liability for negligent driving on a public road, but was rather aimed at indemnifying the company for the kind of risks encountered in off-road driving in 'exciting terrain'.

³⁷⁸⁴ Hutchison *et al Law of Contract* 268.

³⁷⁸⁵ According to the ordinary classification of interpretational rules, these rules are tertiary rules of interpretation 'which are applied as a last resort, without any pretence at attempting to find the real intention of the parties'. See Van der Merwe *et al Contract General Principles* (2007) 304.

³⁷⁸⁶ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17.

c) The ambiguity rule in institutional actions

As briefly mentioned earlier, § 305c(2) does not necessarily lead to a customer-friendly interpretation, but rather to an interpretation 'against the user' in case of doubts. This is the predominant view as regards institutional actions.³⁷⁸⁷ In addition, a customer-friendly interpretation of the clause in question — which necessarily would maintain the problematic clause — would encumber its removal by way of an abstract institutional action. An interpretation that is adverse for consumers could lead to the result that other consumers will be able to refer to the clause in terms of § 11 UKlaG, however.³⁷⁸⁸ Hence, a seemingly unfavourable interpretation for the consumer leads to a more efficient and consumer-protective application of §§ 307 to 309.³⁷⁸⁹

A clause in terms of which 'obvious defects must be brought forward within a week' is ambiguous since it could either mean that the customer has to make his or her declaration within a week, or that this declaration has to be received within a week. The wording and the context are not of help for solving this interpretational problem. The existing doubts in the interpretation of the clause are thus to be resolved against the user in terms of § 305c(2). This means for institutional actions that the most disadvantageous interpretation for the consumer must be favoured. Consequently, the consumer's declaration concerning the defect must be received within one week by the supplier. This leads to the result that the clause is ineffective in terms of the general clause of § 307(1).³⁷⁹⁰

Usually, in institutional actions, the courts do not hesitate to find interpretational 'doubts' justifying the application of § 305c(2) and choose the interpretation that is the most unfavourable to the consumer. The BGH, for instance, ruled that a clause providing for the extension of the duration of a partnership agency contract, which did not contain the right to cancel the agreement in extraordinary circumstances under § 627, must be interpreted in the sense that the customer agrees on a contract without the possibility to cancel.³⁷⁹¹ This, of

³⁷⁸⁷ BGH *NJW* 1991, 1887; 1998, 3119 (3121); 2003, 1237 (1238); 2005, 3567 (3568), UBH/*Ulmer and Schäfer* § 305c para 66.

³⁷⁸⁸ § 11 UKlaG (Effects of the judgment): 'If the user against whom judgment has been given fails to comply with an injunction based on § 1, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. However, this party cannot invoke the effect of the injunction if the user against whom judgment has been given could contest the judgment under § 10.'

³⁷⁸⁹ Stöffels *AGB-Recht* 138.

³⁷⁹⁰ BGH *NJW* 1998, 3119 (3121).

³⁷⁹¹ BGH *NJW* 1999, 276.

course, infringes § 309 no. 8 lit. a) and 9 so that such a clause has to be declared ineffective in the end.

It must be underlined though that the application of § 305c(2) has to be preceded by an interpretation which applies the usual interpretational methods. Only if after this step, several interpretational results remain, § 305c(2) comes into play.³⁷⁹²

d) The ambiguity rule in individual legal actions

Until recently, in individual legal actions, the courts applied the consumer-friendliest interpretation. This consumer-focused interpretation was developed by jurisprudence before the AGBG came into force.³⁷⁹³ Even though this approach prevented an open content control in terms of §§ 307 to 309 (ex-§§ 9 to 11 AGBG), the courts stuck to it, until they applied the contrary approach for institutional actions, as discussed above.³⁷⁹⁴ The main criticism resulted from the unconvincing results of the former approach, due to the different application of § 305c(2). If a court interprets a clause in favour of the consumer, the clause itself remains valid, and the other party (consumer) just would have to accept it in the interpreted form. On the other hand, in an institutional action, the court would have to choose the interpretation that is the most unfavourable for the consumer and declare it ineffective, after having assessed the clause in terms of content control. Then, the statutory rules would apply according to § 306(2). This means that this result might be more in favour of the consumer than a consumer-friendly interpretation.

Such arbitrary results can only be avoided by harmonising the methods of interpretation in both institutional and individual proceedings.³⁷⁹⁵ In order to achieve that, the undifferentiated consumer-friendly interpretation has to make room for a 'split solution'.³⁷⁹⁶ Like in institutional actions, one has to assess first whether the clause in question allows for different interpretational solutions. If so, the court has to assert if the clause's most consumer-unfavourable interpretation withstands content control in terms of §§ 307 to 309. If the clause is ineffective in terms of the content control, the enquiry is finished. This means that the enquiry within the individual proceedings has been harmonised with the one for institutional actions. If, on the other hand, the clause is valid after the control of its content, even while applying the unfavourable interpretation for the consumer, there can be no doubt that it is valid. The

³⁷⁹² Stoffels *AGB-Recht* 139.

³⁷⁹³ Sambuc *NJW* 1981, 314, Roth *WM* 1991, 2088, Thamm/Pilger *AGBG* § 5 para 3.

³⁷⁹⁴ Von Olshausen *ZHR* 151 (1987) 639 *et seq.*, Horn *WM* 1984, 451.

³⁷⁹⁵ Stoffels *AGB-Recht* 140.

³⁷⁹⁶ BGH *NJW* 2008, 2172 (2173); 2008, 2254 (2255), UBH/*Ulmer and Schäfer* § 305c para 90 *et seq.*

remaining question then is which interpretation has to be applied. Since there is no doubt anymore that the clause is effective, the traditional understanding of the ambiguity rule of § 305c(2) can be applied at this stage.

This approach allows for an open content control and is in harmony with the approach for institutional actions. As it results in a more stringent enquiry of the content of a clause and thus ensures a maximum degree of protection for consumers, this approach is furthermore compatible with article 8 of the Unfair Terms Directive.³⁷⁹⁷

6.2 The validity of the principle of restriction

Before the AGBG came into force, the principle of restriction,³⁷⁹⁸ according to which incriminatory standard terms, and above all clauses concerning waivers and exclusions or restrictions of liability, were interpreted restrictively.³⁷⁹⁹ When the AGBG came into effect, there was no legal ground for the application of this principle anymore.³⁸⁰⁰ First, the AGBG advocated an open content control. The principle of restriction eliminates the problematic part of the clause in the stage before though, i.e., in the interpretational control. Furthermore, a narrow interpretation would infringe the prohibition of partial retention,³⁸⁰¹ i.e., the preservation of the unfair clause with the content that is still permissible. The BGH is clearly against partial retention in standard terms as clauses which infringe §§ 307 to 309 are ineffective. What is more, the law's objective is to advocate valid standard terms and not to offer the possibility for the user to choose a wording which infringes §§ 307 to 309, without fearing adverse consequences other than restricting the applicability of its clause to a permissible degree. Besides, retaining an ineffective clause by restricting its application would contravene transparency. Another objective of the law is that consumers obtain relevant information with respect to the scope of their rights and obligations. If they cannot obtain this information other than by instituting court proceedings, the principle of transparency is encumbered.³⁸⁰²

Partial retention is also not compatible with the ambiguity rule under § 306c(2) since it does not advocate an interpretation which is not in favour of the consumer, and does not contribute

³⁷⁹⁷ **Article 8 of the Directive:** 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.'

³⁷⁹⁸ *Restriktionsprinzip.*

³⁷⁹⁹ BGHZ 5, 111; 22, 90 (96); 24, 39 (45); 40, 65 (69); 62, 251 *et seq.*

³⁸⁰⁰ UBH/Ulmer and Schäfer § 305c para 100, Sambuc NJW 1981, 315, Bunte NJW 1985, 600.

³⁸⁰¹ *Geltungserhaltende Reduktion.*

³⁸⁰² BGH NJW 1982, 2309 (2310); 1983, 1322 (1325); 1986, 1610 (1612); 1991, 2141 (2142 *et seq.*); 1993, 326 (330); 1998, 671 (673); 2000, 1110 (1113); 2006, 1059 (1060), UBH/Schmidt § 306 para 14.

to the interpretation of clauses which allow for a position in favour of the consumer going beyond the *ius dispositivum*.³⁸⁰³

For these reasons, the principle of partial retention has no place in the construction of standard business terms. The applicable objective interpretational standards and the rule of ambiguity are able to resolve interpretational problems in a satisfactory manner.³⁸⁰⁴

6.3 Interpretation of standard terms with consideration of individual agreements

It is controversial if in the area of standard business terms there is room for an autonomous interpretational principle that takes into consideration the given individual agreement.³⁸⁰⁵ By applying such an approach, the content of standard terms is 'harmonised' with an overriding individual agreement.

The following example³⁸⁰⁶ serves as a demonstration for this problem: The seller and the purchaser agree to a fixed price of 500 Euros. This price is below the recommended standard price as well as below the usually required price for the given item. The delivery is scheduled in several months. The standard terms of the seller contain a clause by which in case of a general price increase in the seller's company, the recommended standard prices or the generally required prices applies. The question here is if the purchaser still benefits from its price advantage after the price increase. The criterion for the interpretation is the establishing of the conformity with the individual agreement, i.e., the fixed price.

Stoffels³⁸⁰⁷ correctly points out that an autonomous interpretational principle for these cases is not necessary. The objective interpretation does not prevent from considering what content and significance of their agreement the parties had in mind. In the example above, the parties agreed on a firm price that was favourable for the customer. By this, they showed their mutual understanding of the price increase clause contained in the seller's standard terms. This can only be interpreted in that the advantage granted to the purchaser should not be lost in case of a general price increase.

Hence, a natural interpretation can lead to reasonable results in these cases, and a specific interpretation, which takes into account the individual agreement, is superfluous. Furthermore,

³⁸⁰³ Stoffels *AGB-Recht* 141.

³⁸⁰⁴ UBH/Ulmer and Schäfer § 305c para 101.

³⁸⁰⁵ *Individualvertragskonforme Auslegung*. For such an interpretation: WLP/Lindacher and Hau § 305c para 117, Staudinger/Schlosser § 305 c para 131 *et seq.* Against: UBH/Ulmer and Schäfer § 305b para 9 and § 305c para 69, Erman/Roloff § 305c para 20.

³⁸⁰⁶ Example from Staudinger/Schlosser § 305 c para 133.

³⁸⁰⁷ Stoffels *AGB-Recht* 142.

cases like the example above should instead be solved within the next stage, i.e., the content control. What is more, the proponents of such a principle have difficulties in defining the demarcation between interpretational and content control and struggle to avoid a conflict with the provisions on content control and partial retention.³⁸⁰⁸

7. Conclusion

In this chapter, the different techniques of statutory interpretation have been presented first because both statutory interpretation and the construction of agreements show similarities. The starting point for the interpretation of German legislative pieces is the literal rule (grammatical interpretation) where the meaning of the words and grammatical rules are taken into consideration. The Consumer Protection Act, on the other hand, favours purposive construction, looking first at the legislator's objectives before using other interpretative techniques.

Many German statutes contain definitions of terms that can be found throughout the given legislative piece. These are important for the demarcation of words that have various meanings in legal and colloquial language, for instance. South African statutes contain a list of definitions at the beginning of the given piece of legislation instead. This technique has the advantage that all definitions can be found in one place. However, it is only effective if the list is complete, well-drafted and does not contain too many cross-references.

Systematic interpretation puts a provision into relation with other provisions as well as its position within a statute so that it is possible to understand whether its wording is too wide, for example. In contrast, historical interpretation deals with the history of a legislative piece. For the performance of historical interpretation, legislative material must be analysed. This is also the case for purposive construction in the context of the Consumer Protection Act. It is suggested that historical interpretation is imperative for purposive construction. Teleological construction assesses the *ratio legis* of a provision, i.e., its objective and meaning.

In cases where the legislator omitted consciously or unconsciously to regulate specific questions, there is a gap that must be filled by the court (complementary interpretation). Either such a lacuna exists because the legislator did not consider the question correctly (primary lacuna), or it arose after enacting the given statute (secondary lacuna). In both cases, the judge

³⁸⁰⁸ *Geltungserhaltende Reduktion.*

must take the legislator's standpoint and close the gap in the law's spirit and not use his or her own valuations. A gap can be closed either by an extensive interpretation of a legal provision or by applying a principle that is contained in several legal provisions so that these are applied analogously. So-called 'open lacunas' are filled by an analogous application of other provisions. Where the legislator did not consider certain particularities (concealed gap), the court may derive from the unambiguous wording of the provision by restricting its application in the spirit of the law (restrictive interpretation or teleological reduction).

In terms of the interpretation of contractual provisions and standard terms, the German legislator favoured an open content control. Thus, the reasons for the inadequacy of standard terms must be unfolded within the content control and not already within the interpretational construction. This is why interpretational control takes place before content control.

§§ 133 and 157 serve as the basis for the interpretation of contracts, but the courts have developed certain principles. The leading view solves the tension between the subjective standard of § 133 (true intention) and the objective standard of § 157 (good faith) by applying § 157 to all declarations of intent that have to be received by the other party, and § 133 only to those that need not be received by another. The scope of application of §§ 133 and 157 is overlapping though and cannot be separated in most cases. In practice, this controversy has no practical relevance because the courts have developed a canon of construction. Where only the intention of the party issuing a declaration of intent is to be considered (§ 133), one refers to natural interpretation. In such a case, the other party's interests are not worthy of protection (e.g., in a last will). On the other hand, normative interpretation, where also the other party's interests are considered, prevails in most cases. For the interpretation of contracts, the approach of legislative construction applies, i.e., the principles of grammatical, systematic, but also teleological and historical interpretation.

Complementary interpretation of agreements applies where the contract contains an unintentional lacuna because the parties did not consider a particular point. Often, such a gap can be filled by the *ius dispositivum*. The systematic application of statutory provisions for the filling of gaps would infringe the principle of private autonomy however, above all in the case of atypical or mixed-type agreements. In these cases, it is more appropriate to develop the legal order chosen by the parties and to fill the gap in the contract's spirit.

Like in South Africa, also in Germany, general principles of interpretation assist the judge in interpreting an agreement. In some cases, the BGB itself contains terms that provide guidance

to the courts, e.g., 'unless'. Furthermore, jurisprudence has developed some interpretational maxims, such as the *protestatio facto contraria* maxim.

For standard terms, a modified interpretational standard applies. Not the recipient's standpoint is relevant here, but the perspective of an average consumer without legal knowledge and under consideration of the relevant public which is normally confronted with the given standard provisions. Hence, the individual understanding of the parties is not considered, and a more objective approach is applied. This leads to a unified interpretation.

For standard terms, special rules of interpretation exist. § 305c(2) sets out the rule of ambiguity in terms of which any doubts in the interpretation of standard terms are resolved against the user. Since the German legislature favoured an open content control, the courts apply this provision only where after the exhaustion of all interpretational methods an irremovable doubt and at least two legally justifiable interpretational possibilities remain. What is more, the application of this provision does not necessarily lead to a customer-friendly interpretation but instead to one 'against the user'. This however leads to a more consumer-protective application of §§ 307 to 309 since the clause can be removed by an institutional action because consumers will be able to refer to the clause in terms of § 11 UKlaG. The courts apply this standard now to individual actions too and apply a 'split solution' in order to avoid inconsistent results.

The view that individual agreements must be taken into account within the interpretational control is inconsistent because objective interpretation does not prevent from considering what content and significance of their agreement the parties had in mind. A natural interpretation is thus more satisfactory. Besides, the proponents of such a principle struggle to define the demarcation between interpretational and content control.

CHAPTER 5 – CONTENT CONTROL

1. Introduction to content control in German standard business terms legislation

1.1 Fundamentals of content control

1.1.1 §§ 307 to 309 in contract law

a) General remarks

§§ 307 to 309 provide for a restriction in terms of the content of standard business terms and pre-formulated clauses in consumer contracts, and for a more intense control compared to the general provisions in contract law, such as §§ 134³⁸⁰⁹ (statutory prohibition) and 138³⁸¹⁰ (public policy). As long as §§ 305 *et seq.* are applicable, these general provisions only play a secondary and supplementary role. In contracts between individuals, normally there is no content control because the contractual partners are on an equal footing with regard to their respective bargaining power. Where this balance is disturbed, the courts can exceptionally assess the content of the contract in terms of §§ 242³⁸¹¹ (good faith) and 138.³⁸¹²

Although §§ 305 *et seq.* are impregnated by the notion of 'unreasonableness', content control is legal control and not equity control, with the exception of § 315(3) 2nd sent. As such, the courts have to exercise this control *ex officio*, which means that a petition to the court in this regard is not necessary.³⁸¹³

The reasons for content control as well as the advantages and disadvantages have already been discussed in the South African part of this thesis and will therefore not be reproduced here.³⁸¹⁴

b) Relation to other provisions

aa) Public policy in terms of § 138(1) BGB

Since §§ 305 *et seq.* and 138(1) are both based on different evaluative standards, the parallel application of the general clause of § 138(1) is only possible where contractual clauses infringe the principles of public policy.³⁸¹⁵ The threshold for the application of § 138(1) is nonetheless much higher than for §§ 305 *et seq.* as for § 138(1), individual interests must be significantly

³⁸⁰⁹ § 134: 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'

³⁸¹⁰ § 138(1): 'A legal transaction which is contrary to public policy is void.'

³⁸¹¹ § 242: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.'

³⁸¹² Stoffels *AGB-Recht* 143. For the constitutional background see BAG NZA 2005, 1111 (1116).

³⁸¹³ *Wendland* in: Staudinger/Eckpfeiler E para 42.

³⁸¹⁴ See Part I ch 3 para 1.

³⁸¹⁵ UBH/*Fuchs* before § 307 para 60.

affected and the contractual party must have acted in a subjectively reprehensible manner.³⁸¹⁶ What is more, an infringement of § 138 leads to the voidness of the entire contract pursuant to § 139, whereas in terms of § 306(1), only those clauses are void that have not become part of the contract or that are ineffective; the remainder of the contract remains in effect.³⁸¹⁷

For the enquiry under § 138, all circumstances of the given case have to be evaluated, considering the content and the objective of, as well as the motives behind the clause. Therefore, when family members conclude a contract of surety with each other, not only the close relationship between the parties, but also the fact that the security is overstrained because of the high liability amount are factors to be considered. This is not the case in terms of § 307 which applies an abstract-universal approach.³⁸¹⁸

For § 138(1), all contractual clauses must be evaluated, also the ones that would be ineffective or void on the ground of other provisions, such as §§ 305 *et seq.* The BGH legitimately argues in this context that otherwise, standard business terms legislation would reduce consumer protection if it would not be part of the assessment from the beginning.³⁸¹⁹

Contractual clauses are against public policy if performance and counter-performance show a significant imbalance, and other disadvantages in the form of forbidden standard clauses are present. Hence, a loan agreement is not necessarily contrary to the principles of public policy because of high interests. However, if it contains other excessive disadvantages, such as illegal standard terms according to which the borrower has to bear a significant burden, e.g., if his or her does not pay in time, they could be contrary to public policy.³⁸²⁰

The courts decided that in a form contract or an agreement where a significant number of clauses are ineffective, the given clauses are void in terms of § 138(1) because a gap-filling interpretation would change the content and hence the character of the contract.³⁸²¹ For the aforementioned reasons, and inspired by the work of Ludwig Raiser, the BGH preferred in the development of content control the application of § 242 (good faith) rather than § 138.³⁸²² The BGH justified the application of § 242 by stating that a business could abuse its freedom of

³⁸¹⁶ BGH *NJW* 1997, 3372 (3374); 2001, 2331 (2333), UBH/*Fuchs* before § 307 para 58.

³⁸¹⁷ UBH/*Fuchs* before § 307 para 58.

³⁸¹⁸ BGH *NJW* 2005, 971.

³⁸¹⁹ BGH *NJW* 1981, 1206 (1207); 1986, 2564 (2565).

³⁸²⁰ BGH *NJW* 1981, 1206 (1209).

³⁸²¹ BGH *NJW* 1983, 159; 1985, 53.

³⁸²² Raiser *Recht der AGB* 284.

contract by imposing its standard terms upon the customers because merely by the fact that it used standard terms, it claimed freedom of contract only for itself.³⁸²³

bb) Good faith in terms of § 242 BGB

§§ 307 to 309 are a concretisation of the principle of good faith (§ 242) and therefore more specific.³⁸²⁴ Nevertheless, § 242 plays a role in the excluded areas under § 310(4), such as the law of succession, family law, company law or collective agreements and private-sector works agreements.³⁸²⁵ What is more, this provision offers additional consumer protection in order to prevent an individual abuse of rights. This is regularly the case where the user abuses a right that he or she normally has. For instance, the BGH denied the enforcement of a (normally valid) preclusive time limit of a gas provider because the client's overpayments were due to the provider's fault. In order to stress the difference to content control, this control is referred to as 'exercise control'.³⁸²⁶

cc) Equity control in terms of § 315 BGB

Before the AGBG came into force, content control was also based on § 315.³⁸²⁷ According to this norm, the exercise of this right is subordinated to equity control by the courts if one party has the right to determine the contractual contents unilaterally. This presupposes though that the other party (consumer) transfers its own contractual power to shape the contents of the agreement to the user, which is very far from reality.³⁸²⁸ Furthermore, content control under §§ 307 *et seq.* applies a supra-individual and generalising approach, whereas equity control provides for fairness in individual cases, which is not a suitable standard for mass contracts.³⁸²⁹ What is more, § 315 provides for judicial correction of the given contract clause ('contractual assistance'),³⁸³⁰ whereas §§ 307 *et seq.* already provides for the legal consequences that cannot

³⁸²³ The application of the principle of good faith found later application in § 9 AGBG (= § 307 BGB).

³⁸²⁴ Staudinger/*Coester* § 307 para 35.

³⁸²⁵ See Part II ch 5 para 1.1.1 b) bb) and ch 2 para 1.2.

³⁸²⁶ *Ausübungskontrolle*. BGH *BB* 1991, 932, UBH/*Fuchs* before § 307 para 63.

³⁸²⁷ **§ 315:** '(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it. (2) The specification is made by declaration to the other party. (3) Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.'

³⁸²⁸ Staudinger/*Coester* § 307 para 41, Stoffels *AGB-Recht* 145.

³⁸²⁹ Staudinger/*Rieble* § 315 para 305.

³⁸³⁰ *Vertragshilfe*. Staudinger/*Coester* § 307 para 41.

be deviated from.³⁸³¹ For these reasons, the application of § 315 already stood on feet of clay before the implementation of the AGBG.³⁸³²

In one case, § 315 is applicable though in terms of §§ 307 *et seq.* The courts are of the view that where standard business terms grant a right of specification of performance to one of the parties, the specification must be determined by taking into account equity considerations. This is the case for companies providing public services (utilities) on a contractual basis.³⁸³³

dd) Voidability on the grounds of mistake, deceit or duress

It is conceivable that the consumer had a false notion about the contents of the contract. Then, voidability for mistake in terms of § 119³⁸³⁴ is possible. In case of deceit or duress, the contract is voidable under § 123.³⁸³⁵ This is because the objective of §§ 305 *et seq.* differs from the one of §§ 119 and 123. Whereas §§ 305 *et seq.* aim to achieve contractual fairness, the objective of §§ 119 *et seq.* is the implementation of the party's intention free of any 'vice of consent'³⁸³⁶ when entering into a legal transaction.³⁸³⁷

Insofar, the courts have not reached any decisions on voidability of standard clauses on the grounds of mistake, deceit or duress. Apparently, the provisions contained in §§ 305 *et seq.* offer a sufficient protection in this area.³⁸³⁸

ee) Consumer protection law

The contractual content can also be limited by consumer protection provisions. These are mostly specific interventions by the legislator. § 475,³⁸³⁹ for instance, assures that certain legal rights of the buyer cannot be waived *vis-à-vis* the seller.

³⁸³¹ See § 306.

³⁸³² Stöffels *AGB-Recht* 145.

³⁸³³ BGH *NJW-RR* 2006, 133 (134).

³⁸³⁴ § 119: '(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. (2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.'

³⁸³⁵ § 123: '(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration. (2) If a third party committed this deceit, a declaration that had to be made to another may be avoided only if the latter knew of the deceit or ought to have known it. If a person other than the person to whom the declaration was to be made acquired a right as a direct result of the declaration, the declaration made to him may be avoided if he knew or ought to have known of the deceit.'

³⁸³⁶ *Willensmangel*.

³⁸³⁷ Stöffels *AGB-Recht* 146.

³⁸³⁸ Stöffels *AGB-Recht* 147.

³⁸³⁹ § 475: '(1) If an agreement is entered into before a defect is notified to the entrepreneur and deviates, to the disadvantage of the consumer, from [§§] 433 to 435, 437, 439 to 443 and from the provisions of this subtitle, the entrepreneur may not invoke it. The provisions referred to in sentence 1 apply even if circumvented by other

The same applies to § 312a³⁸⁴⁰ that has been inserted due to the Unfair Terms Directive. This provision limits the content of certain agreements on the payment that are typically contained in standard terms.³⁸⁴¹ In terms of subparagraph (4) of this provision, an agreement obligating a consumer to pay a fee for the use of a certain means of payment by way of fulfilling his contractual obligations is ineffective if the user does not offer a customary and reasonable payment method to the consumer that is free of charge, or the fee agreed exceeds the cost borne by the trader for the use of such means of payment.

If a clause has not become part of the contract or is ineffective, it remains effective in all other respects according to § 312a(6). This is similar to § 306(1).³⁸⁴²

1.1.2 Specific legal forms of standard business terms control

Content control is not an exclusive matter of the civil courts, although the courts, namely the BGH, play an important role in this domain. Standard business terms can also be subject to the control of public authorities in areas where the legislator was already active before the AGBG came into force.³⁸⁴³

constructions. (2) The limitation of the claims cited in [§] 437 may not be alleviated by an agreement reached before a defect is notified to an entrepreneur if the agreement means that there is a limitation period of less than two years from the statutory beginning of limitation or, in the case of second-hand things, of less than one year. (3) Notwithstanding [§§] 307 to 309, subsections (1) and (2) above do not apply to the exclusion or restriction of the claim to damages.'

³⁸⁴⁰ § 312a: '(1) Where the trader or a person acting in his name or on his behalf makes a telephone call to the consumer with a view to concluding a contract with same, he shall, at the beginning of the conversation, disclose his identity and, where applicable, the identity of the person on whose behalf he is making the call, as well as the commercial purpose of the call. (2) The trader is obliged to inform the consumer in accordance with the stipulations of Article 246 of the [EGZPO]. The trader may demand that the consumer cover freight, delivery, or postal charges and other costs only inasmuch as he has informed the consumer of these costs in accordance with the requirements established in Article 246 (1) number 3 of the [EGZPO]. Sentences 1 and 2 apply neither to off-premises contracts nor to distance contracts nor to contracts relating to financial services. (3) A trader may conclude an agreement with a consumer that is directed towards obtaining extra payment from the consumer in addition to the remuneration agreed upon for the principal performance only if this is done expressly. Where the trader and the consumer conclude a contract in electronic commerce, such an agreement will form part of the contract only if the trader does not bring about the agreement by means of a default option. (4) An agreement obligating a consumer to pay a fee for the use of a certain means of payment by way of fulfilling his contractual obligations is ineffective if 1. no customary and reasonable payment method is available to the consumer that is free of charge, or 2. the fee agreed exceeds the cost borne by the trader for the use of such means of payment. (5) An agreement obligating a consumer to pay a fee for those cases in which the consumer contacts the trader via a telephone line that the trader operates for the purpose of answering questions or providing explanations regarding a contract concluded by the parties is ineffective if the fee agreed upon exceeds the fee charged for the use merely of the telecommunication service as such. Where an agreement is ineffective pursuant to sentence 1, the consumer is not bound to pay a fee for the call to the telecommunication services provider, either. The telecommunication services provider has the right to demand the fee for the use merely of the telecommunication services from the trader who has concluded the ineffective agreement with the consumer. (6) Where an agreement pursuant to subsections (3) to (5) has not come to form part of the contract or where it is ineffective, the contract remains effective in all other respects.'

³⁸⁴¹ See BGH *NJW* 2010, 2719.

³⁸⁴² Stöffels *AGB-Recht* 148.

³⁸⁴³ See summary in Staudinger/*Schlosser* before §§ 305 *et seq* para 20 *et seq*.

a) Administrative authorisation

The strictest form of administrative control is the submission of standard terms to a previous approval procedure.³⁸⁴⁴ This is the case for standard business terms of building societies,³⁸⁴⁵ investment companies³⁸⁴⁶ and transportation companies.³⁸⁴⁷ The approval is only granted if the standard terms do not violate legal provisions. Once the approval is granted, the standard terms can still be subject to content control by the courts.³⁸⁴⁸ Before ruling on an action, the courts must hear the competent regulator according to § 8(2) UKlaG.³⁸⁴⁹ An authority's previous approval is without prejudice to a court's subsequent ruling though because the only standard for the court are §§ 307 to 309.³⁸⁵⁰

b) Control by insurance regulator

Until 1994, the general terms and conditions of any insurance company were subject to a previous approval procedure by the Federal Supervisory Authority of the Insurance Sector.³⁸⁵¹ Due to the transposition of European Directives, this administrative control ceased to exist. On the other hand, §§ 10 VAG³⁸⁵² and 7 VVG³⁸⁵³ offer higher consumer protection by prescribing a minimum standard for insurance companies' standard terms and information requirements for the conclusion of an insurance policy.³⁸⁵⁴

The Federal Agency for the Supervision of Financial Services³⁸⁵⁵ still is empowered though to intervene subsequently where occasional infringements take place, i.e., where insurance-related standard terms unreasonably disadvantage the insured person.³⁸⁵⁶ The supervisory agency has the right to make any arrangements that are necessary and appropriate to avoid or eliminate any abuse. Abuse is any conduct of an insurer that is contrary to the supervisory

³⁸⁴⁴ Medicus rightly asserts that administrative control for any type of standard business terms was not the legislator's intention and is only limited to specific cases. With a view to the huge number of standard terms in circulation, this was certainly a wise decision. See Medicus *BGB-AT* 163.

³⁸⁴⁵ § 9 BausparkG.

³⁸⁴⁶ § 43(2) InvG.

³⁸⁴⁷ § 39(6) PBefG.

³⁸⁴⁸ Stoffels *AGB-Recht* 149.

³⁸⁴⁹ § 8(2) UKlaG: '2) Before ruling on an action under § 1, the court shall hear: the competent insurance regulator, if the action relates to provisions in general terms of insurance, or the Federal Banking Supervisory Office, if the action relates to provisions in standard contract terms which have to be approved by that Office under the terms of the Building and Loan Associations Act, the Investment Companies Act, the Mortgage Bank Act or the Ship Mortgage Bank Act.'

³⁸⁵⁰ UBH/*Fuchs* before § 307 para 96.

³⁸⁵¹ Bundesaufsichtsamt für das Versicherungswesen.

³⁸⁵² Versicherungsaufsichtsgesetz (VAG)

³⁸⁵³ Versicherungsvertragsgesetz (VVG).

³⁸⁵⁴ Stoffels *AGB-Recht* 149.

³⁸⁵⁵ Bundesanstalt für Finanzdienstleistungsaufsicht.

³⁸⁵⁶ See § 81(2) 1st and 2nd sent. VAG.

objectives enumerated in § 81(1) VAG. That is, *inter alia*, the respect of the needs of the insured person and the laws and regulations applicable to the operation of insurance transactions. §§ 305 *et seq.* are included in these laws, so that any infringement of these provisions are also a violation of the insured person's needs and rights.³⁸⁵⁷ The supervisory agency can prohibit the further use of the terms in question.³⁸⁵⁸

c) Control by antitrust authorities

Content control is focused on the protection of all market players, especially by the outstanding role of the transparency requirement and collective procedures according to the UKlaG, on the one hand, but also on the safeguarding of the market economy, on the other. The Act against Restraints of Competition (GWB)³⁸⁵⁹ and the Act against Unfair Competition (UWG)³⁸⁶⁰ primarily focus on the protection of competition. However, the scope of control pursuant to §§ 305 *et seq.* BGB and the control of the antitrust authorities are more and more interleaved because standard terms tend to be more unified, due to the fact that they are often drafted by professional associations of the different sectors of the economy. Such antitrust tendencies might lead to restrictions in competition which is why the antitrust law comes into play.³⁸⁶¹

aa) System of legal exemption of antitrust law

The European Regulation no. 1/2003³⁸⁶² has been implemented into German competition law by the 7th amendment of the GWB.³⁸⁶³ Under § 1 GWB, agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are still prohibited. Exemptions are no longer only possible after notification to the antitrust authorities which could oppose themselves against such agreements though. If the conditions of § 2 GWB³⁸⁶⁴ are met, these

³⁸⁵⁷ BVerwG NJW 1998, 3216 (3217),

³⁸⁵⁸ Stöffels *AGB-Recht* 150.

³⁸⁵⁹ GWB = Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition).

³⁸⁶⁰ UWG = Gesetz gegen unlauteren Wettbewerb (Act against Unfair Competition).

³⁸⁶¹ Stöffels *AGB-Recht* 150.

³⁸⁶² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

³⁸⁶³ Which came into force on 1 July 2005.

³⁸⁶⁴ **§ 2 GWB:** '(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not 1. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or 2. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question shall be exempted from the prohibition of § 1. (2) For the application of paragraph 1, the Regulations of the Council or the European Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions by associations of undertakings and concerted practices (block exemption regulations) shall apply *mutatis mutandis*. This shall also apply where

agreements are exempted *ex lege*. This means that companies now have to decide under their individual responsibility whether their standard terms fall under the exemption of § 2 GWB. Hence, although they have less bureaucratic efforts to make, in some way their legal security got lost.³⁸⁶⁵

The conditions mentioned above concerning cartels have no major relevance in practice though. So-called 'recommended conditions', such as the General Conditions of Sale of the Electrical Wholesale Trade,³⁸⁶⁶ the Conditions of Purchase of the Association of the Car Manufacturer Industry or the Conditions for the Sale of new Motor Vehicles and trailers³⁸⁶⁷ have by far a greater impact. As the former prohibition of recommendations (ex-§ 22(1) GWB) is no longer of existence, recommendations must be assessed pursuant to § 1 GWB. Therefore, recommended conditions are prohibited if they are mandatory for the members of a professional association or have the characteristics of concerted practices.³⁸⁶⁸

bb) The standard of antitrust control

When exercising content control, the antitrust authority takes into account the disadvantages for the other market participants due to the standardisation of the business terms and the restriction of choices that comes along with it. This content control is not only limited to violations of the GWB, but also involves reasonableness control in terms of §§ 305 *et seq.*³⁸⁶⁹ This dual control leads to a stricter enquiry by the antitrust authority.³⁸⁷⁰

Nonetheless, the fact that a standard clause is valid in terms of §§ 305 *et seq.* does not necessarily mean that it conforms with antitrust law, and *vice versa*.³⁸⁷¹ The control exercised by the antitrust authority is merely a *prima facie* control, and one cannot assume that full control in terms of §§ 307 to 309 BGB takes place.³⁸⁷² What is more, because the antitrust authorities can apply the principle of discretionary powers,³⁸⁷³ the administration can decide

the agreements, decisions and practices mentioned therein are not capable of affecting trade between the Member States of the European Union.'

³⁸⁶⁵ UBH/*Fuchs* before § 307 para 85.

³⁸⁶⁶ Allgemeine Lieferbedingungen des Elektrogroßhandels, Promulgation no. 33/90 of 17 April 1990, BANz no. 78 of 25 April 1990 at 2229.

³⁸⁶⁷ Einkaufsbedingungen des Verbands der Automobilindustrie e.V. (VDA) and Allgemeine Geschäftsbedingungen für den Verkauf von fabrikneuen Kranffahrzeugen und Anhängern, promulgated in BANz no. 133/01 of 21 December 2002.

³⁸⁶⁸ UBH/*Fuchs* before § 307 para 85, with further references.

³⁸⁶⁹ Von Hoyningen-Huene § 9 AGBG para 117.

³⁸⁷⁰ Staudinger/*Coester* § 307 para 49.

³⁸⁷¹ Staudinger/*Coester* § 307 para 49, von Hoyningen-Huene § 9 AGBG para 117.

³⁸⁷² Staudinger/*Coester* § 307 para 50.

³⁸⁷³ *Opportunitätsprinzip*.

not to intervene at all if it has only slight doubts as regards the legality of the clause. For this reason, the civil courts have voided many clauses that had passed antitrust control.³⁸⁷⁴

cc) Prohibition of discrimination in terms of § 20(1) GWB

It is noteworthy that § 20(1) GWB³⁸⁷⁵ establishes the prohibition of discrimination for companies with superior or relative market power. The use of disadvantageous standard terms is not necessarily a violation of § 20(1) GWB since the standard terms might not infringe the normative objective of this statute, i.e., the protection of competition.³⁸⁷⁶ On the other hand, if the requisites of § 20(1) GWB are met, and there is discrimination or obstruction, one can regularly assume that the clause is unreasonable in terms of § 307 BGB.³⁸⁷⁷

d) Protection against unfair competition in terms of the UWG

Although the Act Against Unfair Competition (UWG) has another protective purpose than §§ 305 *et seq.* BGB, namely the protection against distorted competition, the use of unfair standard terms can also be unfair in the sense of § 3 UWG³⁸⁷⁸ and lead to a condemnation to eliminate, cease and desist the unfair practice (§ 8(1) UWG), as well as a condemnation to compensation for damage (§ 9 UWG) and a confiscation of profits (§ 10 UWG).³⁸⁷⁹

Whether §§ 307 to 309 are to be seen as market conduct rules in the sense of § 4 UWG is controversial. Until recently, the BGH argued that § 475(1) 1st sent. BGB³⁸⁸⁰ (deviating agreements) was one of these market conduct rules of the UWG since their purpose is to

³⁸⁷⁴ Stoffels *AGB-Recht* 152.

³⁸⁷⁵ **§ 20(1) GWB:** '§ 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.'

³⁸⁷⁶ WLP/Pfeiffer § 307 para 60.

³⁸⁷⁷ Von Hoyningen-Huene § 9 AGBG para 119.

³⁸⁷⁸ **§ 3 UWG:** '(1) Unfair commercial practices shall be illegal. (2) Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behaviour of consumers. (3) The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal. (4) When assessing commercial practices in relation to consumers reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to these practices or the underlying goods or services because of their mental or physical infirmity, age or credulity in a way which the entrepreneur could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group.'

³⁸⁷⁹ Stoffels *AGB-Recht* 153.

³⁸⁸⁰ **§ 475(1) 1st sent.:** 'If an agreement is entered into before a defect is notified to the entrepreneur and deviates, to the disadvantage of the consumer, from [§§] 433 to 435, 437, 439 to 443 and from the provisions of this subtitle, the entrepreneur may not invoke it.'

regulate market conduct in the interest of the market participants.³⁸⁸¹ In a more recent ruling, the court underlines that the use of invalid standard business terms was against the necessary professional diligence, especially in the case of §§ 308 no. 1 (unreasonable period of time for acceptance and performance), 307 (as far as the liability regardless of negligence or fault is waived) and 309 no. 7 lit. a) (exclusion or limitation of liability for negligent injury to life, body or health). The BGH is of the opinion that such clauses might be an obstacle for consumers to claim their lawful rights.³⁸⁸²

On the other hand, the assessment of whether a clause violates the BGB standard business terms legislation follows a different standard than the UWG.³⁸⁸³ In terms of the general clause of § 307, a breach of the rules contained in the UWG can be a relevant aspect within this enquiry, however.³⁸⁸⁴ For instance, a clause which says that the consumer agrees to receive commercials by text message or e-mail is invalid if the clause is not worded in the sense of a so-called opt-in declaration.³⁸⁸⁵

1.1.3 Content control by notaries public

According to the rules and regulations governing the professional conduct of notaries public, namely § 14(2) Bundesnotarordnung (BNotO)³⁸⁸⁶ and 4 Beurkundungsgesetz (BeurkG),³⁸⁸⁷ notaries public have to assess form contracts against the backdrop of §§ 305 *et seq.* BGB. If a notary public is of the view that clauses in such a contract infringe the aforementioned legislation, he or she has to inform the parties and deny the authentication, if necessary.³⁸⁸⁸

Where a notary public has to issue an enforceable record or document in terms of § 797(2) ZPO,³⁸⁸⁹ his or her assessment competence is limited though. In these cases, the notary public merely has to verify whether a formally valid title with an executable content exists. On the

³⁸⁸¹ BGH *NJW* 2011, 76 (78).

³⁸⁸² BGH *NJW* 2012, 3577 (3580).

³⁸⁸³ UBH/*Fuchs* before § 307 para 94, Staudinger/*Coester* § 307 para 53.

³⁸⁸⁴ Stöffels AGB-Recht 154.

³⁸⁸⁵ BGH *NJW* 2008, 3055. The opt-in solution originates from the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

³⁸⁸⁶ BNotO = Federal Code for Notaries.

³⁸⁸⁷ BeurkG = Notarisation Code.

³⁸⁸⁸ Palandt/*Grüneberg* § 305 para 17, UBH/*Fuchs* before § 307 para 107 ('only in the case of an apparent violation').

³⁸⁸⁹ § 797(2) ZPO: 'The enforceable execution copy of notarial records or documents will be issued by the notary in whose safekeeping the record or document has remained. Should the record or document have remained in the safekeeping of a public authority, the latter is to issue the enforceable execution copy.'

other hand, the notary public is not entitled to assess the substantive content of a declaration of submission to immediate enforcement.³⁸⁹⁰

1.1.4 Content control by the land registry

It is controversial how far the land registry's³⁸⁹¹ assessment competence reaches with respect to standard terms. The land registry as a body of administration of justice must take into account the applicable law, such as §§ 305 *et seq.* The functioning of this administration and the scope of its assessment is governed by the principles of the law of land registration procedures. This is why only obvious infringements against §§ 305 *et seq.* which are relevant for the land registration procedure must be assessed. The administration is not obliged though to perform a systematic and far-reaching scrutiny of the registration documents and their compatibility with standard terms legislation.³⁸⁹² This is the case, for example, for a registration approval under § 19 GBO³⁸⁹³ for a mortgage that refers to pre-formulated clauses for a loan agreement which infringe § 308 no. 6 BGB (fictitious receipt).³⁸⁹⁴ In general, only obvious violations against §§ 308 and 309, but also § 307 are relevant in relation to content control by the land registry.³⁸⁹⁵ This administration often has not the necessary substantive knowledge in order to conduct an enquiry in terms of § 307, however.³⁸⁹⁶

1.2 Restrictions for content control

1.2.1 General remarks

Under § 307(3) 1st sent., the general clause (§ 307(1) and (2)) as well as §§ 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed.

1.2.2 Interpretation of § 307(3)

The scope and legal content of § 307(3) is controversial because the wording of this provision is difficult to grasp. The prevailing opinion assumes that this provision excludes performance specifications and agreements on the price as well as declaratory clauses (which merely reflect legal provisions) from content control.³⁸⁹⁷ According to another view, § 307(3) has no

³⁸⁹⁰ BGH *NJW* 2009, 1887.

³⁸⁹¹ *Grundbuchamt*.

³⁸⁹² Stoffels *AGB-Recht* 155.

³⁸⁹³ GBO = Grundbuchordnung (Land Registry Code).

³⁸⁹⁴ BayObLG *NJW* 1980, 2818.

³⁸⁹⁵ BayObLG *NJW* 1980, 2818 (2819).

³⁸⁹⁶ UBH/*Fuchs* before § 307 para 108, Erman/*Roloff* before §§ 307-309 para 17.

³⁸⁹⁷ BGH *NJW* 1998, 383, UBH/*Fuchs* § 307 para 14, Soergel/*Stein* (1987) § 8 AGBG para 1, Palandt/*Grüneberg* § 307 para 41, Locher *Recht der AGB* 85.

independent meaning and has a mere declaratory character. Therefore, standard clauses that do not pass the test of §§ 307 to 309 are open to content control.³⁸⁹⁸ A third, more recent view, presented by Joost, understands § 307(3) literally and excludes content control where legal norms are absent. According to this view, content control is only permitted where the given clause deviates from the assessment of the legal interests of the parties. Joost maintains that it is irrelevant whether the clause concerns a main or accessory performance or contains a main or accessory agreement.³⁸⁹⁹

Which of these views has more merits will be discussed in the following.

a) Official justification of the government draft

The official motivation of the government draft excludes performance specifications, agreements on the price as well as declaratory clauses from content control³⁹⁰⁰ and therefore complies with the prevailing view.

b) Two-fold *ratio legis*

Also, when considering the *ratio legis* of this provision, one comes to the same result.

aa) Respect of the principles of the market economy

Standard business terms legislation is an emanation of the principle of freedom of contract, which is a pillar of the market economy. Content control is necessary where unfair non-negotiated terms other than core terms are incorporated into a contract³⁹⁰¹ because non-negotiated standard terms cannot be regarded as ‘the proper expression of the self-determination of both parties’,³⁹⁰² which is the prerequisite for enforcing agreements as the parties then have expressed their freedom of contract and autonomy. Consequently, where the user effectively claims freedom of contract for it alone, whereas the other party has no influence on the wording of non-negotiated terms, and where the ‘balancing’ of the parties’ interests is purely formalistic and meaningless, real freedom of contract does not exist.³⁹⁰³ The principle of freedom of contract would be jeopardised though if the courts could interfere with agreements on the price or the specification of the counter-performance.³⁹⁰⁴ In addition, there is no legal standard for the assessment of the principal contractual performance.³⁹⁰⁵ Therefore,

³⁸⁹⁸ Koch/Stübing § 8 AGBG para 3.

³⁸⁹⁹ Joost *ZIP* 1996, 1685 *et seq.*

³⁹⁰⁰ BT-Drs. 7/3919 at 22.

³⁹⁰¹ Naudé 2006 *Stell LR* 365.

³⁹⁰² Zimmermann *New German Law of Obligations* 206.

³⁹⁰³ See Naudé 2006 *Stell LR* 366, Maxeiner 2003 *Yale J. Int. Law* 143, 147, Lewis 2003 *SALJ* 348.

³⁹⁰⁴ Staudinger/*Coester* § 307 para 285.

³⁹⁰⁵ WLP/*Pfeiffer* § 307 para 1, MüKo/*Wurmnest* § 307 para 1.

the restriction of content control of standard terms is designed to ensure that the free market is not unnecessarily disturbed.³⁹⁰⁶ Besides this strengthening of the market by non-intervention, a 'substitution' of the market takes place by content control where the market mechanisms have not sufficiently proven strong enough to avoid one-sidedness at the expense of consumers. There is a constant tension between these two aspects that has to be balanced out by the courts.³⁹⁰⁷ The legislator assumes that the parties, and especially consumers, are particularly attentive to the *essentialia negotii*, i.e., the performance and the price, and safeguard their own interests in this regard. Thus, there should be a high threshold for the law to intervene.

bb) The courts' obligation to observe the law

The legal principle that the courts have to observe the law (article 20(3) GG) is another argument for the exclusion of content control in the earlier mentioned cases.³⁹⁰⁸ If the courts were allowed to assess the reasonableness of standard clauses that merely reflect legal provisions, they would eventually assess the law itself. The law must nonetheless be the applicable standard for the judges' decisions and not the subject of their enquiry.³⁹⁰⁹ Furthermore, a declaratory clause that has been declared invalid by the courts would have to be replaced by the statutory provisions (§ 306(2)), which is an *argumentum ad absurdum* in favour of the exclusion of content control of declaratory clauses.³⁹¹⁰

c) Conclusions from the EU Unfair Terms Directive

The same conclusions can be drawn from the EU Unfair Terms Directive. Article 4(2) regulates that '[a]ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.' Recital 19 of this Directive is formulated alike. Moreover, article 1(2) of the Directive regulates that '[t]he contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party (...) shall not be subject to the provisions of this Directive.' Pursuant to recital 13, the wording 'mandatory statutory or regulatory provisions' in article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.

³⁹⁰⁶ Maxeiner *Yale J. Int. Law* 153.

³⁹⁰⁷ *Wendland* in: Staudinger/Eckpfeiler E para 41.

³⁹⁰⁸ BGH *NJW* 2001, 2012 (2013); 2012, 2337 (2338), Staudinger/*Coester* § 307 para 290.

³⁹⁰⁹ Stoffels *AGB-Recht* 158.

³⁹¹⁰ WLP/*Pfeiffer* § 307 para 331, UBH/*Fuchs* § 307 para 17.

This means that also the *ius dispositivum* is meant by this provision. Recital 13 also assumes that statutory or regulatory provisions are presumed not to contain unfair terms.³⁹¹¹

For these reasons, articles 4(2) and 1(2) of the Directive serve as an interpretational guideline for § 307(3). Hence, the arguments of the prevailing view,³⁹¹² according to which performance specifications and agreements on the price as well as declaratory clauses are excluded from content control, is convincing and should be followed.

1.2.3 Transparency as a condition for the absence of content control

The legislator's assumption laid down in § 307(3) that the client pays especially attention to the core elements of the contract (*essentialia negotii*) and is able to safeguard its own interests is only given where the consumer is presented complete information on the core elements. Only then, he or she can compare other offers and, if necessary, walk away and choose another supplier or offer.³⁹¹³ In cases where the user holds back essential information or misinforms its customer, transparency control in terms of § 307(3) is not only *not* excluded, but necessary.³⁹¹⁴

This position is enforced by the consumer directive 93/13/EEC. In its article 4(2) and in recitals 19 and 29 it lays down that content control of the main subject matter of the contract, the adequacy of the price and remuneration and the services or goods supplied in exchange is only excluded in so far as these terms are in plain, intelligible language. For written consumer contracts, article 5 of the Directive says that these terms must always be drafted in plain, intelligible language.³⁹¹⁵

The German legislator adopted this position by inserting § 307(3) 2nd sent. In terms of this norm, other provisions (than those derogating from legal provisions, or arrangements supplementing those legal provisions) may be ineffective under subsection (1) sentence 2, in conjunction with subsection (1) sentence 1. This means that transparency control is not linked

³⁹¹¹ Stoffels *AGB-Recht* 159.

³⁹¹² BGH *NJW* 1998, 383, UBH/*Fuchs* § 307 para 14, Soergel/*Stein* (1987) § 8 AGBG para 1, Palandt/*Grüneberg* § 307 para 41, Locher *Recht der AGB* 85.

³⁹¹³ BGH *NJW* 1990, 2383, WLP/*Pfeiffer* § 307 para 236. For Harker, the second option is a mere 'fictitious alternative' though, as consumers most likely know that elsewhere they will find the same kind of presentation (Harker 1981 *SALJ* 17). Medicus is also of the view that the client's option to compare standard terms of different suppliers presupposes that the customer has different options at his or her disposal. However, this is not the case where suppliers of a specific industry use the standard business terms that have been recommended by the professional association of the given branch; these are identical. See Medicus *BGB-AT* 161.

³⁹¹⁴ Stoffels *AGB-Recht* 160.

³⁹¹⁵ Stoffels *AGB-Recht* 160. As to the plain language requirement under the CPA see Part I ch 2 para 3.2 a).

to the conditions of § 307(3), and that the conditions of the transparency requirement must be understood as preconditions for the absence of content control.³⁹¹⁶

1.2.4 Declaratory clauses

According to § 307(3) 1st sent., subsections (1) and (2) of § 307, and §§ 308 and 309 apply only to provisions in standard terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. This means that provisions in standard terms that only reproduce the content of legal provisions, i.e., declaratory clauses, are excluded from content control. In practice, it is sometimes difficult to distinguish such declaratory clauses from other provisions, however.³⁹¹⁷

In order to determine the declaratory character of a provision, two legal situations must be compared.³⁹¹⁸ In a first step, the legal content of a clause must be determined by means of interpretation and under consideration of any modifications by standard terms.³⁹¹⁹ Then, one must examine the objective law with regard to any provisions that regulate this matter. If the legal order provides for a provision that has the same content as the standard clause, i.e., that regulates the same matter, the content of the standard clause is compared with the given legal provision(s). If there is conformity, the standard clause is not subject to content control, if there is no accordance, it is. On the other hand., standard clauses that fill a void, i.e., where no legal provisions regulate the given matter, are subject to content control, except they fall under the two exceptions of § 307(3), which are price agreements and performance specifications.³⁹²⁰ Clauses providing that certain legal provisions are applicable, although they are not intended to regulate the given type of contract, are subject to content control too.³⁹²¹

§ 307(3) provides that 'legal provisions' are the basis for the above-mentioned comparison of two legal situations (i.e., the matter regulated by the law as well as the given standard clause). On the other hand, the Unfair Terms Directive speaks of 'mandatory statutory or regulatory provisions' in its article 1(2). The general view is that these two expressions mean both the same, namely substantive legal provisions. These are indubitably provisions based on formal laws, legislative decrees, statutes, customary law, collective agreements, as well as private-sector work agreements and public-sector establishment agreements.³⁹²² An administrative

³⁹¹⁶ BT-Drs. 14/6040 at 154.

³⁹¹⁷ Stöffels *AGB-Recht* 161.

³⁹¹⁸ *Rechtsglägenvergleich*. Staudinger/*Coester* § 307 para 292, UBH/*Fuchs* § 307 para 25.

³⁹¹⁹ BGH *NJW* 1986, 43 *et seq.*, Staudinger/*Coester* § 307 para 292.

³⁹²⁰ Stöffels *AGB-Recht* 161.

³⁹²¹ WLP/*Pfeiffer* § 307 para 335.

³⁹²² Palandt/*Grüneberg* § 307 para 51.

authorisation can also be qualified as substantive law in this context.³⁹²³ According to the prevailing opinion, also unwritten legal rules, case law and even the rights and obligation arising from supplementary interpretation of the given contract under §§ 157, 242 BGB and the nature of the agreement are part of these legal provisions.³⁹²⁴

Stoffels correctly maintains that the prevailing opinion goes too far because a comparison between two legal situations requires a comparative standard that has other sources than the matter which is itself the object of the comparison. The contractual content can thus not serve as the comparative standard.³⁹²⁵ Naudé argues in this regard that otherwise, courts would be able to indirectly attack the legal provision itself, which is rather the task of the Constitutional Court.³⁹²⁶ Also the rights and obligations of an agreement that are outlined by means of interpretation of the agreement according to §§ 157 and 242 cannot serve as the comparative standard because the contract itself contains discretionary rules set out by the parties.³⁹²⁷

Hence, the decision of whether content control can take place should merely be taken by means of the criterion of the 'regulatory identity', that is the accordance between a legal provision and a standard clause.³⁹²⁸

A clause by which the depositor of a cheque must pay the fee that collecting banks have to pay to banks drawn upon means nothing else than that the expenses that the bank can require in terms of §§ 670, 675 have to be reimbursed.³⁹²⁹ Such a clause is merely declaratory and hence not subject to content control.³⁹³⁰

³⁹²³ BGH *NJW* 2007, 3344.

³⁹²⁴ WLP/*Pfeiffer* § 307 para 282, Erman/*Roloff* § 307 para 39.

³⁹²⁵ Stoffels *AGB-Recht* 162.

³⁹²⁶ Naudé 2009 *SALJ* 534.

³⁹²⁷ Stoffels *AGB-Recht* 162.

³⁹²⁸ Stoffels *AGB-Recht* 162.

³⁹²⁹ **§ 670 BGB** (Reimbursement of expenses): 'If the mandatary, for the purpose of performing the mandate, incurs expenses that he may consider to be necessary in the circumstances, then the mandator is obliged to make reimbursement.'

§ 675 BGB (Nongratuitous management of the affairs of another): '(1) The provisions of [§§] 663, 665 to 670 and 672 to 674 apply to a service contract or a contract to produce a work dealing with the management of the affairs of another to the extent that nothing else is provided in this subtitle and, if the person obliged is entitled to terminate without complying with a notice period, the provisions of [§] 671 (2) also apply with the necessary modifications. (2) A person who gives another person advice or a recommendation, notwithstanding the responsibility that arises from a contractual relationship, a tort or another statutory provision, is not obliged to pay compensation for the damage arising from following the advice or the recommendation. (3) A contract by means of which one party undertakes to effect the enrolment or registration of the other party to participate in games of chance operated by a third party must be in text form.'

³⁹³⁰ BGH *NJW* 2012, 2337.

a) Contractual arrangements permitted by law

Where the law provides for a certain margin within which the parties can agree on certain provisions, it is sometimes difficult to assess whether such clauses are merely declaratory clauses. Generally, such clauses only supplement the existing legal provisions and are therefore subject to content control.³⁹³¹ Only where the legislator provides for a legal provision according to which certain agreements are permitted within strict limits, such clauses might be exempt from content control. Since such legal provisions can aim at individual agreements on the one hand, and standard clauses on the other, one has to analyse whether this legal permission is also valid for standard clauses. If so, the protective standard of §§ 305 *et seq.* must not be undermined, and the clause is subject to content control. The enquiry of the legislator's intention is done by taking into consideration the legislative materials, such as the drafting history of the norm.³⁹³²

For this reason, a clause by which the probationary period in an employment contract is up to 6 months is exempt from content control³⁹³³ as the parties merely make use of the margin contemplated in § 622(3) BGB.³⁹³⁴ Under § 651 lit. h(1) BGB, a travel organiser may, by agreement with the traveller, limit its liability for damage that does not constitute bodily injuries to three times the package price. The legislative materials expressly state that the legislature had standardised mass contracts in mind when drafting this provision.³⁹³⁵ Hence, a clause that limits the liability for damage in the aforementioned manner is controllable.³⁹³⁶

b) Provisions that need to be supplemented

Sometimes, the legislator only provides for a general framework that needs to be filled by the parties. In these cases, the standard terms user must provide for substantial provisions filling out this framework and cannot content with simply referring to the framework. Such declaratory clauses are exempt from content control. An insufficient concretisation of the framework might lead to intransparency under § 307(3) 2nd sent., however.³⁹³⁷ For example, a

³⁹³¹ UBH/*Fuchs* § 307 para 32 *et seq.*, Staudinger/*Coester* § 307 para 301 *et seq.*

³⁹³² WLP/*Pfeiffer* § 307 para 340, Staudinger/*Coester* § 307 para 303 *et seq.*

³⁹³³ BAG NZA 2008, 521 (522).

³⁹³⁴ § 622(3) BGB: 'During an agreed probationary period, at most for the duration of six months, the employment relationship may be terminated with a notice period of two weeks.'

³⁹³⁵ BT-Drs. 8/2343 at 11 *et seq.*

³⁹³⁶ UBH/*Fuchs* § 307 para 33, Stöffels *AGB-Recht* 164. The BGH reached a contrary decision though in BGH NJW 1987, 1931 (1937).

³⁹³⁷ UBH/*Fuchs* § 307 para 36.

clause by which a life insurer only refers to ex-§§ 176(3) 1st sent. and ex-174(2) VVG³⁹³⁸ with regard to the repurchase value merely reflects the legal framework and thus provides for an insufficient and intransparent clause in terms of § 307(3) 2nd sent., read in conjunction with § 307(1) 2nd sent.³⁹³⁹

1.2.5 Determination of the principal obligations

§ 307(3) excludes content control of the main subject matter of the contract (performance specification) as well as agreements on the price to be paid.³⁹⁴⁰ The statutory law does not contain provisions pertaining to the main subject matter and the price to be paid because of the freedom of contract of the parties.³⁹⁴¹ These exclusions will be discussed in the following.

As opposed to the German legislature, the South African legislator chose to include into the fairness enquiry also negotiated terms,³⁹⁴² including the core terms (price, subject matter of the contract, warranty etc.).³⁹⁴³

a) Performance specifications

aa) Core of contractual performance specifications

Clauses which merely define the reason for the agreement, the main subject matter, the type, volume, quantity and quality of the goods or services to be delivered are not subject to German content control.³⁹⁴⁴ This also applies to so-called 'negative performance specifications' by which a certain performance is denied.³⁹⁴⁵ The courts define the content control-free area very narrowly by stating that without the given clause, there is no valid contract because of the lack of an identified or identifiable performance.³⁹⁴⁶

³⁹³⁸ **Ex-§ 176(3) VVG** provides, among other things, that the repurchase value is to be calculated for the end of the current insurance period. **Ex-§ 174(2) VVG** provides, for instance, that the calculation of the insurance payout that is free of premium is to be carried out pursuant to the recognised actuarial rules and principles.

³⁹³⁹ BGH *NJW* 2001, 2012 (2013); 2014 (2015 *et seq*).

³⁹⁴⁰ Stoffels *AGB-Recht* 164 and 165.

³⁹⁴¹ Schmidt *BGB-AT* 426, Wolf and Neuner *BGB-AT* 562.

³⁹⁴² The concept of 'non-negotiated terms' is wider than the one of 'standard terms'. Pursuant to art 3(2) of the Council Directive 93/13/EEC of 5 April 1993, '[a] term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.' In terms of § 305(1) BGB, '[s]tandard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract.'

³⁹⁴³ Naudé 2009 *SALJ* 531, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 5, Naudé 2006 *Stell LR* 364. The reason for this choice could be that many South Africans are more vulnerable than consumers in other countries are, given their low level of education and bargaining power.

³⁹⁴⁴ BGH *NJW* 1999, 2279 (2280); 3558 (3559); 2000, 3348.

³⁹⁴⁵ Stoffels *AGB-Recht* 165.

³⁹⁴⁶ BGH *NJW* 2001, 2014 (2016); 2014, 2269 (2273), UBH/*Fuchs* § 307 para 41.

Building specifications or general information in prospects or catalogues are exempt from content control.³⁹⁴⁷ The same applies to a job description in an employment contract³⁹⁴⁸ or the determination of the working hours.³⁹⁴⁹

bb) Modifications of the promised performance

On the other hand, standard business clauses that restrict, modify or undermine the main subject matter of the agreement can be challenged according to the BGH.³⁹⁵⁰ The demarcation between control-free performance specifications and modifications of the performance is nonetheless sometimes difficult to draw. The BGH puts forward the protective purpose of §§ 305 *et seq.* because § 307(2) no. 2 makes clear that the other party must be protected from clauses that limit essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.³⁹⁵¹

Therefore, a clause contained in general travel terms by which the scope of the contractual performance is determined by the performance specification of the tour operator and in consideration of the 'habitual practices' in the given country is subject to content control. The BGH decided that such a clause modifies the promised performance by submitting it to the habitual local practices. Without that clause, the operator would be obliged to ensure a delivery that is considered of average kind and quality (§ 243 BGB) according to German standards. With the 'filter' of the habitual local practices, that standard is undermined though since the foreign standard could fall behind the German one.³⁹⁵²

Stoffels legitimately maintains that the BGH's criterion for the demarcation between clauses that are subject to content control and those that are exempt from it, i.e., whether the given clause restricts, modifies or undermines the main subject matter of the contract, is not suitable for the determination of the control-free area of the principal obligations in terms of § 307(3). In his view, such a criterion does not sufficiently consider the normative purpose of § 307(3), but rather loses itself in a terminological or descriptive debate.³⁹⁵³

In order to decide whether such a clause can be challenged, one thus has to keep in mind the legislator's objective. The fundamental idea of content control is the consumer's protection in

³⁹⁴⁷ WLP/Pfeiffer § 307 para 294.

³⁹⁴⁸ BAG NZA 2007, 974 (975).

³⁹⁴⁹ BAG NZA 2008, 45.

³⁹⁵⁰ BGH NJW 2014, 2269 (2273), Palandt/Grüneberg § 307 para 45.

³⁹⁵¹ BGH NJW 1987, 1931 (1935).

³⁹⁵² BGH NJW 1987, 1931 (1935).

³⁹⁵³ Stoffels AGB-Recht 170 and 171.

areas where the market does not offer sufficient protection against abuse by the user. Where a standard clause is subject to the market's forces and competition in a way that the average client takes notice of it and can include it in its decision, one can suppose that the market regularly offers a fair balance of the parties' interests so that any intervention is superfluous.³⁹⁵⁴

In this context, it is helpful to take into account how the customer deals with the 'fine print' of a contract. Since the transposition of the Unfair Terms Directive and the insertion of § 310(3), consumer protection considerations are now part of German standard business clause legislation. A client that is confronted with standard terms should, according to ECJ case law,³⁹⁵⁵ be considered a reasonable average customer who must be able to reach decisions on the market on the basis of sufficient information. Although he or she has no noteworthy legal knowledge, he or she does not reach any decisions blindly. Therefore, the main subject matter of a contract is crucial for clients as they attempt to satisfy their needs to a price they are ready to pay. Hence, transparent prices and the core of the performance do form part of the control mechanisms of the market and competition.³⁹⁵⁶ Apart from transparency control, they are therefore not subject to content control, save where the legislator regulates certain prices, such as doctor's or lawyer's fees.³⁹⁵⁷

The aforementioned distinction between the main subject matter of the contract (*essentialia negotii*) and ancillary stipulations (*naturalia*) is not sufficient, however. Other considerations should be included too. In certain cases, performance does not form part of the main subject matter of the contract but might convince the client to conclude the contract because the supplier's product offers an ancillary performance that other supplier's products do not offer, e.g., additional services of a credit card provider. Then, the given clause is submitted to real competition and there is no need for content control.³⁹⁵⁸

In two recent rulings, the BGH affirmed that fees for the conclusion of building loan contracts, which are very popular in Germany, and those for the processing of consumer loan agreements are ancillary price agreements and therefore subject to content control.³⁹⁵⁹ Stoffels correctly contradicts the BGH's analysis and argues that in the case of building loan contracts, consumers generally pay attention to the financial impact of such a contract. The conclusion fee for such

³⁹⁵⁴ Fastrich *Inhaltskontrolle* 265, See also Canaris *NJW* 1987, 613.

³⁹⁵⁵ E.g., ECJ *NJW* 1993, 3187 (Yves Rocher); 1995, 3243 ('Mars').

³⁹⁵⁶ UBH/*Fuchs* § 307 para 41.

³⁹⁵⁷ BGH *NJW* 1998, 1786 (1789).

³⁹⁵⁸ Stoffels *AGB-Recht* 173.

³⁹⁵⁹ BGH *NJW* 2011, 1801 (1802 *et seq*) (building loan contracts); 2014, 2420 (consumer loan agreements).

contracts is an essential cost factor. § 6(3) and (8) of the Preisangabenverordnung (PAngV)³⁹⁶⁰ even requires that the supplier includes such fees in the effective annual percentage rate. What is more, many specialised magazines, such as Finanztest, Capital or Managermagazin as well as online services regularly publish comparisons of these products, so that one can argue that the aforementioned fees take part in the competition. The argument that in this sector there is no real competition and that consequently, the market does not function properly can be rebutted because consumers have the possibility to choose other long-term savings products instead, such as bank savings plans or fund saving products. Therefore, building loan contracts compete with these products.³⁹⁶¹

The same applies to consumer loan agreements since the fee for the processing of such contracts take part in the competition for the main subject matter. First, the supplier has the obligation to inform its client of the amount of these fees. Second, the credit institution must inform the borrower of the effective annual percentage rate before he or she signs the contract.³⁹⁶² As discussed before, this rate must include all kinds of costs, also the processing fees (§ 6(3) PAngV). Hence, the processing fees are part of the client's considerations for his or her decision and thus take part in the competition in the relevant market. Because of the fair balance between the parties' interests, there is no need for content control.³⁹⁶³

The BGH's argumentation that processing fees can be challenged since they are not agreements on the price for the contractual main subject matter or a remuneration for additional services, but rather the supplier's attempt to pass on costs to the client for services that the bank must perform in its own interest (such as the scrutiny of the creditworthiness) or because of its own legal obligations, ignores the normative purpose of § 307(3). In more recent decisions, the BGH has thus corrected its view and submits processing fees to content control.³⁹⁶⁴

cc) General insurance terms and conditions

Whether and to what extent risk descriptions in general insurance terms and conditions are subject to content control is controversially discussed.³⁹⁶⁵ Insurance terms and conditions define the performance by describing the inclusions, exclusions and certain duties³⁹⁶⁶ of the

³⁹⁶⁰ PAngV = Price Indication Regulation).

³⁹⁶¹ Stoffels *AGB-Recht* 173 and 174.

³⁹⁶² § 491a(1) BGB, art 247 § 3(1) no. 3 EGBGB.

³⁹⁶³ Stoffels *AGB-Recht* 175. See also the decision of LG Munich I of 17.09.2013 in *ZIP* 2014, 20.

³⁹⁶⁴ BGH *NJW* 2014, 2420 (2421 *et seq.*).

³⁹⁶⁵ See UBH/*Fuchs* § 307 para 55 *et seq.*

³⁹⁶⁶ *Obliegenheit*. Such duties can be defined as co-operation obligations, e.g., the obligation to notify an insured loss within a certain period of time. See Creifelds *Rechtswörterbuch* s.v. 'Obliegenheit'.

insured party. Legal literature tends to exclude primary risk descriptions and a large part of secondary risk restrictions from content control.³⁹⁶⁷ The BGH has not reached any decisions in this regard but generally applies its jurisprudence on control-free performance specifications to general insurance terms and conditions.³⁹⁶⁸ Hence, only risk descriptions belonging to the 'core of performance specifications', i.e., the general description of the insured object and the insured risk, are exempt from content control.³⁹⁶⁹ On the other hand, clauses restricting the promise of the principal performance of the insurer to fully cover the insured loss in a manner that is incompatible with the protective purpose of §§ 305 *et seq.* are subject to content control.³⁹⁷⁰ Clauses that define the co-operation obligations³⁹⁷¹ of the insured are always subject to content control.³⁹⁷²

Standard provisions of a private medical insurance that exclude examinations and treatments that are not generally accepted by the scientific community (so-called 'scientific character clause')³⁹⁷³ or that are not part of conventional medicine³⁹⁷⁴ are no performance descriptions but rather limit the scope of the insurance cover and therefore restrict the performance description. Hence, such clauses are subject to content control.

According to the BGH, a clause by which the price for a one- or two-bed hospital room is fully charged also for the first and last day in hospital is exempt from content control as it merely stipulates the type and scope of the principal contractual obligation and its price.³⁹⁷⁵

b) Price agreements

aa) Direct price agreements

The actual or direct agreement between the parties on the price to be paid by the consumer for the delivery of the given goods or services is not subject to content control under § 307(3).³⁹⁷⁶ In this context, the BGH expressly states that direct price agreements include not only the concrete indication of a price but also the methodology to be applied to calculate the price.³⁹⁷⁷

³⁹⁶⁷ Sieg *VersR* 1977, 491.

³⁹⁶⁸ BGH *VersR* 1991, 175; *NJW* 1999, 3558 (3559).

³⁹⁶⁹ UBH/*Fuchs* § 307 para 55.

³⁹⁷⁰ BGH *NJW* 2001, 1934 (1935).

³⁹⁷¹ *Obliegenheitsklauseln*.

³⁹⁷² Locher *Recht der AGB* 86 *et seq.*, UBH/*Fuchs* § 307 para 59.

³⁹⁷³ *Wissenschaftlichkeitsklausel*. BGH *NJW* 1993, 2369.

³⁹⁷⁴ *Schuldmediziniklausel*. BGH *NJW* 2003, 294.

³⁹⁷⁵ BGH *NJW* 1999, 864.

³⁹⁷⁶ Stoffels *AGB-Recht* 168.

³⁹⁷⁷ BGH *NJW* 2000, 577 (579).

This applies, for instance, to the fees for the German telecommunication agency, the Deutsche Telekom AG.³⁹⁷⁸ Also, a clause stipulating a lump-sum for the remuneration of the delivery of water for the construction of a building is exempted from content control.³⁹⁷⁹ So-called 'discount clauses' of an insurance company by which the latter offers a discount on the premium if it does not have to pay for a damage of the insured, or if the insured extends the insurance for another year, are control-free, too.³⁹⁸⁰

Exceptionally, such direct price agreements can be challenged where a legal price regulation exists and pre-formulated clauses differ from it.³⁹⁸¹ Since the legislator aimed to achieve a certain protective purpose when regulating such prices, any deviation from this regulation must be subject to content control, and it must be assessed whether the price clause corresponds to the fundamental idea behind the price regulation.³⁹⁸²

On the other hand, section 48(1)(a)(i) of the Act expressly prohibits unfair prices. The courts should not be competent for price control however as consumers can be expected to be aware of the price as it is usually the first thing they look at. As long as the price is prominently mentioned in South African terms and conditions, payable in circumstances the consumer reasonably expected, and its calculation is not surprising, there is no reason why courts should interfere unless the price is obviously unfair or gives an excessive advantage to the supplier.³⁹⁸³ In German law, the threshold for an intervention of the courts is very high, e.g., for usury.³⁹⁸⁴ Furthermore, excessive pricing control falls under the competency of competition authorities

³⁹⁷⁸ BGH *NJW* 1998, 3188 (3192).

³⁹⁷⁹ BGH *NJW* 1999, 3260 *et seq.*

³⁹⁸⁰ BGH *NJW-RR* 2005, 1479.

³⁹⁸¹ Erman/*Roloff* § 307 para 45.

³⁹⁸² BGH *NJW* 1981, 2351 (deviation from officially established architect fees); 1998, 1786 (1789) (dentist's fees); 1998, 3567 (lawyer's fees).

³⁹⁸³ According to the common law, a court may set aside a price set by a third party appointed by the parties for that purpose as long as it was manifestly unjust. See *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 (3) SA 449 (C), *Van Heerden v Basson* 1998 (1) SA 715 (T).

³⁹⁸⁴ § 138 (2) BGB: 'In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.' The price must therefore not only be excessive ('disproportionate'), but the other party must also fulfil subjective conditions that are linked to its person.

which are more qualified in terms of empirical market and pricing analysis,³⁹⁸⁵ as well as the handling of market failure.³⁹⁸⁶

bb) Ancillary agreements on the price

According to the BGH, ancillary agreements on the price, i.e., clauses that have an impact on the price and the performance but do not exclusively define the price to be paid for the principal performance, are also subject to content control. Such clauses generally differ from the *ius dispositivum*, and if they would not be contained in standard terms, their content could be determined by §§ 157, 242.³⁹⁸⁷ These are provisions that define the calculation or modification of the price by a party, payment conditions, as well as due date and indexation clauses.³⁹⁸⁸

Clauses that define the value date for bank transactions by which not the percentage of the interests is stipulated but rather the date by which the interests are calculated, are such ancillary price agreements.³⁹⁸⁹ The same applies to bank fees for transactions at the counter,³⁹⁹⁰ or fees for inquiries concerning bank transactions.³⁹⁹¹ Fees for the cancelling of a telephone line that a telecommunication agency charges can also be challenged. The BGH considers such fees as 'an attempt to pass on charges for the safeguarding of the user's interests to the client'.³⁹⁹²

cc) Price agreements on ancillary and special performances

Terms that stipulate a price or a fee for additional special performances, such for the use of a bank card abroad,³⁹⁹³ are control-free if such special performances are not regulated by law.³⁹⁹⁴ The same applies to a clause by which a bank charges a fee for reissuing a savings book.³⁹⁹⁵

On the other hand, clauses that do not define a special performance for the benefit of the client, but pass on charges for the fulfilment of legal or contractual obligations, are subject to content

³⁹⁸⁵ See s 8(a) of the Competition Act 89 of 1998 which prohibits a dominant firm to charge an excessive price to the detriment of consumers, that is a price for a good or service which bears no reasonable relation to the economic value of that good or service and is higher than that value. This must be determined by empirical analysis. As to the elements in order to determine such a price see *Harmony Gold Mining Company Limited and Another v Mittal Steel South Africa Limited and Another* [2007] CPLR 37 (CT).

³⁹⁸⁶ Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

³⁹⁸⁷ § 157 BGB: '(Interpretation of contracts) Contracts are to be interpreted as required by good faith, taking customary practice into consideration.' § 242: '(Performance in good faith) An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.' BGH NJW 2000, 577 (579); NJW-RR 2004, 1206.

³⁹⁸⁸ Stoffels *AGB-Recht* 169.

³⁹⁸⁹ BGH NJW 1989, 582.

³⁹⁹⁰ BGH NJW 1994, 318 *et seq.*

³⁹⁹¹ OLG Schleswig ZIP 2000, 789 (790).

³⁹⁹² BGH NJW 2002, 2386 (2387).

³⁹⁹³ BGH NJW 1998, 383.

³⁹⁹⁴ BGH NJW 1996, 2032.

³⁹⁹⁵ BGH BB 1998, 1864.

control.³⁹⁹⁶ By managing exemption instructions,³⁹⁹⁷ banks fulfil a legal obligation of public interest.³⁹⁹⁸ The management of a loan account is also in the bank's interest in terms of its organisation and bookkeeping.³⁹⁹⁹ Such terms are thus always subject to content control.⁴⁰⁰⁰

It is submitted however that the BGH's (former) argumentation does not consider the normative purpose of § 307(3), i.e., the other party's protection where he or she is abused because the agreement does not represent a fair balance between the parties' interests. For fees that bank charge for the use of a credit card overseas, for instance, the question is if such fees take part in the competition in the relevant market, and not whether they are regulated by law. In a society where people can freely move and travel, especially in the EU, and where a huge part of the population actually has the means to do so, the use of credit cards abroad is part of the considerations average clients usually have. Hence, such fees are a crucial factor in the customer's decision. Furthermore, the standard terms must present these fees in a transparent manner. Finally, these fees take part in the competition in the relevant market because of the regularly published comparisons (e.g., Stiftung Warentest). Hence, there is no need for content control in these cases.⁴⁰⁰¹

1.2.6 Impact of §§ 308 and 309 on control-free clauses

Since §§ 308 and 309 are a concretisation of the control standard of the general clause (§ 307),⁴⁰⁰² one might ask the question of whether these provisions can give some guidance for the determination of whether certain clauses are subject to content control. The legislator aimed to eliminate certain clauses from legal relations that present a certain danger for the other party.⁴⁰⁰³ If these clauses were subject to another filter – in the form of § 307(3) – this objective would be watered down though. Hence, it is generally accepted that § 307(3) does not apply to the prohibitions contained in §§ 308 and 309.⁴⁰⁰⁴

³⁹⁹⁶ BGH NJW 2005, 1275; 2011, 1726 (1727).

³⁹⁹⁷ *Freistellungsaufträge*.

³⁹⁹⁸ BGH NJW 1997, 2753 *et seq.*

³⁹⁹⁹ BGH NJW 2011, 2640 (2641).

⁴⁰⁰⁰ Stoffels *AGB-Recht* 170.

⁴⁰⁰¹ Stoffels *AGB-Recht* 173 and 174.

⁴⁰⁰² Stoffels *AGB-Recht* 243.

⁴⁰⁰³ BT-Drs. 7/3919 at 23.

⁴⁰⁰⁴ Niebling *WM* 1992, 852, Dylla-Krebs *Schranken der Inhaltskontrolle* 189. See e.g., BGH NJW 2001, 751 (752).

Where however interdependences exist, i.e., where §§ 308 and 309 do not apply to a certain standard clause, but the latter shows certain similarities to a prohibition of §§ 308 or 309 because of its thematic proximity, this question is more difficult to answer.

A membership contract for a gym, for instance, contains a clause by which the membership is renewed automatically and implicitly for another six months if not cancelled in due time and form.⁴⁰⁰⁵ § 309 no. 9 lit. b)⁴⁰⁰⁶ is not applicable because it deals only with contracts for the regular supply of goods or the regular rendering of services or work performance by the user. In a gym contract, the main performance is not the supply of goods or services, but the client's right to use the equipment.⁴⁰⁰⁷ Therefore, the clause must be assessed by the general clause.⁴⁰⁰⁸ Before this assessment can take place, one has to examine whether the renewal clause is subject to content control. This question can be answered negatively if the clause takes part in the competition of the relevant market because then, there is a fair balance between the parties' interests. A more normative evaluation can enrich this market-oriented approach. *In concreto*, the question is whether the thematic proximity of § 309 no. 9 lit. b) has an impact on the enquiry in terms of § 307(3). Especially the fact that § 307 only comes into play when §§ 308 and 309 are not applicable speaks for the view that clauses for which §§ 308 or 309 are not directly applicable but which show a certain thematic proximity, generally should be open to content control under § 307. The fact that the legislator prohibits a tacit extension of contractual relationships in some instances also speaks for the argument that in this area, special attention should be given to clauses that deal with that matter, and that the legislator did not intend to limit the control of such a clause to transparency control.⁴⁰⁰⁹

The integration of the market-oriented approach (competition in the relevant market) and the normative evaluation also makes sense because §§ 308 and 309 essentially deal with clauses that jeopardise a fair balance between the parties for the execution of the contract, and the other party usually does not take into consideration such issues when concluding the agreement.

⁴⁰⁰⁵ See BGH *NJW* 1997, 739.

⁴⁰⁰⁶ **§ 309 no. 9 lit. b):** '(Duration of continuing obligations) in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user, (...) b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract' is ineffective.

⁴⁰⁰⁷ BGH *NJW* 1997, 739; 2012, 1431.

⁴⁰⁰⁸ BGH *NJW* 2012, 1431.

⁴⁰⁰⁹ Stöffels *AGB-Recht* 176.

1.3 Conclusion

§§ 307 to 309 provide for a more intense content control compared to more general provisions in contract law, such as §§ 134 (statutory prohibition), 138 (public policy) or 242 (good faith). The latter therefore play a supplementary role, e.g., when the balance in an agreement between individuals is disturbed. § 138(1), for instance, has a different evaluative standard and a higher threshold of application than § 305 *et seq.* The legal consequences are also harsher as the entire contract is void should it violate the principles of public policy, whereas § 306(1) provides that only the ineffective clauses of the contract are void. For § 138, all clauses of the given contract and the concrete circumstances are part of the evaluation. By contrast, § 305 *et seq.* applies an abstract-universal approach. On the other hand, § 242 is applied in areas that are excluded in terms of § 310(4) and offers additional protection in instances where the supplier abuses a right it normally holds (exercise control).

Voidability for mistake under § 119 is possible since this provision's objective is not contractual fairness but the implementation of the party's intention without any 'vice of consent'. Other provisions that apply in conjunction with §§ 305 *et seq.* are consumer protection provisions, such as §§ 475 (deviating agreements) and 312a(4) (restriction of certain payment clauses).

Content control is legal control and, except for a narrow application of § 315(3) 2nd sent., no equity control, and must be performed by the courts *ex officio*.

Besides the courts, certain standard terms can also be controlled by other entities, such as administrative bodies, by means of a previous approval procedure. When the approval is granted, the courts can nevertheless control the standard terms as the only standard applicable for them are §§ 305 *et seq.* In the insurance sector, such a previous content control does not exist anymore, but the *Bundesanstalt für Finanzaufsicht* can intervene subsequently if insurance-related standard terms unreasonably disadvantage the other party.

So-called 'conditions cartels' are still prohibited in terms of antitrust law, but in practice, these cartels have no significant relevance. On the other hand, the 'recommended conditions' of some industries are much more relevant in practice. Content control by the antitrust authorities is double-folded since it assesses not only standard terms against the backdrop of the GWB but also under §§ 305 *et seq.* BGB. This is merely a *prima facie* control though because the authority does not undertake a full scrutiny in terms of the BGB. Besides, the antitrust authorities act on the principle of discretionary power.

The Act Against Unfair Competition (UWG) is also applicable along with the BGB standard terms legislation because it has another protective purpose. The BGH ruled that §§ 305 *et seq.* are market conduct rules in the sense of § 4 UWG. Although the applicable standard for both legislative pieces is different, a violation of the UWG can be a relevant aspect within the enquiry of the general clause of § 307 BGB.

Also notaries public and the land registry have competence for the enquiry of standard business terms within certain limits.

§ 307(3) 1st sent. provides that § 307 as well as §§ 308 and 309 apply only to standard clauses that derogate from legal provisions, or arrangements supplementing those legal provisions. The prevailing view is that § 307(3) excludes performance specifications and agreements on the price as well as declaratory clauses. This view is supported, *inter alia*, by the *ratio legis* of this provision and the conclusions that can be drawn from the EU Unfair Terms Directive. This is only the case though if the clauses are transparent so that the consumer can reach an informed decision. Hence, transparency is a precondition for the absence of content control.

In practice, it can be difficult to distinguish clauses that merely reproduce the content of legal provisions (declaratory clauses) from others. The 'regulatory identity' between the standard clause and the legal provision should be the decisive criterion in this regard. The prevailing view goes however too far by including also rights and obligations arising from a supplementary interpretation of the contract, because a comparative standard that has other sources than the matter which is the object of the comparison is needed.

Contrary to the South African regime, the German legislator did not include negotiated terms, including the core terms. The German courts define the content control-free area narrowly as regards the core of contractual performance specifications. According to the BGH, terms that restrict, modify or undermine the main subject matter are subject to content control. This view does not take sufficiently consider the normative purpose of § 307(3) though. Hence, one should rather keep in mind the legislator's objective, i.e., the consumers' protection where the market fails to protect them sufficiently against abuses. Thus, where the market offers a fair balance between the parties' interests, there is no need for content control. Where real competition between suppliers on specific terms exist because of the fact that consumers usually pay attention to them, or the goods or services of various providers are regularly compared in the press so that there is transparency, there is no need for intervention.

Price agreements, including the calculation method for the price, are generally excluded from content control. This does not apply where a legal price regulation exists, and standard clauses differ from it. On the other hand, the South African legislator expressly prohibits unfair prices (section 48(1)). Courts should not exert price control because they have not the necessary expertise, unlike the competition authorities. According to the BGH, ancillary price agreements, i.e., clauses defining the calculation or modification of the price, are subject to content control. On the other hand, price agreements on ancillary and special performances are generally exempt from this control if the given performances are not regulated by law. Nonetheless, also here, the criterion should rather be if such clauses take part in the competition in the market.

§ 307(3) does not apply to the prohibitions of §§ 308 and 309 since the latter are a concretisation of the general clause. By the application of another 'filter', their protective purpose would be jeopardised. It is recognised though that a 'thematic proximity' might exist in certain cases, and that the legislator did not intend to limit the enquiry of such clauses to transparency control.

2. Prohibited clauses with or without the possibility of evaluation

2.1 Introduction

§§ 308 and 309 contain an 'exemplary enumeration of applications of the general clause of § 307'⁴⁰¹⁰ and certain clauses that are either invalid *per se* (§ 309) or after evaluation (§ 308). The German legislator was above all inspired by the practical relevance for consumers when drafting the two lists.⁴⁰¹¹ Although the general clause offers a flexible approach for content control, it has some disadvantages: it is very widely worded, and the judge has a very extensive scope of evaluation in terms of § 307. This leads to differing results, which might shy consumers away from risking legal procedures.⁴⁰¹² In order to offer more legal security and clarity, the legislator decided to draft a catalogue of exemplary clauses that are prohibited.⁴⁰¹³

What is more, §§ 308 and 309 offer precious guidelines for § 307 because the valuations contained in the two lists can be used for similar content control problems with respect to the general clause.⁴⁰¹⁴ Some provisions contained in §§ 308 and 309 offer a reverse conclusion (*argumentum e contrario*) for the general clause, others a conclusion by 'analogy' or are rather neutral.⁴⁰¹⁵ The BGH⁴⁰¹⁶ decided that § 309 no. 9⁴⁰¹⁷ offers an *argumentum e contrario* in that clauses that do not fall under this provision can nonetheless be invalid under the general clause. The court held in connection with the extension clause in a gym membership contract that on the basis of the non-applicability of § 309 no. 9 lit. b) (tacit extension by more than one year) in the given case, it could not be excluded that the clause was invalid under the general clause. However, the legislator did not aim at stricter rules for contracts that were not covered by the

⁴⁰¹⁰ BT-Drs. 7/5422 at 6.

⁴⁰¹¹ BT-Drs. 7/3919 at 23.

⁴⁰¹² BT-Drs. 7/3919 at 23, Stöffels *AGB-Recht* 243.

⁴⁰¹³ BT-Drs. 7/3919 at 23. The advantages of so-called 'black-' and 'greylists' have already been discussed in Part I ch 3 para 1.2.

⁴⁰¹⁴ Stöffels *AGB-Recht* 244.

⁴⁰¹⁵ WLP/Dammann before §§ 308, 309 para 14 *et seq.*

⁴⁰¹⁶ BGH *NJW* 1987, 2012 (2013 *et seq.*).

⁴⁰¹⁷ **§ 309 no. 9:** The following standard business clauses are ineffective: '(Duration of continuing obligations) in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user, a) a duration of the contract binding the other party to the contract for more than two years, b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract, or c) a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract; this does not apply to contracts relating to the supply of things sold as belonging together, to insurance contracts or to contracts between the holders of copyright rights and claims and copyright collecting societies within the meaning of the Act on the Administration of Copyright and Neighbouring Rights [by Collecting Societies (VGG)].'

prohibition of § 309 no. 9, which is why it was not admissible to 'turn upside down' the legislator's regulatory intentions.⁴⁰¹⁸

In cases of contractual penalty where § 309 no. 6⁴⁰¹⁹ does not apply, the evaluation of this provision can serve the evaluation for the general clause by means of a conclusion by 'analogy'.⁴⁰²⁰ Contractual penalties bear enormous risks for the other party, and the possibility of a reduction of the penalty by the court under § 343⁴⁰²¹ does not offer sufficient protection.⁴⁰²²

§ 309 no. 1⁴⁰²³ is an example of a neutral clause since one cannot conclude the validity or invalidity of price increasing clauses after the expiration of the 4-month period.

In terms of § 310(1) 1st sent., most items of § 308 and all items contained in § 309 do not apply to B2B contracts. The requirements of such transactions between businesses on different levels (production, marketing, distribution) are too diverse and not comparable to relations with final consumers.⁴⁰²⁴ §§ 308 and 309 do apply neither to legal persons under public law, or special funds under public law.⁴⁰²⁵ Content control is performed here through the general clause.⁴⁰²⁶

The legislator distinguishes between 'prohibited clauses without the possibility of evaluation' (§ 309) and those 'with the possibility of evaluation' (§ 308). The former are characterised by their general risks for the other party and are prohibited *per se*, whereas the latter necessitate a case-by-case evaluation.⁴⁰²⁷ A characteristic of the provisions of § 308 is that they all contain indeterminate legal terms, such as 'unreasonably long',⁴⁰²⁸ 'without any objectively justified reason',⁴⁰²⁹ 'reasonably',⁴⁰³⁰ or 'without undue delay'.⁴⁰³¹ This indicates the possibility of

⁴⁰¹⁸ BGH NJW 1997, 739 (740).

⁴⁰¹⁹ § 309 no. 6: '(Contractual penalty) [A] provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract' is prohibited.

⁴⁰²⁰ 'Analogy' here is not an analogy in the technical legal sense because there is no unintended regulatory gap as § 307 serves as a 'catch-all clause'. See Stoffels *AGB-Recht* 245.

⁴⁰²¹ § 343(1): '(Reduction of the penalty) (1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded.'

⁴⁰²² WLP/Dammann § 309 no. 6 para 61.

⁴⁰²³ § 309 no. 1: '(Price increases at short notice) [A] provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract; this does not apply to goods or services delivered or rendered in connection with continuing obligations' is prohibited.'

⁴⁰²⁴ BT-Drs. 7/3919 at 23.

⁴⁰²⁵ § 310(1) 1st sent., BT-Drs. 7/3019 at 24.

⁴⁰²⁶ See § 310(1) 2nd sent.

⁴⁰²⁷ BT-Drs. 7/3919 at 24.

⁴⁰²⁸ E.g., § 308 no. 1 and 2.

⁴⁰²⁹ E.g., § 308 no. 3.

⁴⁰³⁰ E.g., § 308 no. 4.

⁴⁰³¹ E.g., § 308 no. 8.

evaluation by considering the circumstances of the given case.⁴⁰³² Clauses that are subject to § 308 generally contain a risk of a disturbed balancing of interests.⁴⁰³³ On the other hand, § 309 does (generally) not contain any indeterminate legal terms.⁴⁰³⁴ Contrary to § 308, the enquiry under § 309 does not necessitate an evaluation of the circumstances of the case.⁴⁰³⁵ Such clauses are a concretisation of § 307(2) because they are not compatible with essential principles of statutory provisions or undermine cardinal rights and obligations.⁴⁰³⁶

Content control should therefore begin with § 309, and if the given clause does not fall under this provision, continue with § 308.⁴⁰³⁷ If the clause still passes the test, an enquiry within the general clause is performed.⁴⁰³⁸

The South African terminology distinguishing between a 'blacklist' and a 'greylist' is not used in Germany. Naudé legitimately argues that a blacklist is a catalogue of prohibited terms that are invalid *per se*, whereas a greylist contains clauses that may be unfair, but the final decision depends on the circumstances of the given case.⁴⁰³⁹ For the evaluative elements of § 308, the particular circumstances of the case have to be taken into consideration. Once this evaluation has taken place, and the court has decided that the requirements of an indeterminate (open) legal term are fulfilled, the given clause is invalid. In this case, there is no need for recourse to other surrounding circumstances or § 307.⁴⁰⁴⁰ In agreement with Naudé, it is suggested that §§ 308 and 309 can be qualified as black- and greylists, respectively, since the relevant factor is the evaluative element or the invalidity under all circumstances.

The Unfair Terms Directive 93/13/EEC contains an indicative and non-exhaustive list of terms in its Annex that the Member States can regard as unfair.⁴⁰⁴¹ The meaning of this list for the design of the national legal orders and content control exercised by the courts is subject to discussion. Most authors opine that the list merely contains an indicative enumeration of clauses that tend towards being unfair.⁴⁰⁴² There is consensus however that the Annex does not

⁴⁰³² Stoffels *AGB-Recht* 245, BT-Drs. 7/3919 at 24.

⁴⁰³³ BT-Drs. 7/3919 at 24.

⁴⁰³⁴ In § 309 no. 8 lit. b) dd), 'disproportionality' is an indeterminate legal term though. In these cases, an evaluation is not excluded. See MüKo/*Wurmnest* § 307 para 22.

⁴⁰³⁵ Stoffels *AGB-Recht* 246.

⁴⁰³⁶ BT-Drs. 7/3919 at 24.

⁴⁰³⁷ Maxeiner 2003 *Y. J. Int. Law* 153.

⁴⁰³⁸ Stoffels *AGB-Recht* 245.

⁴⁰³⁹ Naudé 2007 *SALJ* 130.

⁴⁰⁴⁰ Naudé 2007 *SALJ* 130.

⁴⁰⁴¹ Art 3(3) of the Directive.

⁴⁰⁴² Palandt/*Grüneberg* § 310 para 29, Staudinger/*Coester* § 307 para 120 *et seq.*, WLP/*Pfeiffer* Art 3 RiLi para 75 *et seq.*

contain a 'blacklist' with clauses that must be considered unfair in any event, and that unmentioned clauses are not necessarily fair. The Member States are particularly not precluded from branding further clauses as unfair.⁴⁰⁴³ More problematic is the question of whether the Member States must implement the clauses of the Annex that go beyond content control based on a general clause. The ECJ held that the Annex does not create rights that go further than the text of the Directive itself and refrained from applying its strict conditions set out in its judgment of 10/05/2001⁴⁰⁴⁴ to the Annex.⁴⁰⁴⁵ According to the court, the Annex is merely a source of information for the national authorities as well as for individuals. In order to achieve the Directive's objective, the Member States must therefore choose a form and means of implementation that ensures that the public obtains knowledge of the list contained in the Annex.⁴⁰⁴⁶ §§ 308 and 309 include most of the clauses of the Directive's Annex and sometimes go beyond the protection offered by the Annex. In cases where §§ 308 and 309 do not contain clauses provided for in the Annex, the German legislator can fill this gap by applying the general clause.⁴⁰⁴⁷ Stoffels correctly alleges that the legislature should nonetheless endeavour to close this gap by inserting the 'missing' clauses from the Annex in order to harmonise the German law with the Directive.⁴⁰⁴⁸

In terms of § 310(2), sections 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers for the supply of electricity, gas, district heating or water from the supply grid to special customers to the extent that the conditions of supply do not derogate from orders on general conditions for the supply of standard-rate customers with electricity, gas, district heating and water to the disadvantage of the customer. § 39 of the Energy Industry Act (EnWG)⁴⁰⁴⁹ and article 243 EGBGB authorise the Ministry of Economy and Technology to adopt price regulations for utility companies. On this basis, in the last years, several regulations in this field have been adopted.⁴⁰⁵⁰ These are legal norms (and not standard business terms, even though their designations might sometimes be confusing) which directly regulate

⁴⁰⁴³ Art 8 of the Directive.

⁴⁰⁴⁴ ECJ *NJW* 2001, 2244 – Commission/The Netherlands.

⁴⁰⁴⁵ ECJ *NJW* 2004, 1647 ('Freiburger Kommunalbauten').

⁴⁰⁴⁶ ECJ *EuZW* 2002, 465 (466) – Commission/Sweden.

⁴⁰⁴⁷ Stoffels *AGB-Recht* 247. Others suggest a preliminary ruling by the ECJ in these cases. See MüKo/*Wurmnest* § 308 para 12.

⁴⁰⁴⁸ Stoffels *AGB-Recht* 247.

⁴⁰⁴⁹ EnWG = Energiewirtschaftsgesetz.

⁴⁰⁵⁰ Stromgrundversorgungsverordnung (StromGVV) and Gasgrundversorgungsverordnung (GasGVV) of 26/10/2006, BGBl. I at 2391, Niederspannungsanschlussverordnung (NAV) of 01/11/2006, BGBl. I at 2477, Niederdruckanschlussverordnung (NDAV) of 01/11/2006, BGBl. I at 2477, Allgemeine Bedingungen für die Versorgung mit Fernwärme (AVBFernwärmeV) of 20/06/1980, BGBl. I at 742, Allgemeine Bedingungen für die Versorgung mit Wasser (AVBWasserV) of 20/06/1980, BGBl. I at 750, 1067.

the content of the relation with the customers. Hence, they are not subject to content control in the sense of §§ 305 *et seq.*⁴⁰⁵¹ On the other hand, *vis-à-vis* special customers⁴⁰⁵² (mostly industrial consumers), these contracts only apply if they have been specifically incorporated. In this case, content control in terms of §§ 305 *et seq.* is possible. § 310(2) provides though that content control under §§ 308 and 309 is excluded so that only § 307 is applicable.⁴⁰⁵³ With this mechanism, the legislator wants to prevent that special customers are in a better position than standard-rate customers.⁴⁰⁵⁴ Since the liberalisation of the energy supply market, consumers can also conclude contracts with utility suppliers and become special customers.⁴⁰⁵⁵ Here too, content control is possible only in terms of the general clause.⁴⁰⁵⁶ The level of protection must not fall behind the Unfair Terms Directive however, which is why §§ 310(2) and 307 must be interpreted in conformity with the Directive.⁴⁰⁵⁷ The courts have therefore recently decided that the validity of price adjustment clauses in gas-supply contracts with special customers must not only be assessed in terms of the Gasgrundversorgungsverordnung, but also in accordance with the Directive.⁴⁰⁵⁸

2.2 Prohibited clauses without the possibility of evaluation (§ 309)

2.2.1 Price increases at short notice (§ 309 no. 1)

In terms of § 309 no. 1, a provision providing for an increase in payment for goods or services that are to be delivered or rendered within four months of the entering into of the contract is ineffective. This does not apply to goods or services delivered or rendered in connection with continuing obligations.

2.2.1.1 Rationale of § 309 no. 1

The determination of the payment for goods or services is part of the *essentialia negotii*. Pre-formulated clauses that enable the standard terms user to increase the price originally agreed with its customer raise concerns because they infringe the *pacta sunt servanda* principle by a subsequent unilateral intervention in the originally agreed counter-performance.⁴⁰⁵⁹ What is more, price comparisons before the conclusion of the contract are less effective, which means

⁴⁰⁵¹ Stoffels AGB-Recht 247.

⁴⁰⁵² *Sonderabnehmer*.

⁴⁰⁵³ Stoffels AGB-Recht 247.

⁴⁰⁵⁴ *Tarifkunden*. BGH NJW 1998, 1640 (1642).

⁴⁰⁵⁵ MüKo/Basedow § 310 para 19.

⁴⁰⁵⁶ BGH NJW 2013, 3647 (3650 *et seq.*), Erman/Roloff § 310 para 9.

⁴⁰⁵⁷ UBH/Schäfer § 310 para 105, Erman/Roloff § 310 para 9.

⁴⁰⁵⁸ ECJ NJW 2013, 2253 ('RWE') and BGH NJW 2013, 3647.

⁴⁰⁵⁹ BT-Drs. 7/3919 at 27.

that price competition is jeopardised.⁴⁰⁶⁰ Hence, no. 1 of § 309 blacklists price increases at short notice.⁴⁰⁶¹

Regulation 44(3)(h) of the Act and the Annex of the Unfair Terms Directive (item (l) of no. 1) contain a similar provision. According to the South African regulation and the European Directive, a clause may be fair if the other party (consumer) is granted a right to cancel the agreement.⁴⁰⁶² § 309 no. 1 prohibits price increases within the first four months after the conclusion of the contract *per se*. Price increases occurring after this period are assessed in terms of the general clause. To ensure a balance between the original and the increased price, the courts apply a standard that goes beyond the requisites of item (l) of the Unfair Terms Directive. Neither the Directive nor the Regulation explicitly exclude contracts concerning continuing obligations. Even if continuing obligations were included in the Directive or the Regulation, the protection granted by the German general clause would not fall short of the Directive or the Regulation, however. What is more, the BGB grants an ordinary right to revoke an agreement as well as an extraordinary right of withdrawal for continuing obligations in terms of § 314⁴⁰⁶³ for a compelling reason. An unacceptable price increase is such a compelling reason.⁴⁰⁶⁴

2.2.1.2 Content of the provision

§ 309 no. 1 contains an *absolute* prohibition for price increases in the given cases, without the possibility for the user to justify price increases. Therefore, price increases on the user's side (e.g., for material, raw materials or salaries) do not allow for a passing on to the consumer.⁴⁰⁶⁵

⁴⁰⁶⁰ BT-Drs. 7/3919 at 27.

⁴⁰⁶¹ The conditions of § 309 no. 1 are the same as in § 1 Preisangabenverordnung (PAngV) of 2002 (BGBl. 2001 I at 4197), but the legal consequence in the PAngV is not ineffectiveness of the clause, but consists in an administrative offence. See Stoffels *AGB-Recht* 331 and BT-Drs. 7/3919 at 27.

⁴⁰⁶² See BT-Drs. 7/3919 at 28.

⁴⁰⁶³ § 314: '(1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period. (2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. [§] 323(2) number 1 und 2 applies, with the necessary modifications, as regards the dispensability of specifying a period for such relief and as regards the dispensability of a warning notice. Specifying a period for relief and issuing a warning notice can also be dispensed with if special circumstances are given which, when the interests of both parties are weighed, justify immediate termination. (3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination. (4) The right to demand damages is not excluded by the termination.'

⁴⁰⁶⁴ Stoffels *AGB-Recht* 331.

⁴⁰⁶⁵ BGH *NJW* 1985, 855 (856), WLP/Dammann § 309 no. 1 para 52.

a) Price increase

In order to fall under no. 1, the given clause must contain a direct increase of the originally agreed price. The term 'price' includes in mutual contracts the client's counter-performance, but also ancillary performances and VAT. Usually, the customer's performance consists of payment in the form of monies but also barter trades are included in no. 1.⁴⁰⁶⁶ There is an increase in the price if the quantity of the (nominal) amount rises. So-called 'escalator' (or indexation) clauses⁴⁰⁶⁷ and 'tension clauses'⁴⁰⁶⁸ stipulating an automatic adjustment of the agreed amount are also subject to no. 1.⁴⁰⁶⁹ On the other hand, indirect price increases, e.g., through a decrease of the promised performance while the price remains the same, are assessed in terms of § 308 no. 4.⁴⁰⁷⁰

Hence, market price clauses ('the payable price is the list price of the delivery day') are ineffective. They do not indicate the payable price when the contract is concluded, which is required for delivery within 4 months in terms of no. 1.⁴⁰⁷¹ The same applies to clauses such as 'prices non-binding' because they enable the user to determine its price any time at will.⁴⁰⁷² The formulation 'price plus VAT' is ineffective too because it would enable the user to adjust its prices after an increase of the VAT.⁴⁰⁷³ On the other hand, clauses by which the user reserves a right to adjust the amount of the reimbursement for its expenses are technically no prices, but expenses.⁴⁰⁷⁴ They are nonetheless controllable in terms of § 307.⁴⁰⁷⁵

b) Goods or services

The payment has to be intended for 'goods or services'. For 'goods', ex-§ 1(2) HGB contained a legal definition before the commercial law reform in 1998 according to which goods are movable objects. Hence, land plots are no goods in this sense,⁴⁰⁷⁶ but transactions relating to them are open to scrutiny in terms of § 307, and the evaluations of § 309 no. 1 can be taken

⁴⁰⁶⁶ WLP/Dammann § 309 no. 1 para 30.

⁴⁰⁶⁷ *Gleitklauseln* or *Indexklauseln*.

⁴⁰⁶⁸ *Spannungsklauseln*. This type of clauses contains a 'tension' between different evaluation bases that are used for the calculation of a performance (e.g., civil servant pensions) in relation to another reference (e.g., a given salary group). In other words, the price of a certain good or service is dependent on the price of a similar good or service. See Creifelds *Rechtswörterbuch* s.v. 'Spannungsklausel' and BT-Drs. 7/3919 at 27.

⁴⁰⁶⁹ Erman/Roloff § 309 para 2.

⁴⁰⁷⁰ Stoffels *AGB-Recht* 332.

⁴⁰⁷¹ Palandt/*Grüneberg* § 309 para 3, UBH/*Fuchs* § 309 no. 1 para 20.

⁴⁰⁷² MüKo/*Wurmnest* § 309 no. 1 para 14 *in fine*.

⁴⁰⁷³ BGH *NJW* 1980, 2133. See also § 1(1) PAngV that sets out that the indicated price has to include VAT.

⁴⁰⁷⁴ WLP/Dammann § 309 no. 1 para 30.

⁴⁰⁷⁵ UBH/*Fuchs* § 309 no. 1 para 16.

⁴⁰⁷⁶ WLP/Dammann § 309 no. 1 para 32.

into account within the general clause.⁴⁰⁷⁷ 'Services' are all contractual performances that are neither goods nor immovable objects (land plots).⁴⁰⁷⁸ Therefore, § 309 no. 1 covers all types of transactions save those concerning immovable objects.⁴⁰⁷⁹

c) Four-month period

No. 1 is only applicable to price increase clauses in agreements of which the main performance has to be delivered within four months of the entering into the contract.⁴⁰⁸⁰ The reason for allowing price increases after four months is that the user might have a legitimate interest to readjust the price, notably in times of sharp cost increases.⁴⁰⁸¹ This period is calculated on the basis of the time of performance set out in the pre-formulated clause or individually agreed by the parties.⁴⁰⁸² If the parties have not agreed on a particular time of performance, the user may effect it immediately in terms of § 271(1).⁴⁰⁸³ The actual time of performance is irrelevant.⁴⁰⁸⁴

A circumvention of § 309 no. 1 by an extension of the time of performance over four months is prevented by § 308 no. 1. This norm prohibits unreasonably long periods of time for rendering performance and enables an enquiry in terms of the general clause.⁴⁰⁸⁵

d) Exception for continuing obligations

No. 1 does not apply to agreements on continuing obligations (open-ended agreements),⁴⁰⁸⁶ even if they cover a shorter period of time of performance than four months. Continuing obligations are those contained in insurance contracts, leases, subscriptions or loan agreements. Apportioned contracts⁴⁰⁸⁷ and recurring obligations⁴⁰⁸⁸ are qualified as continuing obligations in the sense of § 309 no. 1 too. Although these types of contracts are not assessed in terms of § 309 no. 1, the general clause is applicable.⁴⁰⁸⁹ Despite this fact, the courts apply a more

⁴⁰⁷⁷ Stoffels *AGB-Recht* 333.

⁴⁰⁷⁸ WLP/Dammann § 309 no. 1 para 33.

⁴⁰⁷⁹ Stoffels *AGB-Recht* 333.

⁴⁰⁸⁰ Stoffels *AGB-Recht* 333.

⁴⁰⁸¹ BT-Drs. 7/3919 at 27.

⁴⁰⁸² Stoffels *AGB-Recht* 333.

⁴⁰⁸³ § 271(1): 'Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately.'

⁴⁰⁸⁴ Stoffels *AGB-Recht* 333.

⁴⁰⁸⁵ Stoffels *AGB-Recht* 333.

⁴⁰⁸⁶ *Dauerschuldverhältnisse*.

⁴⁰⁸⁷ *Sukzessivlieferungsverträge* or *Teillieferungsverträge*. In this type of agreement, a certain volume of goods, stipulated in advance, is delivered in portions. See Creifelds *Rechtswörterbuch* s.v. 'Sukzessivlieferungsvertrag'.

⁴⁰⁸⁸ *Wiederkehrschuldverhältnisse*. These are agreements with individual clients on water, gas or electricity, for instance. Since no total volume has been agreed on in advance, as for apportionate contracts (*Sukzessivlieferungsverträge*), they are renewed for each new contract period. See Creifelds *Rechtswörterbuch* s.v. 'Wiederkehrschuldverhältnis'.

⁴⁰⁸⁹ WLP/Dammann § 309 no. 1 para 27.

generous standard since price increase clauses in continuing obligations are an 'appropriate and accepted instrument to keep in balance price and performance'.⁴⁰⁹⁰

2.2.1.3 Price increase clauses in package travel contracts

§ 651 a to y (ex-§ 651(4) and (5)) contain specific provisions for price increases of package travel contracts.

Under § 651f, the travel organiser may only increase the travel price if this is provided for in the contract with precise information on the calculation of the new price and if in doing this he is taking into account an increase in transport costs, charges for specific services, port or airport fees or a change in the foreign exchange rates relating to the travel package in question. The requirement of the information on the calculation of the new price corresponds to BGH jurisprudence according to which the terms for the calculation of the price increase must already be contained in the contract.⁴⁰⁹¹

In contrast to the former wording of § 651, the new provision does not provide that section 309 no. 1 remains unaffected. Hence, price increase clauses in package travel contracts are assessed in terms of § 651f, as amended, and the general clause.⁴⁰⁹²

2.2.1.4 Price increase clauses in long-term consumer contracts

As the scope of application of no. 1 is restricted and does not apply to agreements on continuing obligations and contracts where the term of delivery is over four months, content control under the general clause plays a prominent function for closing these loopholes. The fact that item (l) of the Annex of the Unfair Terms Directive does not provide for a timeframe like § 309 no. 1 also speaks for the necessity of content control. What is more, consumers need to be protected from unjustified price increases the longer the duration of their agreement is.⁴⁰⁹³ A standard provision is in conflict with § 307 in cases where standard terms not only allow for a price increase in order to pass on the user's own price increases and to avoid a lower margin. A term also violates the general clause where it enables the user to increase its margin.⁴⁰⁹⁴

The BGH requires for B2C contracts that the consumer be able to identify the scope of possible price increases when entering into the contract by reading the given clause and assess whether

⁴⁰⁹⁰ BGH *NJW* 2012, 2187 (2189).

⁴⁰⁹¹ BGH *NJW* 2003, 507 (508).

⁴⁰⁹² BGH *NJW* 2003, 507 (508).

⁴⁰⁹³ Stoffels *AGB-Recht* 335.

⁴⁰⁹⁴ BGH *NJW* 2008, 360 (361).

the user is entitled to increase the price at a given moment.⁴⁰⁹⁵ In this regard, § 651f (ex-§ 651a(4) and (5)) is of assistance. For so-called 'cost element clauses',⁴⁰⁹⁶ the courts require that the clause contain the different cost elements and their weighting for the calculation of the total price so that the consumer is able to estimate possible price increases when concluding the agreement.⁴⁰⁹⁷ Where such a concretisation is not possible, the clause must contain the right to cancel the agreement in the case of a price increase.⁴⁰⁹⁸ This is also specifically set out in item (l) of the Annex of the Directive. In any event, if a price increase is foreseeable at the moment of the conclusion of the contract and the user could take into account this increase then, it cannot refer to a price increase clause at a subsequent stage.⁴⁰⁹⁹

The BGH held that a market price clause⁴¹⁰⁰ in contracts for the purchase of a new car is invalid if it says that the purchaser has to pay the price that is valid on the day of delivery if more than four months have passed between the conclusion of the agreement and the agreed day of delivery. Such a clause enables the user to put forward any price increase.⁴¹⁰¹

Cost-element clauses by which the monthly fee for a pay-TV subscription can be increased are invalid if the clause does not contain the different cost elements and their weighting so that the consumer is not able to comprehend the calculation of the fee.⁴¹⁰²

2.2.1.5 Price adjustment clauses in energy supply agreements

Price adjustment clauses of energy suppliers mostly take the form of cost-element clauses so that the strict requirements that the BGH developed for such provisions apply.⁴¹⁰³ Clauses that do not contain the various cost elements and their weighting with regard to the price calculation do not become valid, even if they contain the consumer's right to cancel the agreement when the supplier adjusts its prices, and if the cancellation is only possible for the time after the price increase or is tied to unacceptable costs for the client.⁴¹⁰⁴ Furthermore, the courts require that energy suppliers not only can adjust their prices within the legal limits but also must lower their prices if their own costs decrease.⁴¹⁰⁵

⁴⁰⁹⁵ BGH NJW 1986, 3134 (3135).

⁴⁰⁹⁶ *Kostenelementeklausel*.

⁴⁰⁹⁷ BGH NJW 2008, 360 (361).

⁴⁰⁹⁸ BGH NJW 1986, 3134 (3135).

⁴⁰⁹⁹ In this case, according to Palandt/*Grüneberg* § 309 para 8, the clause should be invalid.

⁴¹⁰⁰ *Tagespreisklausel*.

⁴¹⁰¹ BGH NJW 1985, 621 (622).

⁴¹⁰² BGH NJW 2008, 360 (361).

⁴¹⁰³ Stoffels *AGB-Recht* 336.

⁴¹⁰⁴ BGH NJW 2007, 1054.

⁴¹⁰⁵ BGH NJW 2008, 2172 (2173).

So-called 'tension clauses'⁴¹⁰⁶ require a projection that the market price for the given goods (e.g., natural gas) will typically develop in line with its reference (e.g., light fuel oil). If such a projection cannot be made, the user has no legitimate interest to increase its prices beyond the range of the actual costs increase. This range is exceeded where the user has an additional gain by the price increase.⁴¹⁰⁷

Recently, the ECJ decided that also gas supply contracts with special customers must be assessed in the light of the Unfair Terms Directive and that the transparency requirement of the Directive applies.⁴¹⁰⁸ In the past, the BGH had decided that price adjustment clauses are valid in terms of § 307 if they fulfil the standard set out in § 5(2) GasGVV⁴¹⁰⁹ (which gives the supplier the right to increase its prices without any justification).⁴¹¹⁰ The BGH now requires that the contract between the supplier and the special customer contains the reason and the mode for the price adjustment in a transparent manner so that the customer can project possible price increases.⁴¹¹¹ The BGH will probably decide likewise for electricity supply agreements.⁴¹¹²

Price increase clauses of suppliers holding a monopolistic position are subject to equity control under § 315.⁴¹¹³ In terms of § 315(3), the determination of the price can be made by judicial decision.⁴¹¹⁴

Price adjustment clauses in distance-heating contracts are not subject to content control under §§ 307 *et seq.* but in terms of § 24(4) ABVFernwärmeV.⁴¹¹⁵

2.2.1.6 Legal consequences in case of violation

If a clause is invalid in terms of § 309 no. 1 the originally agreed price applies. A gap-filling interpretation under §§ 157 and 133 is excluded. Such a gap-filling interpretation is only

⁴¹⁰⁶ *Spannungsklauseln*. See para 2.2.1.2 above.

⁴¹⁰⁷ BGH NJW 2010, 2793.

⁴¹⁰⁸ ECJ NJW 2013, 2253 ('RWE decision').

⁴¹⁰⁹ Verordnung über Allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Gas aus dem Niederdrucknetz (Gasgrundversorgungsverordnung - GasGVV).

⁴¹¹⁰ See, for instance, BGH NJW 2011, 1342 (1344).

⁴¹¹¹ BGH NJW 2013, 3647 (3651 *et seq.*).

⁴¹¹² Büdenbender NJW 2013, 3604, Stoffels *AGB-Recht* 337.

⁴¹¹³ BGH NJW 2009, 502 (504).

⁴¹¹⁴ MüKo/Würdinger § 315 para 22, with further references.

⁴¹¹⁵ BGH NJW 2011, 2501. Verordnung über Allgemeine Bedingungen für die Versorgung mit Fernwärme (AVBFernwärmeV). Pursuant to this provision, price increase clauses must take into consideration the cost evolution in the relevant market and contain the factors for the price calculation in a transparent manner, as well as the different cost factors.

possible in terms of the general clause, where, e.g., specific provisions such as § 632(2)⁴¹¹⁶ (for a contract to produce a work) are not applicable. Then, the court must assess what the parties would have agreed in their respective interest in good faith.⁴¹¹⁷ This could lead to the result that the user should have the right to determine the price pursuant to §§ 315 and 316,⁴¹¹⁸ that the price which is valid on the day of delivery shall apply⁴¹¹⁹ or that certain cost increases should be passed on to the consumer.⁴¹²⁰ In return, fair balancing of the parties' interests requires that the consumer should have the right to cancel the contract if the price increase is significantly higher than the increase of the cost of living between the order and the delivery.⁴¹²¹

2.2.1.7 B2B contracts

The strict evaluations of no. 1 cannot be applied to B2B contracts and have no indicative effect.⁴¹²² In contracts between commercial partners, price calculation is a significant part of commercial success, and business partners can be expected to assess such clauses and refuse them if they are unfair.⁴¹²³

Standard clauses cannot undermine the agreement of a fixed price,⁴¹²⁴ and list prices are not invalid *per se* in B2B agreements.⁴¹²⁵ In long-term contracts, the reference to such list or market prices can be even necessary.⁴¹²⁶ In B2B contracts, the other party needs not to be granted a right of cancellation.⁴¹²⁷ Price increase clauses must be transparent and clearly spelt out and must not allow the user to increase its price at will.⁴¹²⁸

2.2.2 Right to refuse performance (§ 309 no. 2)

2.2.2.1 Rationale of the provision

§ 309 no. 2 sets out that a provision by which a) the right to refuse performance to which the other party to the contract with the user is entitled under § 320, is excluded or restricted, or b) a right of retention to which the other party to the contract with the user is entitled to the extent

⁴¹¹⁶ § 632(2): 'If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.'

⁴¹¹⁷ BGH NJW 1984, 1177 (1178).

⁴¹¹⁸ MüKo/Wurmnest § 309 no. 1 para 31.

⁴¹¹⁹ BGH NJW 1984, 1177 (1178).

⁴¹²⁰ MüKo/Wurmnest § 309 no. 1 para 31.

⁴¹²¹ BGH NJW 1984, 1177 (1179).

⁴¹²² UBH/Fuchs § 309 no. 1 para 45.

⁴¹²³ Stöffels AGB-Recht 338.

⁴¹²⁴ UBH/Fuchs § 309 no. 1 para 46.

⁴¹²⁵ UBH/Fuchs § 309 no. 1 para 47.

⁴¹²⁶ Stöffels AGB-Recht 338.

⁴¹²⁷ BGH NJW 1985, 853 (855).

⁴¹²⁸ WLP/Dammann § 309 no. 1 para 162.

that it is based on the same contractual relationship, is excluded or restricted, in particular made dependent upon acknowledgement of defects by the user is ineffective.

The legislator was of the view that the legal norms granting a right to refuse performance or a right of retention serve to protect a balance between the parties. A clause excluding or restricting these rights is therefore unilaterally to the disadvantage of the other party.⁴¹²⁹

The former UK Office of Fair Trading put forward another argument why such clauses might be dangerous for the consumer. Consumers might believe that they have no choice but to pay in full, even if the product or service in question is defective. Ultimately, they first have to obtain justice in court, which is costly, causes delays and entails an uncertain outcome. As a result, they simply might give up their claim, which amounts to a deprivation of their rights.⁴¹³⁰

Regulation 44(3)(n) greylists terms permitting the supplier, but not the consumer, to avoid or limit performance of the agreement. The practical relevance of this subregulation is however limited as item (b) already greylists clauses excluding or limiting the consumer's right in the event of a breach of contract by the supplier. In practice, terms permitting the supplier to limit or avoid its performance may often have the same effect as terms obliging the consumer, unlike the supplier, to fulfil all its obligations.⁴¹³¹

§ 320 contains a right to refuse performance and sets out that a person who is a party to a reciprocal contract may refuse his or her part of the performance until the other party renders consideration unless he or she is obliged to perform in advance. This objection aims to secure the purchaser's rights and enables him or her to apply pressure on her counterpart so that the latter fulfils its obligations.⁴¹³² The legislator wanted to ensure that this principle of 'fairness for the execution of contracts'⁴¹³³ also applies to contractual relationships governed by standard terms, which is why it prohibited any exclusions or restrictions of this right in § 309 no. 2.

The right of retention of § 273⁴¹³⁴ is also based on the said principle of contractual fairness. This provision grants a right of retention for all rights stemming from the same legal

⁴¹²⁹ BT-Drs. 7/3919 at 28.

⁴¹³⁰ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.2 at 28.

⁴¹³¹ Van Eeden *Consumer Protection Law* (2013) 280.

⁴¹³² Palandt/*Grüneberg* § 320 para 1.

⁴¹³³ *Vertragliche Abwicklungsgerechtigkeit*. See BT-Drs 7/3919 at 28, WLP/*Dammann* § 309 no. 2 para 1.

⁴¹³⁴ § 273: '1) If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention). (2) A person who is obliged to return an object has the same right, if he is entitled to a claim that is due on account of outlays for the object or on

relationship on which the obligor's duties are based. The courts construe the term 'same *legal* relationship'⁴¹³⁵ in § 273 widely and assume such a relationship where both claims (performance and counter-performance) are based on 'inwardly related and uniform circumstances'.⁴¹³⁶ It is sufficient that there is a natural and economical connection and that it would be against good faith if one claim could be asserted without the other.⁴¹³⁷ The legislator considered this interpretation as too far-reaching for § 309 no. 2 which is why this provision only applies to a right of retention that is based 'on the same *contractual* relationship'.⁴¹³⁸

2.2.2.2 Content of the provision

a) Protection of the right to refuse performance (lit. a)

For the application of § 309 no. 2, the given clause must refer to the customer's obligations as the counterpart of the user's duties, i.e., they must be synallagmatic. These are all principal obligations as well as secondary rights in case of a default,⁴¹³⁹ such as the right of rectification or subsequent delivery⁴¹⁴⁰ and the right to restitution in terms of a rescission (§ 348, read with § 320).⁴¹⁴¹ If, on the other hand, the standard clause merely refers to cases in which the right of retention would be in any case excluded under § 320, § 309 no. 2 lit. a) does not apply (e.g., 'the client must pay in advance', or 'if the supplier has performed in part, consideration may not be refused to the extent that refusal, in the circumstances, and particularly because the part in arrears is trivial, would be against the principle of good faith.').⁴¹⁴²

Standard terms that exclude the client's 'right of retention' generally have the objective to incite the other party to perform without consideration of his or her right to refuse performance. Usually, consumers do not understand the differentiated use of BGB terms such as 'right to refuse performance'⁴¹⁴³ and 'right of retention'.⁴¹⁴⁴ Hence, such clauses should also be considered as excluding the rights in terms of § 320.⁴¹⁴⁵

account of damage caused to him by the object, unless he obtained the object by means of an intentionally committed tort. (3) The obligee may avert the exercise of the right of retention by providing security. The providing of security by guarantors is excluded.'

⁴¹³⁵ Emphasis added.

⁴¹³⁶ *Innerlich zusammengehöriges und einheitliches Lebensverhältnis.*

⁴¹³⁷ BGH NJW 1997, 2944 (2945).

⁴¹³⁸ Stoffels *AGB-Recht* 339. Emphasis added.

⁴¹³⁹ Palandt/*Grüneberg* Intro to § 320 para 7.

⁴¹⁴⁰ UBH/*Schäfer* § 309 no. 2 para 8.

⁴¹⁴¹ UBH/*Schäfer* § 309 no. 2 para 7.

⁴¹⁴² Examples from Stoffels *AGB-Recht* 340. My own translation.

⁴¹⁴³ *Leistungsverweigerungsrecht.*

⁴¹⁴⁴ *Zurückbehaltungsrecht.*

⁴¹⁴⁵ BGH NJW-RR 2005, 919 (920).

b) Protection of the right of retention (lit. b)

The right of retention set out in § 273 is protected by § 309 no. 2 lit. b) to the extent that it concerns its core, i.e., only insofar that it is based on the *same* contractual relationship. Therefore, it does not protect a right of retention that is based on former contractual relations or other contracts as part of ongoing business relations between the parties.⁴¹⁴⁶ Non-contractual claims are also excluded, such as the right of retention of the possessor (§ 1000). On the other hand, partial performances in terms of an apportioned contract⁴¹⁴⁷ or open-ended agreements fall under no. 2 lit. b).⁴¹⁴⁸ It is irrelevant whether the right of retention refers to principal or secondary obligations, or if the agreement is synallagmatic.⁴¹⁴⁹

c) Exclusions and restrictions

§ 309 no. 2 not only prohibits clauses that exclude the assertion of the rights protected by this provision, but also any restrictions. The comparative standard in order to assess whether a clause contains such exclusion or restriction is the legal situation without the standard terms. If the user requires unacceptable or even unrealisable conditions for the recognition of the other party's rights, the given right is considered excluded under no. 2.⁴¹⁵⁰ The conditions for assuming a restriction of the other party's rights are fulfilled where their assertion is only possible under certain conditions and the requirements are stricter than the statutory provisions.⁴¹⁵¹ The legislator expressly made clear in lit. b) *in fine* that a clause by which the assertion of the other party's rights is made dependent upon acknowledgement of defects by the user is ineffective. Often consumers refuse to pay because they do not accept the delivered item where it does not correspond to what was ordered. Making the assertion of the right of retention dependent on the user's acknowledgement would ultimately prevent such a right.⁴¹⁵²

Therefore, a clause which sets out that for the assertion of the other party's rights, a written notice⁴¹⁵³ or complaint report⁴¹⁵⁴ is required falls under no. 2. The same applies to clauses that prohibit the stopping of the customer's cheque in case of wrong delivery.⁴¹⁵⁵

⁴¹⁴⁶ BT-Drs. 7/3919 at 28 and 29.

⁴¹⁴⁷ *Sukzessivlieferungsvertrag*.

⁴¹⁴⁸ WLP/Dammann § 309 no. 2 para 34-36.

⁴¹⁴⁹ WLP/Dammann § 309 no. 2 para 34-36.

⁴¹⁵⁰ Stöffels *AGB-Recht* 340.

⁴¹⁵¹ Staudinger/*Coester-Waltjen* § 309 no. 2 para 6.

⁴¹⁵² Stöffels *AGB-Recht* 341.

⁴¹⁵³ Erman/*Roloff* § 309 para 25.

⁴¹⁵⁴ LG Karlsruhe *NJW-RR* 1991, 124 (126).

⁴¹⁵⁵ BGH *NJW* 1985, 855 (857 *et seq.*).

On the other hand, for clauses in terms of which the user's right to refuse performance or right of retention is extended, not § 309 no. 2, but the general clause of § 307 is applicable.⁴¹⁵⁶

2.2.2.3 Relation to other provisions

There is a partial overlap between § 309 no. 2 and no. 8 lit. b) dd)⁴¹⁵⁷ because a clause that makes cure dependent upon prior payment also excludes the customer's right to refuse payment with regard to a faulty product or service.⁴¹⁵⁸ The prohibition of no. 8 lit. b) dd) is insofar more extensive than no. 2 as it also excludes clauses by which the user may claim performance (payment) without rectifying the defect. On the other hand, the scope of application of no. 8 lit. b) dd) is more restrictive because this provision only covers agreements relating to the supply of newly produced things and relating to the performance of work, as indicated at the beginning of lit. b). Which one of the two norms applies depends on the question of whether the user's right of payment (then § 309 no. 2) or the rectification of a default (then § 309 no. 8 lit. b) dd)) is requested.⁴¹⁵⁹

The relation between § 309 no. 2 and no. 3 (prohibition of set-off)⁴¹⁶⁰ is controversial. Contrary to the right to refuse performance according to §§ 273 and 320, the right to set-off a claim can be waived in standard terms because no. 3 concerns only 'a claim that is uncontested or has been finally and non-appealably established'. Problems arise where a client opposes the user's claim (payment) by asserting its claim of payment that arose from a primary claim of performance. If the user does not rectify timely a defect of an item the other party had ordered, and the client rectifies the defect itself, it is entitled to demand reimbursement of its expenses (§§ 634 no. 2 and 637).⁴¹⁶¹ If the user's standard terms contain a prohibition of set-off, the client would not be able to set-off its claim (reimbursement) with the user's claim (payment).⁴¹⁶²

⁴¹⁵⁶ WLP/Dammann § 309 no. 2 para 4 and 42.

⁴¹⁵⁷ § 309 no. 8 lit. b) dd): '[A] provision by which in contracts relating to the supply of newly produced things and relating to the performance of work (...) dd) the user makes cure dependent upon prior payment of the entire fee or a portion of the fee that is disproportionate taking the defect into account' is ineffective.

⁴¹⁵⁸ WLP/Dammann § 309 no. 2 para 56.

⁴¹⁵⁹ Staudinger/Coester-Waltjen § 309 no. 2 para 3.

⁴¹⁶⁰ § 309 no. 3: '(Prohibition of set-off) [A] provision by which the other party to the contract with the user is deprived of the right to set off a claim that is uncontested or has been finally and non-appealably established' is ineffective.

⁴¹⁶¹ § 634 no. 2: 'If the work is defective, the customer, if the requirements of the following provisions are met and to the extent not otherwise specified, may (...) 2. under [§] 637, remedy the defect himself and demand reimbursement for required expenses.' § 637(1): 'If there is a defect in the work, the customer may, after the expiry without result of a reasonable period specified by him for cure, remedy the defect himself and demand reimbursement of the necessary expenses, unless the contractor rightly refuses cure.'

⁴¹⁶² Stoffsels AGB-Recht 342.

The other party's primary claim (performance) is therefore substituted by a secondary claim (reimbursement) so that two monetary claims are opposed to each other. If the client therefore refuses to pay for the defective item or performance, this refusal is considered a declaration of set-off.⁴¹⁶³ Hence, not § 309 no. 2 but no. 3 is applicable in this case, and a prohibition of set-off contained in the user's standard terms may apply. The legislator saw the problem that a monetary claim is treated differently than a claim of performance and accepted it without giving a guideline on how to solve it.⁴¹⁶⁴ A teleological reduction of no. 3 in that a prohibition of set-off is ousted if the counter-claim stems from the right to refuse performance (payment) is not convincing.⁴¹⁶⁵ The user would be obliged to formulate its standard terms in an even more complicated and inflated manner⁴¹⁶⁶ to explicitly exclude the above-mentioned constellation from the scope of application of its prohibition of set-off. The general – and more convincing – view restricts the prohibition of set-off in terms of the good-faith provision of § 242, i.e., where a prohibition of set-off would be abusive. This is regularly the case where the user wants to enforce its claim (payment) by referring to the valid prohibition of set-off in its standard terms although the other party has a counter-claim of the same nature that arose from a violation committed by the user and an original claim to perform.⁴¹⁶⁷

2.2.2.4 Non-applicability of no. 2 in case of the obligation to perform in advance

Since § 309 no. 2 has to be read in conjunction with § 320, the prohibition of no. 2 is not applicable where the user's standard terms set out an obligation for the other party to pay in advance.⁴¹⁶⁸ A prerequisite of § 320 is that the other party has no such obligation ('unless he is obliged to perform in advance'). The legislator did not wish to exclude agreements on the obligation to perform in advance *per se*.⁴¹⁶⁹ If the user's standard terms set out an obligation to perform in advance for the other party, the scrutiny of such a clause has to be performed with the general clause.⁴¹⁷⁰ The normative starting point for this enquiry is the obligation to perform upon counter-performance (§§ 320 and 322) as well as the obligation of the contractor to perform in advance in terms of § 641(1) 1st sent. ('The remuneration must be paid upon acceptance of the work').⁴¹⁷¹ Agreements deviating from these valuations require sufficient

⁴¹⁶³ See § 388. BGH JZ 1978, 799 (800).

⁴¹⁶⁴ BT-Drs. 7/3919 at 29.

⁴¹⁶⁵ For this solution: Palandt/*Grüneberg* § 309 para 20.

⁴¹⁶⁶ WHL/*Wolf* § 11 no. 2 AGBG para 24.

⁴¹⁶⁷ WLP/*Dammann* § 309 no. 2 para 55, MüKo/*Wurmnest* § 309 no. 2 para 2, Staudinger/*Coester-Waltjen* § 309 no. 2 para 4.

⁴¹⁶⁸ BGH NJW 2006, 3134.

⁴¹⁶⁹ BT-Drs. 7/3919 at 28. See also WLP/*Dammann* § 309 no. 2 para 11.

⁴¹⁷⁰ WLP/*Dammann* § 309 no. 2 para 12 *et seq.*

⁴¹⁷¹ Stöffels *AGB-Recht* 344.

justification, such as an objective reason that withstands a weighting of the interests of the other party and the disadvantages that it has to bear because of the existence of such a clause.⁴¹⁷²

A standard business clause by which the client has to pay the full price without deduction when the kitchen furniture is delivered deprives the customer of any leverage if the furniture is defective.⁴¹⁷³ The protection offered by §§ 641(1) 1st sent. and 320(1) 1st sent. is completely waived without compensation so that such a clause is ineffective under § 307(2) no. 1.⁴¹⁷⁴ The same applies to a clause by which the residual payment of the ordered item has to be made at delivery.⁴¹⁷⁵ On the other hand, a clause in a marriage broking contract by which payment is due in advance is effective because according to § 656,⁴¹⁷⁶ such a fee cannot be claimed afterwards.⁴¹⁷⁷

These examples also show that the given standard clause does not necessarily have to use the word 'set-off', and that it is sufficient that the clause's effect amounts to exclusion or restriction of a *compensatio*.

It should be noted that a prohibition of clauses requiring performance in advance would go too far as many transactions could not be executed without payment in advance, such as entrance tickets or transport tickets.⁴¹⁷⁸

2.2.2.5 Legal consequences in case of violation

A clause that is ineffective in terms of § 309 no. 2 is not applicable, and a teleological reduction is excluded.⁴¹⁷⁹ Hence, the statutory provisions of §§ 273 and 320 apply.⁴¹⁸⁰

2.2.2.6 B2B contracts

In B2B contracts, an exclusion of the right to refuse performance or the right of retention is generally accepted, and § 309 no. 2 has no indicative effect.⁴¹⁸¹ Even before the AGBG came into force, the BGH did not object to such exclusions in B2B contracts. On the other hand, an overall exclusion of the right of retention is also ineffective in B2B agreements because the

⁴¹⁷² Palandt/*Grüneberg* § 309 para 13.

⁴¹⁷³ See also OFT *Unfair Contract Terms Guidance* (2008) para 2.5.8 at 30.

⁴¹⁷⁴ BGH *NJW* 2013, 1431 (1432). See also OFT *Unfair Contract Terms Guidance* (2008) para 2.5.3 at 28.

⁴¹⁷⁵ BGH *NJW* 1999, 2180 (2181).

⁴¹⁷⁶ § 656(1): 'No obligation is established by promising a fee for giving evidence of an opportunity to contract a marriage or for acting as a broker in arranging a marriage. What has been paid on the basis of such a promise may not be claimed back on the grounds that there was no obligation.'

⁴¹⁷⁷ BGH *NJW* 1983, 2817 (2819).

⁴¹⁷⁸ BT-Drs. 7/3919 at 28.

⁴¹⁷⁹ BGH *NJW* 1986, 3199 (3201).

⁴¹⁸⁰ Stöffels *AGB-Recht* 343.

⁴¹⁸¹ UBH/*Schäfer* § 309 no. 2 para 20, Palandt/*Grüneberg* § 309 para 16.

other party would be prevented from asserting its right of retention even if it is based on an uncontested or final and non-appealable counter-claim.⁴¹⁸²

Therefore, a clause by which a complaint of the other party has no impact on the agreed payment conditions is ineffective. It prevents the client from asserting its right of retention even if this right is based on an uncontested or final and non-appealable claim. The BGH requires that this exception be inserted in the user's standard terms. The BGH is also of the view that a partial retention (*geltungserhaltende Reduktion*) by which the clause is only ineffective to the extent that the right of retention is excluded in terms of final or uncontested counter-claims or those which are ready for decision is not permitted.

In the case of a gross breach of contract committed by the entrepreneur,⁴¹⁸³ or where it exerts itself a right of retention,⁴¹⁸⁴ the entrepreneur cannot invoke the exclusion of the right of retention.

In contrast to the German solution where clauses dealing with set-offs are prohibited without the possibility of evaluation, regulation 44(3)(b) *in fine* merely greylists such provisions.⁴¹⁸⁵

2.2.3 Prohibition of set-off (§ 309 no. 3)

In terms of § 389, a set-off pursuant to § 387⁴¹⁸⁶ has the effect that the claims, to the extent that they correspond, are deemed to expire at the time when they are set against each other as being appropriate for set-off (*compensatio*).

Under §§ 387 *et seq.*, the claims must be mutual, i.e., both parties must owe something to each other. Furthermore, the performances must substantially be of the same nature, which is the case with monies. The performances must also be due and enforceable,⁴¹⁸⁷ and the set-off must

⁴¹⁸² BGH *NJW* 1985, 319 (320), 1992, 575 (577).

⁴¹⁸³ BGH *DB* 1972, 868.

⁴¹⁸⁴ BGH *NJW* 1978, 634.

⁴¹⁸⁵ See discussion on item (b) of regulation 44(3) CPA in Part I ch 3 para 3.4.1 b).

⁴¹⁸⁶ § 387: 'If two persons owe each other performance that is substantially of the same nature, each party may set off his claim against the claim of the other party as soon as he can claim the performance owed to him and effect the performance owed by him.'

⁴¹⁸⁷ Creifelds *Rechtswörterbuch* s.v. 'Aufrechnung'.

not be excluded.⁴¹⁸⁸ Alimonies cannot be set off,⁴¹⁸⁹ but a set-off with owed tax *vis-à-vis* the tax administration with a refund claim is not excluded in Germany (§ 226 AO).⁴¹⁹⁰

Technically, a set-off has a dual function. On the one hand, it settles the claim by the other party by substitution,⁴¹⁹¹ and makes it possible that the debtor 'executes' its debt itself, on the other,⁴¹⁹² which may be useful when the person making use of the set-off has financial difficulties.⁴¹⁹³

Regulation 44(3)(b) *in fine* also provides for such a prohibition,⁴¹⁹⁴ as well as item (b) of the Annex of the EU Unfair Terms Directive.

According to the former UK Office of Fair Trading, the rationale behind the greylisting of provisions restricting set-offs is that consumers might believe that they have no choice but to pay in full, even if the product or service they have received has a defect. The effect of these clauses is that consumers first have to obtain justice in court, which is costly, causes delays and leads to an uncertain outcome. As a result, they might give up their claim, which is the same as a deprivation of their rights.⁴¹⁹⁵

2.2.3.1 Prohibited set-offs

Often, users exclude the right to set off a debt in their standard terms. They fear that the customer makes use of this right on the basis of non-existing counterclaims in order to delay payment.⁴¹⁹⁶ Then, the user bears the risk of litigation because it has to prove that the counterclaim is inexistent.⁴¹⁹⁷ For this reason, the legislator did not outlaw clauses prohibiting the exertion of a right to set-off claims *per se* but only where this right is uncontested or has

⁴¹⁸⁸ Statutory prohibitions are set out in §§ 392 BGB (set-off of a claim excluded in terms of a seizure if the obligor acquired his claim after the seizure), 394 (intentionally committed tort), 850 *et seq* ZPO (exemptions from attachment).

⁴¹⁸⁹ BGHZ 197, 326.

⁴¹⁹⁰ AO = Abgabenordnung, the German Fiscal Code. § 226 AO ('Set-off'): '(1) Unless otherwise stipulated, the provisions of civil law shall apply *mutatis mutandis* with regard to using both claims from the tax debtor-creditor relationship and counterclaims to set off claims. (2) Claims arising from the tax debtor-creditor relationship may not be used as set-off where they have lapsed through limitation or the expiry of a period of exclusion. (3) Taxpayers may set off claims arising from the tax debtor-creditor relationship only with counterclaims which are uncontested and have been established as final and binding. (4) The political subdivision that administers the tax shall also be deemed to be creditor or debtor of a claim from the tax debtor-creditor relationship with respect to any set-off.'

⁴¹⁹¹ *Erfüllungssurrogat*.

⁴¹⁹² Palandt/*Grüneberg* § 387 para 1.

⁴¹⁹³ Stoffels *AGB-Recht* 345.

⁴¹⁹⁴ In this regard, see discussion on reg 44(3)(b) in Part I ch 3 para 3.4.1 b).

⁴¹⁹⁵ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.2 at 28.

⁴¹⁹⁶ BT-Drs. 7/3919 at 29.

⁴¹⁹⁷ WHL/*Wolf* § 11 no. 3 ABGB para 1.

been finally and non-appealably established. What is more, the other party does not suffer a total loss of its legal rights in the case where set-offs are prohibited.⁴¹⁹⁸

a) Prohibited set-offs in commercial practice

Prohibitions to set off a claim are mostly subject to an express agreement, such as 'the client only has the right to set off a claim of the bank against its own claim if the latter is uncontested or has been finally and non-appealably established'.⁴¹⁹⁹ Whether the agreement between the parties contains an implied prohibition to set off the claims is a matter of interpretation.⁴²⁰⁰ § 391(2) contains such an implied exclusion: 'If it is agreed that the performance is to take place at a specified time and in a specified place, then it is to be assumed, in case of doubt, that set-off against a claim for which there is another place of performance is to be excluded.'⁴²⁰¹

A standard clause by which only payment in cash is accepted can also be seen as an implied exclusion of set-off. The same applies to so-called 'net-cash clauses'. Provisions that establish that the customer has to pay in advance ('cash on delivery', 'charge forward') have the same effect, so that the client cannot set off claims in the case of defects of the *merx*.⁴²⁰² In leases for other things than apartments, the provision of § 579, according to which the rent has to be paid at the end of the lease period, is regularly abrogated so that the tenant must pay its rent in advance. For the rent of an apartment, § 556b is applicable though. Under this provision, rent is to be paid at the commencement of the periods of time according to which it is computed but at the latest by the third working day of each such period. Consequently, the tenant cannot set off its claim by reducing the rent for the current month due to a defect of the apartment. A clause such as 'the rent has to be paid in advance on the 3rd day of each month'⁴²⁰³ is no

⁴¹⁹⁸ BT-Drs. 7/3919 at 29.

⁴¹⁹⁹ No. 4 AGB-Banken. My own translation.

⁴²⁰⁰ Stöffels *AGB-Recht* 345.

⁴²⁰¹ Stöffels *AGB-Recht* 345.

⁴²⁰² BGH *NJW* 1985, 550 and 1998, 3119 *et seq.* In Part I of this thesis it was submitted that reg 44(3)(b) must be interpreted widely, so that also a clause by which a supplier may require full payment before it has delivered the agreed service, such as the installation, is unfair. This different treatment *vis-à-vis* the situation in Germany seems to be justified, since otherwise the consumer bears the risk in case of the supplier's insolvency, which is not rare in South Africa, especially for artisans. A different treatment seems appropriate though where the monies to be paid by the client are held under secure arrangements (deposit account). See discussion on reg 44(3)(b) in Part I ch 3 para 3.4.1 b).

⁴²⁰³ According to the BGH, such clauses are permitted, unless they create an unreasonable disadvantage for the other party when combining them with a prohibition to set off claims of the tenant on the basis of unjustified enrichment (§ 812 *et seq.*). See BGH *NJW* 1995, 254 *et seq.* and BGH *NJW* 2011, 2201).

exclusion of a set-off however because § 536⁴²⁰⁴ provides for a *de lege* adjustment of the contractual obligations in case of material or legal defects.⁴²⁰⁵

b) Content of the prohibition of § 309 no. 3

§ 309 no. 3 provides that a provision by which the other party to the contract with the user is deprived of the right to set off a claim that is uncontested or has been finally and no-appealably established is ineffective.

The BGH held that the prohibition of such clauses also applies to those that restrict the right to set off to claims that have been recognised by the user.⁴²⁰⁶

The claim must be uncontested or has been finally and non-appealably established. A claim is uncontested when its legal basis and amount are not disputed (*cum certum est an et quantum debeatur*).⁴²⁰⁷ Sometimes, standard terms users oppose set-offs of the other party by contesting the existence of the counterclaim. An argument often brought forward in this regard is that a set-off has already extinguished the other party's claim against another claim of the user. The BGH applies a high threshold for the conclusiveness of such arguments. Otherwise, the user would be able to contest every single counterclaim by its own allegedly existing claims.⁴²⁰⁸

A claim has been finally and non-appealably established in case of an enforceable and final judgement in terms of § 704,⁴²⁰⁹ read in conjunction with § 794 ZPO.⁴²¹⁰

⁴²⁰⁴ § 536(1): 'If the leased property at the time of surrender to the lessee has a defect which removes its suitability for the contractually agreed use, or if such a defect arises during the lease period, then the lessee is exempted for the period when suitability is removed from paying the rent. For the period of time when suitability is reduced, he need only pay reasonably reduced rent. A trivial reduction of suitability is not taken into account.'

⁴²⁰⁵ Stöffels *AGB-Recht* 346.

⁴²⁰⁶ BGH *NJW* 1994, 657 (658); 2007, 3421 (3422). See also *Smith v Morum Bros* (1877) 7 Buch 20 where it is also admitted that a set-off is possible in these cases as there is 'easy and speedy proof'.

⁴²⁰⁷ WLP/*Dammann* § 309 no. 3 para 31.

⁴²⁰⁸ WLP/*Dammann* § 309 no. 3 para 31 and note 35.

⁴²⁰⁹ § 704 ZPO: 'Compulsory enforcement may be pursued based on final judgments that have become final and binding, or that have been declared provisionally enforceable.'

⁴²¹⁰ Stöffels *AGB-Recht* 346. § 794 ZPO: '(1) Compulsory enforcement may furthermore be pursued: 1. Based on settlements concluded by the parties, or between one of the parties and a third party, in order to resolve the legal dispute either in its full scope or as regards a part of the subject matter of the litigation, before a German court or before a dispute-resolution entity established or recognised by the Land department of justice (Landesjustizverwaltung), as well as based on settlements that have been recorded pursuant to [§] 118 (1), third sentence, or [§] 492 (3) for the record of the judge; 2. Based on orders assessing the costs; (...) 3. Based on decisions against which a complaint may be lodged as an appellate remedy; (...) 4. Based on writs of execution; 4a. Based on decisions declaring arbitration awards as enforceable, provided that the decisions are final and binding or have been declared provisionally enforceable; 4b. Based on orders pursuant to [§] 796b or [§] 796c; 5. Based on records or documents that have been recorded in accordance with the requirements as to form by a German court or by a German notary within the bounds of his official authority, provided that the record or document has been recorded regarding a claim that can be provided for by a settlement, that is not directed at obtaining a declaration of intent, and that does not concern the existence of a tenancy relationship for residential spaces, and furthermore provided that the debtor has subjected himself, in the record or document, to immediate

According to the majority view, also claims that are ripe – or ready – for judgment⁴²¹¹ are equal to those that have been finally and non-appealably established.⁴²¹² The exclusion of set-offs has the objective to protect the user *vis-à-vis* alleged and non-existing claims of the other party. For claims that are ripe for judgment though, i.e., those of which existence has been fully proved so that a decision can be made without further evidence, there is no need for such protection.⁴²¹³

c) Legal consequences in case of too extensive prohibitions of set-offs

If the pre-formulated clause prohibiting a set-off is too far-reaching, it is invalid in its entirety and the other party can exert its right to set off its claim according to §§ 387 *et seq.* without restriction. Partial retention⁴²¹⁴ of the clause in that a valid remainder is maintained is not permitted.⁴²¹⁵ The courts tend to interpret too extensive clauses by a restrictive interpretation in order to save them from invalidity.⁴²¹⁶ For example, a provision which allows only set-offs with uncontested claims also includes finally and non-appealably established claims. This is because uncontested claims are a sub-category of finally and non-appealably established claims since both are not contestable anymore.⁴²¹⁷ The same applies to provisions which exclude only set-offs with finally and non-appealably established claims.⁴²¹⁸ On the other hand, in cases where the standard terms do not include claims that are ready for judgment, like the earlier mentioned no. 4 AGB-Banken,⁴²¹⁹ although the prevailing view treats them equally to finally and non-appealably established claims, such clauses cannot be held against the user because they merely reflect the wording of the law.⁴²²⁰

compulsory enforcement of the claim as specified therein; 6. Based on European orders for payment that have been declared enforceable.'

⁴²¹¹ *Entscheidungsreif*.

⁴²¹² BGH WM 1978, 620 (621), Erman/Roloff § 309 para 29, WLP/Dammann § 309 no. 3 para 31, Palandt/Grüneberg § 309 para 17.

⁴²¹³ Stöffels AGB-Recht 346.

⁴²¹⁴ *Geltungserhaltende Reduktion*.

⁴²¹⁵ BGH NJW 2007, 3421 (3423).

⁴²¹⁶ Stöffels AGB-Recht 347.

⁴²¹⁷ BGH NJW 1989, 3215 (3216).

⁴²¹⁸ BGH NJW-RR 1993, 519 (520).

⁴²¹⁹ No. 11(1) AGB-Spark which are applicable to semi-public savings banks (*Sparkassen*) is similar to no. 4 AGB-Banken.

⁴²²⁰ BGH NJW 1986, 1757 *et seq.*; 2002, 2779.

d) B2B contracts

§ 309 no. 3 is a concretisation of § 307 because an exclusion of the possibility to set off claims is a severe restriction of the other party's rights that cannot be accepted in transactions between businesses either.⁴²²¹

2.2.3.2 Extension of the possibility to set off claims in favour of the user

If the user extends its right to set off its claims against the other party's claims, the clause is not to be assessed in terms of § 309 no. 3 but according to the general clause.⁴²²² Such provisions can be unreasonably disadvantageous for the other party in terms of mortgage accreditation. Hence, a standard clause of a large-scale manufacturer by which it is entitled to set off its claims not only against commercial customers but also against their group companies (so-called 'group set-off clauses')⁴²²³ might be disadvantageous because the claims of the given companies are not suitable to serve as security anymore. They are likely to be invalid in cases where the customers are not designated individually, or the number of the concerned group companies is too vast.⁴²²⁴ § 449(3)⁴²²⁵ that has been inserted after the modernisation of the law of contracts speaks in favour of a categorical invalidity of such clauses.⁴²²⁶

Further examples for an extension of the possibility to set off claims are open account agreements⁴²²⁷ and clearing.⁴²²⁸ These set-off agreements are often met in the banking sector, where the participants mutually set off their claims. Both forms are seen as compatible with § 307.⁴²²⁹

2.2.4 Warning notice or setting of a period of time (§ 309 no. 4)

§ 309 no. 4 provides that a provision by which the user is exempted from the statutory requirement of giving the other party to the contract a warning notice or setting a period of time for the latter to perform or cure is ineffective.

⁴²²¹ BGH NJW 1985, 319 (320); 2007, 3421 (3422).

⁴²²² MüKo/Wurmnest § 309 no. 3 para 6, WLP/Dammann § 309 no. 3 para 44.

⁴²²³ Konzernverrechnungsklausel.

⁴²²⁴ UBH/Hensen 8th ed § 11 no. 3 AGBG para 12.

⁴²²⁵ § 449(3): 'An agreement on retention of title is void to the extent that the passing of ownership is made subject to the satisfaction by the buyer of third-party claims, including, without limitation, those of an enterprise associated with the seller.'

⁴²²⁶ UBH/Schäfer § 309 no. 3 para 12.

⁴²²⁷ Kontokorrentabreden.

⁴²²⁸ Skontration.

⁴²²⁹ WHL/Wolf § 11 no. 8 AGBG para 16 *et seq.*, with further references.

2.2.4.1 Rationale of § 309 no. 4

The objective of § 309 no. 4 is to prevent that users of standard terms liberate themselves from the necessity of issuing a warning notice⁴²³⁰ to the other party or setting a period of time for performance or cure.⁴²³¹ Typically, the other party's performance consists in paying of the agreed sum and accepting the *merx*. If the customer has not performed, the user may claim damages for the damages caused⁴²³² under §§ 280(1) and 286, or damages instead of performance under § 280(1), read with § 281. The user may also revoke the contract according to § 323. The user may claim its damages for the harm caused if the customer is in default. This is the case where the obligor (other party), following a warning notice from the obligee (user) that is made after performance is due, fails to perform, and the customer's non-performance is not the result of a circumstance for which it is not responsible (§ 286(1) and (4)).⁴²³³

The requirement of the warning notice or setting a period of time not only has formal reasons, but serves above all the other party. Even though the other party is in delay with its performance (payment, acceptance), it deserves protection, and must be warned about the consequences of its delay and have the opportunity to perform.⁴²³⁴ Clauses exempting the supplier from issuing a warning notice are not fairly balanced because in case of a late delivery, the customer has no similar rights.⁴²³⁵

The Consumer Protection Act or the regulations do not contain a similar provision. Therefore, the case law, and particularly *mora debitoris*, applies. The requirements and legal consequences are comparable to the BGB provisions.⁴²³⁶

⁴²³⁰ See § 286(1).

⁴²³¹ *Nacherfüllung*. See §§ 281, 321(2), 323, 637, 651c(3) or 651e(2).

⁴²³² *Verspätungsschaden*.

⁴²³³ Stoffels *AGB-Recht* 354.

⁴²³⁴ BT-Drs. 7/3919 at 29.

⁴²³⁵ BT-Drs. 7/3919 at 29.

⁴²³⁶ See Hutchison *et al Law of Contract* 280 *et seq.*

2.2.4.2 Contents of the provision

§ 309 no. 4 prohibits an exemption from the user's obligation to warn the other party and to set a period of time to perform if he or she fails to perform timely, unless the user is exempted from this obligation in terms of §§ 286(2),⁴²³⁷ 281(2)⁴²³⁸ and 323(2).⁴²³⁹

Hence, clauses which stipulate 'Payment on delivery. If the due payment is not made timely, we charge a normal interest rate'⁴²⁴⁰ are not allowed in terms of no. 4. Also prohibited are clauses by which the user 'reserves the right to revoke the contract without being obligated to set an additional period of time'.⁴²⁴¹

The clause 'Payment due 30 days upon date of invoice. In case of late payment, the buyer is in delay without a previous warning notice issued by the seller. Then, default interest at a rate of ... % is due'⁴²⁴² could infringe § 309 no. 4. However, in terms of § 286(3), the obligor of a claim for payment is in default at the latest if he or she does not perform *within thirty days* after the due date and receipt of an invoice or equivalent statement of payment. The clause mentioned above is only valid though if the customer is duly informed on the invoice of this provision. Then, there is no content control because of § 307(3). According to the clause in question, the 30-day period starts at the date of the invoice, and not from its reception. Hence, it is subject to content control and infringes § 309 no. 4.⁴²⁴³

§ 309 no. 4 also applies where a standard clause does not expressly declare that a warning notice or the setting of an additional period of time for performance is superfluous, but where

⁴²³⁷ § 286(2): 'There is no need for a warning notice if 1. a period of time according to the calendar has been specified, 2. performance must be preceded by an event and a reasonable period of time for performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar, 3. the obligor seriously and definitively refuses performance, 4. for special reasons, weighing the interests of both parties, the immediate commencement of default is justified.'

⁴²³⁸ § 281(2): 'Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages.'

⁴²³⁹ Palandt/*Grüneberg* § 309 para 22. § 323(2): 'The specification of a period of time can be dispensed with if 1. the obligor seriously and definitively refuses performance, 2. the obligor does not render performance by a date specified in the contract or within a period specified in the contract, in spite of the fact that, according to a notice given by the obligee to the obligor prior to conclusion of the contract or based on other circumstances attending at the time of its conclusion, the performance as per the date specified or within the period specified is of essential importance to the obligee, or 3. in the case of work not having been carried out in accordance with the contract, special circumstances exist which, when the interests of both parties are weighed, justify immediate revocation.'

⁴²⁴⁰ UBH/*Schäfer* § 309 no. 4 para 5. My own translation.

⁴²⁴¹ L/GvW/T/*Graf von Westphalen* § 11 no. 4 AGBG para 17.

⁴²⁴² Example from Stoffels *AGB-Recht* 354. My own translation.

⁴²⁴³ Stoffels *AGB-Recht* 354.

the user makes use of a legal consequence that only occurs on the basis of a warning notice or additional period of time.⁴²⁴⁴

The standard business terms of a furniture company read: 'Dunning expenses are due by the buyer and amount to EUR 2.50 plus postage fees for each warning notice'.⁴²⁴⁵ As the damage must be the consequence of the other party's default, the seller must not charge its expenses for its first reminder under § 280(1) and (2), read with § 286. The expenses for the first warning notice occurred before the other party's default though. In the clause above, the user liberates itself from these expenses, which infringes § 309 no. 4. It is irrelevant that the clause does not expressly mention that a warning notice is superfluous because it suffices that the user claims a legal consequence that can only occur after the issuance of a warning notice.⁴²⁴⁶

2.2.4.3 B2B contracts

The rationale behind § 309 no. 4 also applies indirectly to B2B contracts by applying the general clause.⁴²⁴⁷ Due to the particularities of relations between entrepreneurs, the contents of the clause must be assessed independently though, which is why one cannot assume an indicative effect of no. 4.⁴²⁴⁸

2.2.5 Lump-sum claims for damages (§ 309 no. 5)

2.2.5.1 Rationale of § 309 no. 5

§ 309 no. 5 sets out that the agreement of a lump-sum claim by the user for damages or for compensation of a decrease in value is invalid if a) the lump sum, in the cases covered, exceeds the damage expected under normal circumstances⁴²⁴⁹ or the customarily occurring decrease in value, or b) the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum.

The EC Unfair Terms Directive⁴²⁵⁰ and regulation 44(3)(r)⁴²⁵¹ contain similar items, although the Directive speaks of a 'disproportionally high sum in compensation' whereas the South African regulation speaks of 'significantly exceed the harm'. The German legislature chose the

⁴²⁴⁴ BGH *NJW* 1988, 258.

⁴²⁴⁵ Example from Stoffels *AGB-Recht* 355.

⁴²⁴⁶ BGH *NJW* 1998, 991 (992).

⁴²⁴⁷ A direct application is excluded in terms of § 310(1) 1st sent.

⁴²⁴⁸ WLP/*Dammann* § 309 no. 4 para 60 *et seq.*

⁴²⁴⁹ '[N]ach dem gewöhnlichen Lauf der Dinge'.

⁴²⁵⁰ **Directive 93/13/EEC, Annex lit. e):** Terms which have the object or effect of 'requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation' may be regarded as unfair.

⁴²⁵¹ **Regulation 44(3)(r):** A term 'requiring any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier' is presumed to be unfair.

formulation 'exceeds the damage expected under normal circumstances'. In South Africa, the item is greylisted, whereas in Germany it is prohibited outright.

The agreement on lump-sum claims serves the need for a simplified and economic enforcement of these claims,⁴²⁵² but also has a preventive effect *vis-à-vis* the other party.⁴²⁵³ Hence, standard terms users have a legitimate interest to insert such clauses in their standard clauses. However, there is an undeniable danger that users formulate such clauses to their own benefit. For this reason, the legislator aims to restrict this danger without going too far because of the legitimate interests of standard terms users in such clauses.⁴²⁵⁴

2.2.5.2 Scope of application

No. 5 is concerned with lump sums. A lump sum is the determination of an amount by using a generalised standard and by renouncing the use of concrete factors for the calculation of the actual damage for the given case.⁴²⁵⁵

Sometimes it might be challenging to demarcate lump-sum claims from contractual penalties.⁴²⁵⁶ For the latter, no. 6 is applicable. The distinction is made by applying functional-typological aspects. Hence, the type of claim on which the request for payment is based is relevant, and the objective of the agreement has to be found out by interpretation. Thus, a penalty is given where the objective is the fulfilment of the main claim and exerting effective pressure on the other party.⁴²⁵⁷ On the other hand, there is a lump-sum agreement where the objective is a simplified execution of the given claim. The designation of the claim as 'compensation', 'indemnity' or 'damages' is irrelevant, even though it points out a compensative function. On the other hand, the amount of the claim is more critical. A penalty is rather a 'harsh additional sanction' (and therefore higher), whereas a lump-sum claim is more a 'simplified normal sanction' (which is orientated towards an actual damage).⁴²⁵⁸

No. 5 includes only agreements of lump-sum claims or compensation of a decrease in value. The courts nevertheless also include travel package standard terms in which a compensation

⁴²⁵² BT-Drs. 7/3919 at 29 *et seq.* See also Van der Merwe *et al Contract General Principles* 379.

⁴²⁵³ Stoffels *AGB-Recht* 356. Naudé speaks of a 'proactive effect', although she refers to the Conventional Penalties Act. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 99.

⁴²⁵⁴ BT-Drs. 7/3919 at 30, Stoffels *AGB-Recht* 356. See also OFT *Unfair Contract Terms Guidance* (2008) para 5.1 at 40.

⁴²⁵⁵ WLP/Dammann § 309 no. 5 para 51-59.

⁴²⁵⁶ See, for instance, BGH NJW 1992, 2625. Interestingly, South African and English literature refers in both cases to 'penalty clauses'. See, for instance, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 99 and OFT *Unfair Contract Terms Guidance* (2008) para 5.7 at 40 *et seq.*

⁴²⁵⁷ Stoffels *AGB-Recht* 357.

⁴²⁵⁸ Stoffels *AGB-Recht* 357.

under § 651(h) (ex-§ 651(i)(2) and (3))⁴²⁵⁹ is stipulated in the case of a revocation by the client.⁴²⁶⁰

Agreements in standard terms of lumps-sum claims for the benefit of the other party do not fall under no. 5.⁴²⁶¹

2.2.5.3 Restrictions

The restrictions for the agreement of a lump-sum claim are contained in no. 5 but can also emanate from the general clause.⁴²⁶² The point of reference for an agreement of a lump-sum claim must also be a fact on which an actual claim for damages can be based.⁴²⁶³ No. 5 contains the following two restrictions.

a) Excessive lump-sum

§ 309 no. 5 lit. a) provides that a lump-sum agreement is invalid if the lump sum, in the cases covered, exceeds the damage expected under normal circumstances or the customarily occurring decrease in value. This standard replicates § 252 2nd sent.⁴²⁶⁴ which applies to the compensation of lost profit. The average damages of the given branch⁴²⁶⁵ or the average of the decreased value serve as the applicable comparative standard.

Processing fees for return debit notes are based on a non-compliant conduct of the debtor triggering damages. In cases where the labour costs of the user are unduly included in such fees, they infringe § 309 no. 5. The BGH held that the staff costs are no damage caused by the other party's non-compliance but rather expenses that are necessary for the performance of the contract that cannot be included in the lump-sum claim for the given damage.⁴²⁶⁶ What is more, a prepayment penalty (sic)⁴²⁶⁷ that is based on a percentage exceeding the bank's net interest margin for the residual capital, or which does not include the interests of the damages paid by

⁴²⁵⁹ § 651(h)(1): 'Prior to commencement of travel, the traveller may revoke the contract at any time. If the traveller revokes the contract, then the travel organiser loses his claim to the agreed package price. He may however demand appropriate compensation.'

⁴²⁶⁰ BGH NJW 1985, 633 (635).

⁴²⁶¹ Stoffels *AGB-Recht* 357. See also Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 98.

⁴²⁶² MüKo/Wurmnest § 309 no. 5 para 8.

⁴²⁶³ Erman/Roloff § 309 para 44.

⁴²⁶⁴ BGH NJW 1984, 2941. § 252 2nd sent.: 'Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.'

⁴²⁶⁵ UBH/Fuchs § 309 no. 5 para 21.

⁴²⁶⁶ BGH NJW 2009, 3570.

⁴²⁶⁷ Despite its designation, prepayment penalties are lump-sum claims (see discussion above on the demarcation between penalties and lump-sum claims).

the customer for the future period, is invalid.⁴²⁶⁸ Other examples are clauses stipulating that the consumer must pay excessive storage fees where it failed to take delivery as agreed, or saying that the supplier is entitled to claim all its costs and expenses and not just its net costs, or – more excessively – to claim both the supplier’s costs as well as its loss of profit. This would lead to a double compensation of the same loss.⁴²⁶⁹

b) Express permission of counterevidence

According to lit. b) of no. 5, a lump-sum claim is invalid if the other party is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum. For the former § 11 no. 5 lit. b) AGBG it was sufficient that counterevidence was not excluded. Now, it must be expressly permitted. § 309 no. 5 lit. b) is therefore more stringent than its previous version.⁴²⁷⁰ Neither no. 5 nor the official justification⁴²⁷¹ require though that the clause must reproduce the wording of lit. b) of this provision. It is therefore sufficient if the clause makes clear for not legally trained customers that they can show that the damage or decrease in value is non-existent or substantially less than the required lump sum.⁴²⁷² A clause such as 'the amount to be paid is less if the client furnishes evidence that proves that the damage is less than stipulated in this clause' therefore fulfils the requirements of lit. b).⁴²⁷³ In practice, it might be difficult for the other party to prove that the user has not suffered any damage, however. If the client does not accept delivery of the ordered item but suggests another solvent client who would accept the ordered item instead, the user nevertheless bears some costs.⁴²⁷⁴

2.2.5.4 Legal consequences in case of violation

A provision that infringes no. 5 is invalid in its entirety. The user does not lose its material claim though, but for its calculation, § 252 is applicable.⁴²⁷⁵

2.2.5.5 B2B contracts

The agreement of a lump-sum claim exceeding the reasonable amount and leading to the user's enrichment is contrary to essential principles of the law of damages (§ 252), and unreasonably disadvantages the other party (§ 307(2) no. 1). Hence, in accordance with lit. a) of no. 5, such

⁴²⁶⁸ BGH NJW 1998, 592; NJW-RR 1999, 842.

⁴²⁶⁹ See OFT *Unfair Contract Terms Guidance* (2008) paras 5.2 and 5.3 at 40.

⁴²⁷⁰ Stoffels *AGB-Recht* 358.

⁴²⁷¹ BT-Drs. 14/6040 at 155.

⁴²⁷² Bamberger/Roth/Becker § 309 no. 5 para 36, WLP/Dammann § 309 no. 5 para 100.

⁴²⁷³ The BGH had to decide on similar clauses in BGH NJW 2010, 2122 (2124); 2011, 1954 (1956).

⁴²⁷⁴ BT-Drs. 7/3919 at 30.

⁴²⁷⁵ MüKo/Wurmnest § 309 no. 5 para 25.

clauses are also invalid in B2B agreements.⁴²⁷⁶ For the same reasons, also the exclusion of counter-evidence in terms of lit. b) is unreasonable. The express permission of the possibility of counter-evidence in B2B contracts is however not necessary.⁴²⁷⁷

2.2.6 Contractual penalty (§ 309 no. 6)

2.2.6.1 Distinction between contractual penalties and related forms of penalties

In terms of § 309 no. 6, a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract is invalid.

Regulation 44(3)(q) of the Consumer Protection Act⁴²⁷⁸ as well as item (d) of the Annex of the Unfair Terms Directive⁴²⁷⁹ contain items that include parts of § 309 no. 6. The German/European term for such clauses is 'asymmetric retention clauses',⁴²⁸⁰ whereas in South Africa they are referred to as 'one-sided forfeiture clauses'.⁴²⁸¹ Such clauses allow the supplier to retain payment in the case of breach without giving the consumer the right to be compensated in the same amount if the supplier commits a breach. Contrary to this type of clauses, the German provision only focuses on the supplier.⁴²⁸² What is more, penalty clauses⁴²⁸³ in the sense of §§ 339 *et seq.* are regulated in South Africa in the Conventional Penalties Act. If the amount is out of proportion of the actual harm suffered by the supplier, the court may reduce it in terms of section 3 of the Conventional Penalties Act.⁴²⁸⁴ Since financial penalties in terms of the Conventional Penalties Act are not submitted to content control under regulation 44(3) of the Consumer Protection Act, suppliers might want to insert penalty clauses rather than

⁴²⁷⁶ BGH NJW 1998, 592 (593); NJW-RR 1999, 842.

⁴²⁷⁷ Erman/Roloff § 309 para 51, Staudinger/Coester-Waltjen § 309 no. 5 para 26.

⁴²⁷⁸ **Regulation 44(3)(q):** A term 'allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative' is presumed to be unfair. In this regard, see discussion on this item in Part I ch 3 para 3.4.3 a).

⁴²⁷⁹ **Item (d) of the Annex of Directive 93/13/EEC:** Terms which have the object or effect of 'permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract' may be regarded as unfair.

⁴²⁸⁰ Stoffels *AGB-Recht* 361.

⁴²⁸¹ See, e.g., Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 95.

⁴²⁸² Stoffels *AGB-Recht* 361.

⁴²⁸³ Under s 1(2) of the Conventional Penalties Act 15 of 1962, a penalty is defined as '[a]ny sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable (...).'

⁴²⁸⁴ **Section 3 of the Conventional Penalties Act:** 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.' This provision is comparable to § 343 BGB.

clauses that are presumed to be unfair with regard to item (q) of regulation 44(3).⁴²⁸⁵ A drawback of penalty clauses compared to forfeiture clauses is that the proactive and extra-judicial effect of the items of the greylist is circumvented because suppliers probably will tend to put an unreasonably high penalty into their contracts hoping that the consumer will not go to court. If they do so, they bear the cost risk.⁴²⁸⁶

Since neither the South African nor the EU provisions are entirely congruent with § 309 no. 6, the protection offered by these clauses can be reached in Germany by applying §§ 308 no. 7, 309 no. 6 and 307, as the case may be.⁴²⁸⁷

Where the obligor promises, in the event that it fails to perform its obligation or fails to do so properly, payment of an amount of money or performance other than the payment of a sum of money as a penalty, the penalty is payable if it is in default.⁴²⁸⁸ This type of agreement has a double function: first, it motivates the debtor to perform its obligation, and second, it enables the creditor to be indemnified in a simple manner (so-called 'double-function of contractual penalties').⁴²⁸⁹

§§ 309 no. 6 and 339 *et seq.* are tailored for so-called 'dependent penalty agreements',⁴²⁹⁰ as opposed to 'independent penalty agreements'.⁴²⁹¹ The former are dependent on the main

⁴²⁸⁵ See discussion on reg 44(3)(q) in Part I ch 3 para 3.4.3 a).

⁴²⁸⁶ The same arguments apply in Germany in terms of § 339 *et seq* (see discussion below in this chapter and on reg 44(3)(q) in Part I ch 3 para 3.4.3 a).

⁴²⁸⁷ WLP/Pfeiffer Anhang RiLi para 44.

⁴²⁸⁸ §§ 339 and 342. § 339: '(Payability of contractual penalty) Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default. If the performance owed consists in forbearance, the penalty is payable on breach.' § 340: '(Promise to pay a penalty for non-performance) (1) If the obligor has promised the penalty in the event that he fails to perform his obligation, the obligee may demand the penalty that is payable in lieu of fulfilment. If the obligee declares to the obligor that he is demanding the penalty, the claim to performance is excluded. (2) If the obligee is entitled to a claim to damages for non-performance, he may demand the penalty payable as the minimum amount of the damage. Assertion of additional damage is not excluded.' § 341: '(Promise of a penalty for improper performance) (1) If the obligor has promised the penalty in the event that he fails to perform his obligation properly, including without limitation performance at the specified time, the obligee may demand the payable penalty in addition to performance. (2) If the obligee has a claim to damages for the improper performance, the provisions of [§] 340 (2) apply. (3) If the obligee accepts performance, he may demand the penalty only if he reserved the right to do so on acceptance.' § 342: '(Alternatives to monetary penalty) If, as penalty, performance other than the payment of a sum of money is promised, the provisions of [§§] 339 to 341 apply; the claim to damages is excluded if the obligee demands the penalty.' § 343: '(Reduction of the penalty) (1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded. (2) The same also applies, except in the cases of [§§] 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action.'

⁴²⁸⁹ *Bifunktionalität der Vertragsstrafe*. UBH/Fuchs § 309 no. 6 para 11.

⁴²⁹⁰ *Unselbständige Strafversprechen*.

⁴²⁹¹ *Selbständige Strafversprechen* or *selbständige Strafgedinge*.

obligation, whereas the latter are merely a binding undertaking in terms of which an indemnification for a non-fulfilled expectation has to be paid.⁴²⁹² In an independent penalty clause, someone promises a penalty in the event that he or she undertakes or omits an action without being the debtor (§ 343(2)). Nonetheless, no. 6 can be applied to independent penalty agreements by analogy. If a debtor with legal obligation must not be confronted with contractual penalty clauses in terms of no. 6, *a fortiori* a party which is not obliged must neither be confronted with such a provision.⁴²⁹³

In terms of penalty agreements, the debtor is obliged to make an additional performance (mostly in the form of money) besides its main obligation, whereas so-called 'forfeiture clauses'⁴²⁹⁴ stipulate that the debtor loses a right.⁴²⁹⁵ In pre-formulated leases, for example, one can find clauses by which the tenant loses its right to reimbursement of its expenses if he terminates the lease before its expiry.⁴²⁹⁶ Despite the different denomination, technically the economic implications for the debtor are the same in both scenarios. This applies even more so if the clause has a penalising objective. Hence, § 309 no. 6 applies also to forfeiture clauses.⁴²⁹⁷ If the clause provides that in case of an early termination of the contract, the other party loses all its rights, this has to be qualified as a revocation in terms of § 360 though. Such a clause has therefore to be assessed in terms of § 308 no. 3.⁴²⁹⁸

According to the BGH, prepayment penalties according to which the repayment of a credit becomes immediately due when the debtor is in default of payment of the instalments do not fall under no. 6. Such clauses are no penalty clauses but rather a special form of a stipulation on the termination of the agreement. Hence, they are subject to the general clause. They are only valid if the requirements for this type of termination are comparable to those for a regular notice. Infringements that lead to the prepayment of the credit must be so significant that they justify an automatic termination of the contract without consideration of the individual case.⁴²⁹⁹

In practice, terms such as 'compensation' ('*Abstandssumme*') or 'forfeit' ('*Reuegeld*') are often used. Technically, such agreements are penalty agreements so that no. 6 applies.⁴³⁰⁰

⁴²⁹² Stoffels *AGB-Recht* 359.

⁴²⁹³ WLP/Dammann § 309 no. 6 para 15, Staudinger/Coester/Waltjen § 309 no. 6 para 7.

⁴²⁹⁴ *Verfallsklauseln*.

⁴²⁹⁵ Stoffels *AGB-Recht* 360.

⁴²⁹⁶ Locher *Recht der AGB* 110.

⁴²⁹⁷ Palandt/Grüneberg § 309 para 33, WLP/Dammann § 309 no. 6 para 16 *et seq.*

⁴²⁹⁸ Stoffels *AGB-Recht* 360.

⁴²⁹⁹ BGH *NJW* 1986, 46 (48).

⁴³⁰⁰ BT-Drs. 7/3919 at 30. See also UBH/Fuchs § 309 no. 6 para 18.

2.2.6.2 Rationale of § 309 no. 6

Penalty clauses are not prohibited *per se*, as shown by §§ 339 *et seq.*, but when they are pre-formulated, they have a clear potential to be worded against the other party's interests.⁴³⁰¹ The conditions for the applicability of such clauses often contain a low threshold so that penalties have to be paid even for minor breaches. They offer a possibility to use this sanction in order to obtain an unjustified profit. Although § 343 offers the possibility to reduce an unreasonably high penalty by judicial condition, such a reduction depends on the other party's initiative, and he or she bears the cost risk.⁴³⁰² In spite of these risks, the legislator did not generally prohibit penalty clauses.⁴³⁰³ The cases contained in § 309 no. 6 (non-acceptance or late acceptance of the performance, payment default or termination of the contract by the other party) generally lack a justifiable interest for the user because it has a legal claim for damages in these cases the enforcement of which is moreover facilitated within the restrictions of § 309 no. 5.⁴³⁰⁴

2.2.6.3 Prohibitions contained in the provision

No. 6 focuses on clients that have to pay a certain amount for the supplier's counter-performance. Regularly, they have concluded a purchase or service contract or a contract to produce a work for which the supplier expects payment. The legislator disapproves of additional guarantees for the client's payment in the form of penalty clauses though since his or her expectation is already secured by the client's obligation to pay damages.⁴³⁰⁵

a) Non-acceptance or late acceptance of the performance

The term 'acceptance' has to be interpreted widely and includes all forms of acceptance of a performance, and not only acceptance in connection with a purchase contract (§ 433(2)) or a contract to produce a work (§ 640(1)). It is irrelevant if acceptance of the performance is a main or ancillary obligation.⁴³⁰⁶

⁴³⁰¹ BT-Drs. 7/3919 at 30.

⁴³⁰² BT-Drs. 7/3919 at 30.

⁴³⁰³ Stöffels *AGB-Recht* 360 and 361.

⁴³⁰⁴ BT-Drs. 7/3919 at 30.

⁴³⁰⁵ Stöffels *AGB-Recht* 361.

⁴³⁰⁶ Stöffels *AGB-Recht* 361.

b) Payment default

'Payment default' means default in the sense of § 286.⁴³⁰⁷ No. 6 does however not require that the clause explicitly refer to default. It is therefore sufficient if payment default is included, for instance, by the formulation 'infringement of the contract'.⁴³⁰⁸

c) Termination of the contract

Termination of the contract is given where the client reveals that it does not feel being bound to the agreement anymore.⁴³⁰⁹ It is irrelevant whether it refers to a legal or contractual right to terminate the agreement. For the German legislator, it was important to prevent clauses combining the termination of a contract with a compensation ('*Abstandssumme*') or a forfeit ('*Reuegeld*').⁴³¹⁰

2.2.6.4 Clauses to be assessed against the backdrop of § 307

Penalty clauses for which no. 6 does not apply can nonetheless be ineffective in terms of the general clause if they are unreasonably disadvantageous for the other party.⁴³¹¹

a) Amount of the penalty

A penalty clause can be invalid in terms of § 307 if its amount is unreasonable. The possibility to reduce the amount by judicial ruling in terms of § 343 does not prevent a control under the general clause because § 339 *et seq.* are tailored for individual agreements. What is more, content control with respect to the general clause refers to the stipulated amount, and not to the payable amount.⁴³¹² The amount agreed upon in a penalty clause is unreasonable if it is disproportionate in relation to the infringement of the contract and the consequences for the

⁴³⁰⁷ § 286: '(1) If the obligor, following a warning notice from the obligee that is made after performance is due, fails to perform, he is in default as a result of the warning notice. Bringing an action for performance and serving a demand for payment in summary debt proceedings for recovery of debt have the same effect as a warning notice. (2) There is no need for a warning notice if 1. a period of time according to the calendar has been specified, 2. performance must be preceded by an event and a reasonable period of time for performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar, 3. the obligor seriously and definitively refuses performance, 4. for special reasons, weighing the interests of both parties, the immediate commencement of default is justified. (3) The obligor of a claim for payment is in default at the latest if he does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment; this applies to an obligor who is a consumer only if these consequences are specifically referred to in the invoice or statement of payment. If the time at which the invoice or payment statement is received by the obligor is uncertain, an obligor who is not a consumer is in default at the latest thirty days after the due date and receipt of the consideration. (4) The obligor is not in default for as long as performance is not made as the result of a circumstance for which he is not responsible.'

⁴³⁰⁸ OLG Hamburg *NJW-RR* 1988, 651.

⁴³⁰⁹ Erman/*Roloff* § 309 no. 6 para 55.

⁴³¹⁰ Stöffels *AGB-Recht* 362.

⁴³¹¹ UBH/*Fuchs* § 309 no. 6 para 12, WLP/*Dammann* § 309 no. 6 para 30.

⁴³¹² BGH *NJW* 1983, 385 (387 *et seq.*).

user.⁴³¹³ The amount must particularly not be disproportionate in relation to the damage that is typically to be expected.⁴³¹⁴

For example, in construction contracts, penalty clauses that do not take into account the actual importance of the infringement, but which are increased with the duration of the infringement without any restriction with regard to the time and the amount are ineffective.⁴³¹⁵ The BGH applies these principles also to authorised dealer contracts.⁴³¹⁶

b) Strict liability penalty

Clauses providing strict liability penalties are not compatible with the essential principles of the statutory provisions and are therefore invalid. Such clauses are only valid where relevant circumstances exist that justify a deviation from the statutory principles.⁴³¹⁷

2.2.6.5 Legal consequences in case of violation

Penalty clauses that infringe §§ 309 no. 6 or 307 are invalid in their entirety. A reinterpretation as a valid lump sum for damages or a 'reduction' to an acceptable degree is excluded.⁴³¹⁸

Clauses that are separable into different parts can be partly valid though, e.g., if the facts to be assessed are independent from each other. This does not apply to clauses that fulfil the prohibition of an accumulation of a penalty with damages.⁴³¹⁹

2.2.6.6 B2B contracts

The prohibitions of § 309 no. 6 cannot be applied in terms of § 307 to contracts between business people.⁴³²⁰ Penalty clauses are ubiquitous in B2B contracts and have the function to motivate the other party to fulfil its obligations. The reasons for invalidity of such clauses drawn from § 307 can also be applied to B2B contracts, but the margin for entrepreneurs is wider. This is because they can be expected to assess such penalty clauses and their legal consequences correctly.⁴³²¹

⁴³¹³ BGH *NJW* 1998, 2600 (2606).

⁴³¹⁴ BGH *NJW* 2012, 2577.

⁴³¹⁵ BGH *NJW* 1983, 385 (387). The BGH assumes an unreasonable disadvantage for the other party if the penalty is 5 % of the contract value since the customer would suffer such a loss that it could have consequences for its cash flow (BGH *NJW* 2003, 1805 (1808 *et seq.*)). Also invalid are penalty clauses stipulating 0.5 % of the contract value per working day (BGH *NJW* 2003, 2158 (2161)). Not unreasonably disadvantageous are penalty clauses stipulating an amount of 0.3 % per working day in case of late delivery (BGH *NJW-RR* 2008, 615).

⁴³¹⁶ BGH *NJW* 1997, 3233.

⁴³¹⁷ Staudinger/*Rieble* § 339 para 103, BGH *NJW* 2013, 2111 (2113).

⁴³¹⁸ Erman/*Roloff* § 309 no. 6 para 57.

⁴³¹⁹ BGH *NJW* 1992, 1096 (1097).

⁴³²⁰ UBH/*Fuchs* § 309 no. 6 para 35, Staudinger/*Coester-Waltjen* § 309 no. 6 para 28.

⁴³²¹ Stöffels *AGB-Recht* 363.

Invalid in terms of the deviation from the guiding function of the statutory provision of § 307(1) no. 1 are B2B contracts on strict liability agreements,⁴³²² the exclusion of the 'deduction' of the penalty from the damages that the other party has to pay,⁴³²³ or the waiver of the reservation of the penalty under § 341(3).⁴³²⁴ Furthermore, the amount of the penalty can be unreasonably high, although § 348 HGB sets out that a penalty that has been agreed between business people cannot be reduced in terms of § 343 BGB.⁴³²⁵ B2B penalties must be sufficiently high in order to be a perceptible sanction for the other party. The BGH therefore decided that a penalty clause by which an agent has to pay DM 250 (EUR 125) per non-communicated client if he or she does not hand over its clients' contact details is effective.⁴³²⁶

2.2.7 Exclusion or restriction of liability for injury to life, body or health or for other damages (§ 309 no. 7)

§ 309 no. 7 deals with the exclusion or restriction of liability for high-ranking rights and other damages. This field is traditionally the core of content control of standard business terms.

In terms of § 309 no. 7, (a) any exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user, or (b) any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user is ineffective.

The provision further sets out *in fine* that letters (a) and (b) do not apply to limitations of liability in terms of transport and tariff rules, authorised in accordance with the Passenger Transport Act,⁴³²⁷ of trams, trolleybuses and motor vehicles in regular public transport services, to the extent that they do not deviate to the disadvantage of the passenger from the Order on Standard Transport Terms for Tram and Trolley Bus Transport and Regular Public Transport

⁴³²² BGH *NJW* 1998, 2600 (2601).

⁴³²³ WLP/*Dammann* § 309 no. 6 para 105.

⁴³²⁴ WLP/*Dammann* § 309 no. 6 para 105. § 341(3): 'If the obligee accepts performance, he may demand the penalty only if he reserved the right to do so on acceptance.'

⁴³²⁵ BGH *NJW* 2014, 2180.

⁴³²⁶ BGH *NJW* 1993, 1786 (1787 *et seq.*).

⁴³²⁷ Personenbeförderungsgesetz.

Services with Motor Vehicles⁴³²⁸ of 27 February 1970. What is more, letter (b) does not apply to limitations on liability for state-approved lotteries and gaming contracts.

2.2.7.1 Prohibitions set out in § 309 no. 7

a) Scope of application

aa) Contractual and legal claims for damages

No. 7 prohibits pre-formulated restrictions or exclusions of the user's liability for claims for damages that arise due to breach *vis-à-vis* the client as well as third parties involved in the contract, irrespective of their legal basis. Hence, claims for damages, namely those based on § 280,⁴³²⁹ or on the delivery of faulty goods are included.⁴³³⁰ The prohibition also concerns the liability for breach at the moment of the conclusion of the contract (*culpa in contrahendo*) in terms of §§ 280 and 311(2),⁴³³¹ as well as for tortious acts under § 823 *et seq.*⁴³³²

bb) Exceptions related to the type of contract

The 2nd half-sentence of no. 7 excludes the application of lit. a) and b) of the provision for the transport and tariff rules for regular public transport services on the road. The reason for this exemption is the normative character of the given Order of 27 February 1970 which sets out restrictions for liability in its § 14. If its application were not excluded, there would be a conflict with §§ 305 *et seq.* The exemption ensures that the conditions for the transport of passengers on the road and tariffs set out similar thresholds for liability, provided that they do not deviate from the Order.⁴³³³ The exemption does however not include the conditions for air transport; the latter can therefore be assessed in terms of §§ 305 *et seq.*⁴³³⁴

⁴³²⁸ Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen.

⁴³²⁹ § 280 (Damages for breach of duty): '(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of [§] 286. (3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of [§§] 281, 282 or 283.'

⁴³³⁰ BT-Drs. 14/6040 at 156.

⁴³³¹ § 311(2): '(2) An obligation with duties under [§] 241 (2) also comes into existence by 1. the commencement of contract negotiations, 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts.'

⁴³³² Palandt/*Grüneberg* § 309 para 40. § 823: '(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.'

⁴³³³ BT-Drs. 7/3919 at 42.

⁴³³⁴ BGH *NJW* 1983, 1322 (1324).

Furthermore, the 3rd half-sentence of no. 7 excludes its application to state-approved lotteries and gaming contracts for gross negligence (lit. b). The standard terms of such lotteries and gaming companies become part of the private-law gaming contract in terms of § 763.⁴³³⁵ The conditions of the various German lotteries provide for liability thresholds in the case of the loss or falsification of lottery slips. The legislator admitted clauses excluding liability also in the case of gross negligence because it was of the opinion that otherwise the danger of concerted manipulations by lottery agents and players would be too great (false slips etc.).⁴³³⁶ Wurmnest suggests that the true intention for this inclusion is to exclude any risk of the lottery organisers in terms of the employees of the lottery sales outlets.⁴³³⁷ This debate has no practical relevance though because such clauses are open to scrutiny pursuant to § 307.⁴³³⁸

b) No exclusion or restriction for the violation of highest-ranking legal rights

§ 309 no. 7 lit. a) provides that the exclusion or restriction of liability for the violation of highest-ranking legal rights, i.e., injury to life, body or health,⁴³³⁹ is not possible, not even when committed negligently. The provision even bars exclusions or restrictions of liability for intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user in terms of §§ 278 *et seq.*⁴³⁴⁰ This absolute prohibition is based on no. 1 lit. a) of the Annex of the Unfair Terms Directive.⁴³⁴¹

The South African legislator chose another way in this regard by merely greylisting similar terms. Regulation 44(3)(a) of the Act refers to injury or death caused by a reason other than a defective good, e.g., harm caused by sub-standard service delivery, as it is not permitted in terms of section 61 to exclude liability for harm caused by defective goods or a product failure.⁴³⁴² On the other hand, section 51(c)(i) blacklists terms that purport to limit or exempt a supplier from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier. Read together with

⁴³³⁵ § 763: 'A lottery contract or a gaming contract is binding if the lottery or the gaming has state approval. (...)'

⁴³³⁶ BT-Drs. 7/5422 at 14.

⁴³³⁷ MüKo/Wurmnest § 309 no. 7 para 15 *et seq.*

⁴³³⁸ Palandt/*Grüneberg* § 309 para 4.

⁴³³⁹ The definition of these terms corresponds to § 823(1). See Palandt/*Grüneberg* § 309 para 43.

⁴³⁴⁰ Stöffels *AGB-Recht* 382.

⁴³⁴¹ BT-Drs. 14/6040 at 156.

⁴³⁴² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18. Section 61 CPA corresponds in part to the German ProdHaftG. According to § 1(1) ProdHaftG, '[I]n such case as a defect in a product causes a person's death, injury to his body or damage to his health, or damage to an item of property, the producer of the product has an obligation to compensate the injured person for the resulting damage (...)' § 1(2) ProdHaftG enumerates the cases when the producer's liability is excluded.

regulation 44(3)(a), it becomes clear that the latter only refers to exemption clauses excluding liability not based on gross negligence and which do not fall into the ambit of section 61.⁴³⁴³

With regard to the discussion on the requirement of signing or initialling clauses pursuant to section 49(2)(c), it is referred to Part I.⁴³⁴⁴

The fact that the limitation or exclusion of the supplier's liability for any loss attributable to gross negligence is blacklisted in terms of section 51(c)(i), whereas the limitation or exclusion of its liability for death or personal injury – unless it concerns section 61(1) – is 'only' presumed to be unfair, although the common law and the Constitution attribute a very high rank to the sanctity of life,⁴³⁴⁵ is a systemic weakness that the legislature should correct. The former UK OFT took the stance that no contractual term can legally have the effect of excluding liability for death or injury caused by negligence in the course of business, and that such terms should not appear in consumer contracts.⁴³⁴⁶ For this reason, § 309 no. 7 lit. a) BGB and no. 1 lit. a) of the Annex of the Unfair Terms Directive outlaw such terms.

Unlike § 309 no. 7 lit. a), regulation 44(3)(a) does not mention the liability of the supplier's legal representative or vicarious agent. In terms of item (d) of regulation 44(3), terms limiting, or having the effect of limiting, the supplier's vicarious liability for its agents, are greylisted. Item (d) only applies to the supplier's vicarious liability under the residual common law since section 113(1) applies to the supplier's joint and several liability in terms of the Act, e.g., the liability for defective goods pursuant to section 61.⁴³⁴⁷

In terms of 'other damages' than personal damages, § 309 no. 7 lit. b) finds its corresponding provision in section 51(1)(c)(i) of the Act. The latter also deals with gross negligence of the supplier as well as to persons acting for or controlled by it.

c) No exclusion or restriction for gross fault

The exclusion or restriction of liability for other damages than those mentioned in lit. a) is not excluded *per se*, but lit. b) contains limits for such clauses. Hence, the user cannot exclude or restrict its liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by its legal representative or a person

⁴³⁴³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

⁴³⁴⁴ Chapter 2 para 3.2 b) cc).

⁴³⁴⁵ See, for instance, *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) 518, *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZN).

⁴³⁴⁶ OFT *Unfair Contract Terms Guidance* (2008) para 1.10 at 16.

⁴³⁴⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 48.

used to perform an obligation of the user. The norm does not mention liability for intentional breach committed by the user. This is because under § 276(3), the obligor may not be released in advance from liability for intention.⁴³⁴⁸

d) Exclusion and restriction of liability

aa) Exclusions

No. 7 does not require that the exclusion be mentioned explicitly in the standard clause. It suffices if the clause gives the impression that it has the object or effect of excluding liability. This is the case where the objective obligation that is the basis for liability is excluded, and the risk is transferred solely to the other party.⁴³⁴⁹

Therefore, a bank's standard terms pursuant to which the client bears the risk for temporary restrictions or disruptions of the bank's online services are ineffective. By that clause, the bank does not wish to be liable for damages arising from the realisation of such a risk.⁴³⁵⁰

bb) Restrictions

A restriction of the user's liability is given where the client's claims for damages are reduced, for example, by excluding certain damages (indirect damages, subsequent damages etc.),⁴³⁵¹ or by restricting the amount of the damages.⁴³⁵²

Such a restriction exists in a standard clause of a photo development company according to which 'in the case of the loss of films, photos (...) or similar items, we are liable up to the value of the material'.⁴³⁵³ The same applies to a standard contract of a dry cleaner by which 'also in the case of a grossly negligent or intentionally caused loss of the items, only the current value, and not the replacement value is due'.⁴³⁵⁴

cc) Restrictive modalities

No. 7 is also applicable if the clause does not concern the claim for damages itself but contains restrictive modalities for its assertion.⁴³⁵⁵ Such formal hindrances, e.g., a very short preclusion period, can be harsher than an objective restriction of the due amount (that might be higher than the actual damage). What is more, in practice it is difficult to distinguish between objective

⁴³⁴⁸ Stoffels *AGB-Recht* 382.

⁴³⁴⁹ BGH *NJW* 2001, 751 (752).

⁴³⁵⁰ BGH *NJW* 2001, 751 (752).

⁴³⁵¹ MüKo/Wurmnest § 309 no. 7 para 23.

⁴³⁵² Stoffels *AGB-Recht* 383.

⁴³⁵³ OLG Nuremberg *NJW-RR* 2000, 436.

⁴³⁵⁴ BGH *NJW* 2013, 2502 (2503).

⁴³⁵⁵ BGH *NJW* 2007, 674 (675).

and formal liability restrictions.⁴³⁵⁶ In order to ensure effective protection, Stoffel correctly suggests that no. 7 should apply to all clauses that create an obstacle for the user's liability.⁴³⁵⁷

This is the case for a shorter prescription period than the legal prescription,⁴³⁵⁸ or a subsidiarity clause in terms of which the user's liability depends on the vain availment of a third party.⁴³⁵⁹

2.2.7.2 Liability for negligent breach of duty in B2C contracts

As clearly stated in no. 7 lit. a), the user cannot free itself from its liability for negligent conduct in terms of personal injuries (life, body, health). In general, it is possible to exclude or restrict the user's liability for negligent conduct for other damages, however. After all, § 309 no. 7 lit. b) only rules out exclusions or restrictions of liability based on intentional or *grossly* negligent breach. Based on § 307, the BGH has determined a prohibited area 'proceeding' the forbidden domain in terms of no. 7. Therefore, also clauses excluding or restricting simple negligence in terms of lit. b) can be ineffective.⁴³⁶⁰ This is namely the case if a clause erodes essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised in terms of § 307(2) no. 2. Moreover, the user is not allowed to restrict its liability by exempting itself from obligations that are necessary for the fulfilment of the agreement and that the other party regularly can rely on. Jurisprudence has coined the term 'cardinal obligations'⁴³⁶¹ for these duties.⁴³⁶² These are, besides the principal obligations that are characterised by reciprocity, also certain ancillary duties if they are significant for the 'integrity interest'⁴³⁶³ of the contractual partner, i.e., the interest of the contractual partner in the integrity of its legal interests which are outside the existing contractual relationship.⁴³⁶⁴ The term 'breach of cardinal obligations' must nonetheless not detract from the fact that the only standard of control is § 307(2) no. 2.⁴³⁶⁵

A cardinal obligation is the seller's duty to deliver non-defective goods. Hence, it cannot exclude completely its liability for damages caused by a defective item or for consequential

⁴³⁵⁶ UBH/Christensen § 309 no. 7 para 28.

⁴³⁵⁷ Stoffels *AGB-Recht* 383.

⁴³⁵⁸ BGH *NJW* 2013, 2584 (2585).

⁴³⁵⁹ PWW/Berger § 309 para 42, Palandt/*Grüneberg* § 309 para 45.

⁴³⁶⁰ BGH *NJW* 2013, 2502 (2503).

⁴³⁶¹ *Kardinalpflichten*. See, e.g., BGH *NJW* 2002, 673 (674); 2005, 1774.

⁴³⁶² Medicus *BGB-AT* 162.

⁴³⁶³ *Integritätsinteresse*.

⁴³⁶⁴ See *Kaiser* in: Staudinger/Eckpfeiler I para 185 and 186.

⁴³⁶⁵ Stoffels *AGB-Recht* 384.

damages, or for delivery in time.⁴³⁶⁶ It can restrict its liability to foreseeable and typical damages for the given type of contract though.⁴³⁶⁷

A travel agency must unsolicitedly inform its clients about immigration requirements in the country of destination and cannot exclude its liability in this regard because the fulfilment of these requirements is *sine qua non* for the success of the travel. Such clauses are ineffective in terms of § 307(2) no. 2.⁴³⁶⁸ Furthermore, the exclusion of liability for simple negligence in a fund prospectus is contrary to the objective of such a document, namely to inform potential investors in a reliable, complete and truthful manner.⁴³⁶⁹

A restriction of liability of a dry-cleaner for property damage to the 15-fold amount of the price the client has paid for the cleaning of its clothes does not sufficiently consider the value of the clothes and leads to an unjustified restriction in the case of valuable items. The fact that the company recommends its clients to sign an insurance policy is irrelevant in this regard.⁴³⁷⁰ In order to be effective, limitations of liability concerning the amount have to cover foreseeable damages that are typical for the given type of contract. The user cannot exclude its liability for such damages.⁴³⁷¹

Note should be taken that the liability of the producer under § 1(1) ProdHaftG⁴³⁷² cannot be excluded according to § 14 ProdHaftG. Under § 14 ProdHaftG, 'the liability of the producers

⁴³⁶⁶ BGH NJW 1994, 1060 (1062 *et seq.*).

⁴³⁶⁷ PWW/Berger § 307 para 27.

⁴³⁶⁸ BGH NJW 1985, 1165 (1166).

⁴³⁶⁹ BGH NJW-RR 2002, 915.

⁴³⁷⁰ BGH NJW 2013, 2502 (2503 *et seq.*).

⁴³⁷¹ BGH NJW 2002, 673 (675).

⁴³⁷² ProdHaftG = Produkthaftungsgesetz (Product Liability Act). **§ 1 ProdHaftG (Liability):** (1) In such case as a defect in a product causes a person's death, injury to his body or damage to his health, or damage to an item of property, the producer of the product has an obligation to compensate the injured person for the resulting damage. In case of damage to an item of property, this shall only apply if the damage was caused to an item of property other than the defective product and this other item of property is of a type ordinarily intended for private use or consumption and was used by the injured person mainly for his own private use or consumption. (2) The producer's liability obligation is excluded if 1. he did not put the product into circulation, 2. under the circumstances it can be assumed that the defect which caused the damage did not exist at the time when the producer put the product into circulation, 3. the product was neither manufactured by him for sale or any other form of distribution for economic purpose nor manufactured or distributed by him in the course of his business, 4. the defect is due to compliance of the product with mandatory regulations at the time when the producer put the product into circulation or 5. the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the defect to be discovered. (3) The obligation to pay damages of the producer of a component part is also excluded if the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product. The first sentence shall apply to the producer of a raw material *mutatis mutandis*. (4) The injured person bears the burden of proving the defect, the damage and the causal relationship between defect and damage. If it is disputed whether the obligation to pay compensation is excluded pursuant to paragraph 2 or 3, the producer bears the burden of proof.'

pursuant to th[e ProdHaftG] may not be excluded or limited in advance. Any agreements to the contrary shall be null and void.⁴³⁷³

2.2.7.3 Liability in B2B contracts

Pursuant to § 310 (1) 1st sent., § 309 no. 7 is not directly applicable to B2B contracts. Its valuations have a radiating effect on the general clause of § 307 though.⁴³⁷⁴

a) Exclusion of liability

It is indisputable that an exclusion of liability for bodily harm in terms of lit. a) of no. 7 is also not possible in B2B contracts.⁴³⁷⁵ § 309 no. 7 lit. a) aims to protect high-ranking legal rights which do not allow for a differentiation between B2C and B2B contracts. What is more, the user's contractual party is a legal person so that claims for damages of the injured person are not concerned by such an exclusion because there is no concrete contractual relation with this natural person.⁴³⁷⁶

In terms of liability for gross negligence (no. 7 lit. b), the user can neither exclude its own liability for gross negligence nor gross negligence of its management. This also applies to organisational negligence.⁴³⁷⁷

The BGH decided that the user cannot exclude its liability for gross negligence of vicarious agents,⁴³⁷⁸ i.e., the persons used to perform an obligation of the user, if they violate cardinal obligations.⁴³⁷⁹ The court even made clear that an exclusion of liability for only simple negligence of these persons is not permitted.⁴³⁸⁰ This applies even more for the user's own simple negligence.⁴³⁸¹

If no cardinal obligations are concerned, an exclusion of liability for gross negligence of the user's vicarious agents requires a special justification that sometimes can be found in commercial practices and customs.⁴³⁸² It would go too far though to say that exclusions that are typical for a certain industry and generally recognised always withstand content control.⁴³⁸³

⁴³⁷³ Stoffels *AGB-Recht* 385.

⁴³⁷⁴ Stoffels *AGB-Recht* 385 and 386.

⁴³⁷⁵ Palandt/*Grüneberg* § 309 para 55.

⁴³⁷⁶ Stoffels *AGB-Recht* 386.

⁴³⁷⁷ UBH/*Christensen* § 309 no. 7 para 45.

⁴³⁷⁸ *Erfüllungsgehilfen*.

⁴³⁷⁹ BGH *NJW-RR* 2006, 267 (269).

⁴³⁸⁰ BGH *NJW-RR* 1998, 1426.

⁴³⁸¹ MüKo/*Wurmnest* § 309 no. 7 para 37.

⁴³⁸² Stoffels *AGB-Recht* 386.

⁴³⁸³ UBH/*Hensen* (2001) § 11 no. 7 AGBG para 32.

b) Restriction of liability

In terms of liability restrictions in B2B contracts, one generally may assume a more liberal stance as for exclusions of liability. The user's interest not to assume the risk of surprising and unusual damages has more weight here. Hence, a restriction of liability for negligently committed contractual violations may be permitted, except for gross negligence of the user or its management. Then, the maximum amounts must cover likely damages that are typical for the given type of contract.⁴³⁸⁴ Article 74 2nd sent. CISG by which '(...) damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known as a possible consequence of the breach of contract' also considers this aspect.

Because of the radiating effect of lit. a) of no. 7, any liability restriction for personal damage is *a priori* prohibited.⁴³⁸⁵

2.2.7.4 Legal consequences in case of violation

A standard clause that infringes § 309 no. 7 is ineffective in its entirety. A retention of the part of the clause that still is in accordance with this provision is not possible.⁴³⁸⁶

Therefore, a clause that does not differentiate between the category of persons involved (user, management, vicarious agents etc.) and the degree of liability (simple or gross negligence, intention) is ineffective because due its wording, the user's liability is excluded even if its contractual partner suffers a damage based on the user's intention or gross negligence. The same applies to standard clauses that exclude the user's liability for negligently caused damages because they do not differentiate between the high-ranking legal rights (lit. a) and the other rights (lit. b).⁴³⁸⁷

2.2.7.5 Special provisions for liberal professions

Because of their obligation to conclude a professional insurance policy and their special position of trust, lawyers (advocates), patent attorneys, tax advisors and chartered accountants cannot exclude their liability in their contracts with clients.⁴³⁸⁸ § 323(4) HGB expressly prohibits such an exclusion for chartered accountants.⁴³⁸⁹

⁴³⁸⁴ UBH/Christensen § 309 no. 7 para 46.

⁴³⁸⁵ UBH/Christensen § 309 no. 7 para 46.

⁴³⁸⁶ BGH NJW 2011, 139 (141).

⁴³⁸⁷ Palandt/Grüneberg § 309 para 54, HK/Schulte-Nölke § 309 para 24.

⁴³⁸⁸ Stoffels AGB-Recht 388.

⁴³⁸⁹ Stoffels AGB-Recht 388.

For liability restrictions, special provisions apply for these professions.⁴³⁹⁰ Members of such a profession may restrict their liability by written agreement up to the minimum insurance cover. For lawyers, patent attorneys and tax advisors, this amount is currently EUR 250,000,⁴³⁹¹ and for chartered accountants, it amounts to EUR 1m.⁴³⁹² As far as the standard terms of the members of these professions reflect these thresholds, they are not subject to content control in terms of § 307(3).⁴³⁹³

2.2.7.6 Special provisions in transport law

For liability restrictions in contracts for freight and forwarding, §§ 449 and 466 contain special provisions. For international carriage contracts, articles 23⁴³⁹⁴ and 41⁴³⁹⁵ CMR⁴³⁹⁶ contain

⁴³⁹⁰ See §§ 51a BRAO, 45a PatAnwO, 67a StBerG and 54a WiPrO.

⁴³⁹¹ §§ 51(3) BRAO, 45(4) PatAnwO.

⁴³⁹² § 54(1) WiPrG, read in conjunction with § 323(2) 1st sent. HGB.

⁴³⁹³ UBH/Schmidt (2006) Annex to § 310 para 638, Palandt/*Grüneberg* § 307 para 54.

⁴³⁹⁴ **Article 23 CMR:** '1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage. 2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to normal value of goods of the same kind and quality. 3. Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short. 4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable. 5. In the case of delay if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges. 6. Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been declared in accordance with articles 24 and 26. 7. The unit of account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in paragraph 3 of this article shall be converted into the national currency of the State of the Court seized of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the Parties. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by the State. 8. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 7 of this article may, at the time of ratification of or accession to the Protocol to the CMR or at any time thereafter, declare that the limit of liability provided for in paragraph 3 of this article to be applied in its territory shall be 25 monetary units. The monetary unit referred to in this paragraph corresponds to the 10/31 gram of gold of millesimal fineness nine hundred. The conversion shall be made according to the law of the State concerned. 9. The calculation mentioned in the last sentence of paragraph 7 of this article and the conversion mentioned in paragraph 8 of this article shall be made in such a manner as to express in the national currency of the State as far as possible the same real value for the amount in paragraph 3 of this article as is expressed there in units of account. States shall communicate to the Secretary-General of the United Nations the manner of calculation pursuant to paragraph 7 of this article or the result of the conversion in paragraph 8 of this article as the case may be, when depositing an instrument referred to in Article 3 of the Protocol to the CMR and whenever there is a change in either.'

⁴³⁹⁵ **Article 41 CMR:** '1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract. 2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.'

⁴³⁹⁶ Convention on the Contract for the International Carriage of Goods by Road (CMR) (1978 - the CMR Convention of Geneva, 19 May 1956 as amended by the CMR Protocol of Geneva, 5 July 1978).

mandatory provisions. These apply with the following restrictions: If the sender or recipient is a consumer, any liability restriction is ineffective, irrespective of whether it is part of a pre-formulated contract or the result of an individual agreement between the parties. Only the carriage of letters and similar items is excluded from this restriction. In agreements other than consumer contracts, deviating liability agreements are possible if they have been negotiated in detail.⁴³⁹⁷

2.2.8 Other exclusions of liability for breaches of duty

§ 309 no. 8 contains seven items in lit. a) (one item) and b) (six items). These items will be discussed in the following.

2.2.8.1 Exclusion of the right to free oneself from the contract (§ 309 no. 8 lit. a)

2.2.8.1.1 Rationale of the provision

Pursuant to § 309 no. 8 lit. a), a provision which, in case of a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the right of the other party to free himself from the contract is ineffective. This does however not apply to the terms of transport and tariff rules referred to in no. 7⁴³⁹⁸ under the conditions set out there.

This provision has practical relevance for standard clauses that exclude or restrict the client's right to cancel its contract with the supplier if the supplier does not deliver within the agreed time.⁴³⁹⁹

2.2.8.1.2 Content of the provision

The provision only concerns clauses that exclude or restrict the other party's right to terminate the contract.⁴⁴⁰⁰ If the user's standard terms contain a clause by which the user may terminate the contract, § 308 no. 3⁴⁴⁰¹ applies.⁴⁴⁰²

⁴³⁹⁷ Stoffels *AGB-Recht* 388 and 389.

⁴³⁹⁸ The enumeration in § 309 no. 7 refers to transport and tariff rules, authorised in accordance with the Passenger Transport Act [*Personenbeförderungsgesetz*], of trams, trolley buses and motor vehicles in regular public transport services, to the extent that they do not deviate to the disadvantage of the passenger from the Order on Standard Transport Terms for Tram and Trolley Bus Transport and Regular Public Transport Services with Motor Vehicles [*Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen*] of 27 February 1970.

⁴³⁹⁹ BT-Drs. 7/3919 at 32.

⁴⁴⁰⁰ BGH *NJW* 2009, 575 (576).

⁴⁴⁰¹ § 308 no. 3: '[T]he agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract' is ineffective. '[T]his does not apply to continuing obligations.'

⁴⁴⁰² Stoffels *AGB-Recht* 352.

§ 309 no. 8 lit. a) applies to all kinds of agreements, except for the terms of transport and tariff rules referred to in no. 7.⁴⁴⁰³ What is more, the exceptions contained in § 310(4)⁴⁴⁰⁴ apply.⁴⁴⁰⁵

The phrase 'free oneself from the contract' ('*sich vom Vertrag zu lösen*') does not only include the right to revoke the contract under §§ 323 (Revocation for non-performance or for performance not in conformity with the contract), 324 (Revocation for breach of a duty under section 241 (2))⁴⁴⁰⁶ and 326(5)⁴⁴⁰⁷ but all legal rights under which a contract may be terminated to the extent that they are based on a breach of the user. Hence, also the termination of contracts for the performance of a continuing obligation (open-ended agreement) for compelling reasons in terms of § 314 and other types of revocations which are at least partly based on the fact that the user committed breach (e.g., revocation of a mandate in terms of § 671) are included.⁴⁴⁰⁸

On the other hand, any right to terminate an agreement that is based on a defect of the thing sold or the work is excluded in terms of no. 8 lit. a). For these cases, no. 8 lit. b)⁴⁴⁰⁹ applies because this provision primarily covers clauses dealing with defects.⁴⁴¹⁰

The right to free oneself from the agreement must neither be excluded nor restricted. A standard clause excludes this right if it expressly denies it, but also if it contains conditions that indicate the exclusion of the exercise of this right.⁴⁴¹¹ A restriction is given if the clause contains particular conditions for the exercise of the right to free oneself from the contract that are disadvantageous for the other party.⁴⁴¹²

Hence, a clause by which the revocation 'has to be declared immediately after expiry of the grace period, and at the latest within one week after expiry of this period' is invalid because

⁴⁴⁰³ Palandt/*Grüneberg* § 309 para 59.

⁴⁴⁰⁴ § 310(4): 'This division does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements. When it is applied to employment contracts, reasonable account must be taken of the special features that apply in labour law; [§] 305 (2) and (3) must not be applied. Collective agreements and private-sector works agreements or public-sector establishment agreements are equivalent to legal provisions within the meaning of [§] 307 (3).'

⁴⁴⁰⁵ Stöffels *AGB-Recht* 352.

⁴⁴⁰⁶ § 241(2): 'An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.'

⁴⁴⁰⁷ § 326(5): 'If, under [§] 275 (1) to (3), the obligor does not have to perform, the obligee may revoke; [§] 323 applies with the necessary modifications to the revocation, subject to the proviso that it is not necessary to specify a period of time.'

⁴⁴⁰⁸ MüKo/*Wurmnest* § 309 no. 8 para 8, WLP/*Dammann* § 309 no. 8 lit. a) para 12.

⁴⁴⁰⁹ See discussion of this item below.

⁴⁴¹⁰ Stöffels *AGB-Recht* 352.

⁴⁴¹¹ WLP/*Dammann* § 309 no. 8 lit. a) para 31, Staudinger/*Coester-Waltjen* § 309 no. 8 para 9.

⁴⁴¹² WLP/*Dammann* § 309 no. 8 lit. a) para 32 *et seq.*, Staudinger/*Coester-Waltjen* § 309 no. 8 para 10.

§ 349⁴⁴¹³ does not provide for any deadline for the declaration of a revocation.⁴⁴¹⁴ Furthermore, a clause in terms of which the client has to pay an indemnity if it frees itself from the agreement is invalid because such a penalty also restricts the client's right to free itself from the contract.⁴⁴¹⁵ If a clause stipulates that for the declaration of a revocation written form is necessary, the valuations of § 309 no. 13 have to be considered. Therefore, the imposition of the simple written form is possible, but a stricter form than the written form – such as notarial recording pursuant to § 128, or official certification in terms of § 129 – is invalid.⁴⁴¹⁶

2.2.8.1.3 Relation to other provisions

§ 309 no. 8 lit. a) and § 308 no. 1 to 3 complete themselves mutually. The former ascertains that the other party's right to free itself from the contract is maintained in case of breach of the user in terms of statutory provisions, whereas the latter provisions protect the other party from abusive contract design in cases of impossibility of performance or delay, for instance.⁴⁴¹⁷

2.2.8.1.4 B2B contracts

The exclusion and restriction of the right to free oneself from the agreement, resulting from the user's breach, are generally also invalid in B2B contracts in terms of § 307.⁴⁴¹⁸ An entrepreneur's need for protection is not necessarily lower than for individuals because also entrepreneurs cannot be expected to be bound to an unacceptable contract.⁴⁴¹⁹

The Consumer Protection Act does not contain a similar provision. Item (k) of regulation 44(3) concerns the absence of reciprocity between the supplier's and the consumer's right to cancel an agreement. This item concerns the termination of contracts 'at will', whereas § 309 no. 8 lit. a) deals with cases of termination where the supplier committed breach. Furthermore, this item does not apply to open-ended agreements.⁴⁴²⁰ The item does neither apply to a termination

⁴⁴¹³ § 349: 'Revocation is effected by declaration to the other party.'

⁴⁴¹⁴ BGH NJW-RR 1989, 625 (625 *et seq.*).

⁴⁴¹⁵ Palandt/*Grüneberg* § 309 para 59.

⁴⁴¹⁶ BGH NJW-RR 1989, 625 (626).

⁴⁴¹⁷ Stoffels *AGB-Recht* 353.

⁴⁴¹⁸ BGH NJW 2009, 575 (576).

⁴⁴¹⁹ Stoffels *AGB-Recht* 353.

⁴⁴²⁰ See reg 44(3)(l) CPA.

of an agreement for stated reasons, such as breach, and a cancellation clause (*lex commissoria*)⁴⁴²¹ has to be assessed in terms of the general clause (section 48).⁴⁴²²

2.2.8.2 Defects (§ 309 no. 8 lit. b)

2.2.8.2.1 General remarks

§ 309 no. 8 lit. b) prohibits in its items aa) to ff) a number of clauses in contracts relating to the supply of newly produced things and the performance of work.

In practice, the question of the supplier's warranty in case of defects of the supplied thing or performed work is very significant. It is recognised that the statutory provisions of §§ 434 *et seq.* and §§ 633 *et seq.* concerning the clients' rights in case of defects for purchase agreements or contracts to produce a work, respectively, are fairly balanced. Therefore, any deviation from these provisions must be under scrutiny.⁴⁴²³

Because of the insertion of § 474 *et seq.*⁴⁴²⁴ due to the reform of the law of obligations of 2001, and despite only marginal modifications of § 11 no. 10 of the former AGBG, the German legislator excluded the application of the newly inserted § 309 no. 8 lit. b) to consumer contracts and the deviation from the statutory provisions. In terms of defects, consumers are now protected by §§ 474 *et seq.* which extensively refer to §§ 434 *et seq.*⁴⁴²⁵ Hence, the scope of application of no. 8 lit. b) has been reduced to contracts between consumers and those concerning real estate. Besides, for contracts of which the object are building works, no. 8 lit. b) bb) finds no application.⁴⁴²⁶ No. 8 lit. b) remains nevertheless significant for clauses in B2B contracts.⁴⁴²⁷ It even seems that the radiating effect of this provision on B2B contracts was the reason why the legislator did not much change the wording of lit. b).⁴⁴²⁸

⁴⁴²¹ A forfeiture clause entitles the creditor to cancel the contract if the debtor fails to perform by the time fixed for performance. Such a clause is enforceable. See Christie and Bradfield *Law of Contract* 534, Vessio *LLD thesis* 425. Vessio points out that the meaning of the term *lex commissaria* has been widened through trade usage and nowadays encompasses all kinds of cancellation clauses, whereby the use of 'forfeiture clause' is reserved for certain kinds of clauses in relation to specific forfeiture of payments for breach. See Vessio *LLD thesis* 425 and 426 note 2537.

⁴⁴²² See discussion on reg 44(3)(k) in Part I ch 3 para 3.4.2 d).

⁴⁴²³ UBH/Christensen § 309 no. 8 para 17.

⁴⁴²⁴ § 474: '(1) Sales of consumer goods are contracts by which a consumer buys a movable thing from a trader. A contract will likewise constitute a sale of consumer goods where its subject matter comprises, in addition to the sale of a movable thing, the provision of a service by the trader. (2) The following rules of this subtitle have concomitant application for the sale of consumer goods. This does not apply to second-hand things that are sold at a publicly accessible auction which the consumer may attend in person.'

⁴⁴²⁵ BT-Drs. 14/6040 at 80.

⁴⁴²⁶ Stoffels *AGB-Recht* 365.

⁴⁴²⁷ BT-Drs. 16/6040 at 158.

⁴⁴²⁸ Stoffels *AGB-Recht* 366.

2.2.8.2.2 Material scope of application of the provision

No. 8 lit. b) of § 309 is limited to two contract forms: the supply of newly produced things and the performance of works.

a) Supply of newly produced things

The provision is applicable to contracts concerning the supply of newly produced things. Such a supply includes purchase agreements (§ 433 *et seq.*), also contracts to produce a work (§ 631 *et seq.*)⁴⁴²⁹ and contracts to produce a work and supply materials (§ 650, ex-§ 651),⁴⁴³⁰ but also agreements the object of which is the transfer of ownership is the object.⁴⁴³¹ The definition of 'things' of § 90, i.e., corporeal things, applies. Furthermore, buildings and installation fall under no. 8 lit. b), although they are essential components or immovable fixtures of real property. As animals are governed by provisions that apply to things (§ 90a), they are also things in terms of lit. b) of no. 8.⁴⁴³²

The things to be supplied under the provision must be newly produced, and the warranty must be excluded or restricted. Newly produced is a thing only when it has not been exposed to a risk after its production that might inflict a defect by the use of the thing or the course of time. 'New' therefore is not equivalent to 'as good as new' or 'as new'.⁴⁴³³ Hence, a demonstration vehicle of a car dealer might be 'as good as new', but because of its use by several drivers, the risk of defects is increased, which is why such a car is not 'new' anymore.⁴⁴³⁴ A renovated apartment is not new, except when significant modifications in its building structure have been undertaken,⁴⁴³⁵ or the seller accepts works that are equivalent to a newly constructed building or apartment.⁴⁴³⁶ An animal is 'new' when it is sold 'unused', i.e., right after its birth.⁴⁴³⁷

b) Performance of works

The second field of application of no. 8 lit. b) concerns contracts the object of which is the performance of a work. Hence, the provision only applies where the standard terms user owes the performance of a work, i.e., a specific result.⁴⁴³⁸ Developer contracts where the developer

⁴⁴²⁹ *Werkverträge*.

⁴⁴³⁰ *Werklieferungsverträge*.

⁴⁴³¹ WLP/Dammann § 309 no. 8 lit. b) para 10.

⁴⁴³² Stoffels *AGB-Recht* 366.

⁴⁴³³ Staudinger/*Coester-Waltjen* § 309 no. 8 para 21.

⁴⁴³⁴ OLG Frankfurt/M. *NJW-RR* 2001, 780.

⁴⁴³⁵ BGH *NJW* 1988, 490.

⁴⁴³⁶ BGH *NJW* 1989, 2534 (2536).

⁴⁴³⁷ BGH *NJW* 2007, 674.

⁴⁴³⁸ Stoffels *AGB-Recht* 367.

owes the construction of one or several buildings on a real property that must still be transferred to the contractual partner also fall under the provision.⁴⁴³⁹

2.2.8.2.3 Warranty clauses pertaining to the supply of used things

Used things are typically sold without the use of standard business terms, except for pre-owned cars and art. Because these objects are not new, § 309 no. 8 lit. b) does not apply, but such clauses can be assessed under § 307. Generally, the exclusion of the user's liability for used things do not unreasonably disadvantage the other party⁴⁴⁴⁰ because the buyer is aware of the fact that the item has traces of wear and tear due to its previous use or because of its age. On the other hand, the seller generally cannot determine all defects and has no general obligation to assess the item.⁴⁴⁴¹ Before the modernisation of the law of obligations,⁴⁴⁴² the BGH authorised the complete exclusion of any warranties of used things.⁴⁴⁴³ The exclusion of the warranty for used things is now restricted, however, and the BGB does not distinguish between used and new things in sales of consumer goods (§§ 474 *et seq.*).⁴⁴⁴⁴ Hence, the entrepreneur cannot exclude its warranty for used things it sold to a consumer. Only the limitation period can be shortened to one year (§476(2)). The clause 'sold as seen, any warranties are excluded'⁴⁴⁴⁵ is therefore not permissible anymore in contracts on the sale of consumer goods because under § 476(1), the buyer's rights under §§ 434 *et seq.* cannot be excluded.⁴⁴⁴⁶

Also in other contracts, such as in contracts between consumers, in real estate agreements or in B2B contracts, the exclusion of the warranty for used things is not permissible *per se*. This is because a general exclusion of the other party's rights infringes § 309 no. 7 (damages from injury to life, body or health as well as other damages arising from gross negligence).⁴⁴⁴⁷ Such clauses are also invalid in B2B contracts because they unreasonably disadvantage the other party (§ 307(1) and (2) no. 2)).⁴⁴⁴⁸

⁴⁴³⁹ BGH NJW 1998, 904.

⁴⁴⁴⁰ WLP/Dammann Klauseln para G 75.

⁴⁴⁴¹ Stoffels *AGB-Recht* 374 and 375.

⁴⁴⁴² Gesetz zur Modernisierung des Schuldrechts of 26 November 2001 (BGBl. I at 3138).

⁴⁴⁴³ E.g., BGH NJW 1993, 657 (658 *et seq.*).

⁴⁴⁴⁴ § 474(1): 'Sales of consumer goods are contracts by which a consumer buys a movable thing from a trader. A contract will likewise constitute a sale of consumer goods where its subject matter comprises, in addition to the sale of a movable thing, the provision of a service by the trader.'

⁴⁴⁴⁵ Before the modernisation of the law of obligations, such a clause was permissible: See BGH NJW 1979, 1886 *et seq.*

⁴⁴⁴⁶ Stoffels *AGB-Recht* 375.

⁴⁴⁴⁷ Stoffels *AGB-Recht* 375.

⁴⁴⁴⁸ BGH NJW 2007, 3774 (3775).

2.2.8.2.4 The prohibited provisions in detail

The prohibited clauses in terms of § 309 no. 8 lit. b) aa) to ff) are discussed in the following.

a) Exclusion and referral to third parties (§ 309 no. 8 lit. b) aa)

Clauses providing that claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties, are prohibited.

The provision expresses the principle that the customer must remain entitled to warranties, and that its contractual partner, the user, must remain the primary obligated party for any warranty.⁴⁴⁴⁹ To achieve this purpose, the legislator has designed a threefold construction.

aa) Entire or partial exclusion of claims

Standard clauses that exclude claims against the user in their entirety or with regard to individual parts are prohibited. The client must be allowed to the minimum standard set out in §§ 434 and 634 and be entitled to free itself from the agreement.⁴⁴⁵⁰ Therefore, a clause in a contract concerning newly produced items by which 'any warranty is excluded' is ineffective. The limitation to a reduction of the purchase price under *exclusion* of a rescission is prohibited too because the client must not be forced to keep a defective thing for which he or she has no use.⁴⁴⁵¹ On the other hand, clauses that *restrict* the customer's right to a rescission are considered valid.⁴⁴⁵²

The exclusion of claims is also prohibited where it is restricted to individual parts. These are not only physical parts of the thing or the performance (e.g., accessories), but also certain categories of defects.⁴⁴⁵³ Hence, a clause by which a developer restricts its liability against the purchaser to those defects for which the developer itself has recourse against the architect, artisans and/or companies involved in the project is ineffective.⁴⁴⁵⁴

The South African greylist does not contain a similar item. Regulation 44(3)(b) is only applicable to exclusions or restrictions of legal rights or remedies in the event of breach by the supplier of obligations provided for in the agreement, i.e., contractual obligations. Non-derogable rights that are granted under other legislation do not fall under this provision though.

⁴⁴⁴⁹ WLP/Dammann § 309 no. 8 lit. b) aa) para 1.

⁴⁴⁵⁰ Stoffels *AGB-Recht* 367.

⁴⁴⁵¹ BGH *NJW* 1993, 2436 (2438).

⁴⁴⁵² Palandt/*Grüneberg* § 309 para 63.

⁴⁴⁵³ Stoffels *AGB-Recht* 368.

⁴⁴⁵⁴ BGH *NJW* 1976, 1934.

Sections 54(2) and 56(2) afford such non-derogable rights in the case of defective services or goods. For this reason, a similar provision to § 309 no. 8 lit. b) bb) concerning the exclusion of the other party's rights could be section 51(1)(b)(i) and (ii). This item blacklists clauses that purport to waive or deprive a consumer of a right in terms of the Act (i) or avoid a supplier's obligation or duty in terms of the Act (ii). Such rights are afforded to the consumer in terms of sections 54, 55 and 56 of the Act.

It is submitted that in contrast to § 309 no. 8 lit. b), section 55 does not only apply to newly produced things. This becomes clear when reading section 55(4)(c), according to which the time when the goods were produced and supplied has to be taken into account when determining whether the goods satisfy the imposed requirements. What is more, 'service' in section 54 not only includes contracts relating to the performance of work, like in § 309 no. 8 lit. b) aa), but all kind of services.

bb) Limitation to the granting of claims against third parties

It is further not allowed that users refer their clients to a third party in order to assert their rights. Clients cannot be expected to deal with a third party that they do not know and that they did not choose, no matter how solvent the third party is.⁴⁴⁵⁵

This item is also comparable to section 51(1)(b)(i) and (ii) of the Consumer Protection Act. As discussed above, section 51 has a broader scope of application than § 309 no. 8 lit. b) aa) because it is not only applicable to newly produced things, and applies to all kind of services.

cc) Prior court action against third parties

Thirdly, the user is prohibited from making the other party's claims dependent upon prior court action taken against third parties. On the other hand, provisions by which the user establishes only a subsidiary liability are not prohibited *per se*.⁴⁴⁵⁶ Hence, a clause by which the other party may only assert its claims against the user after a third has refused or is not able to meet the client's claims is not prohibited because the provision does not require any court action against the third party.⁴⁴⁵⁷

On the other hand, clauses that require that clients sue a third party in order to assert their rights are not allowed. It is likely that the customer will not initiate proceedings because of the risk of litigation, and will lose its possibility to assert its claims against the user. Such clauses can

⁴⁴⁵⁵ Stoffels *AGB-Recht* 368.

⁴⁴⁵⁶ Stoffels *AGB-Recht* 368.

⁴⁴⁵⁷ WLP/Dammann § 309 no. 8 lit. b) aa) para 40.

often be found in developer contracts where the developer tries to pass on its obligations to its subcontractors.⁴⁴⁵⁸ The BGH underlines the protectional purpose of this provision and declares clauses ineffective where the formulation fosters the danger that clients suppose that they first have to assert their claims *vis-à-vis* the third party by going to court before they can assert the user's liability.⁴⁴⁵⁹ Therefore, a clause by which the seller is only liable if the purchaser cannot enforce its claims for factual reasons (e.g., insolvency or closing-down) against the third party is ineffective. This clause is misleading. The term 'enforce' may lead the client to the conclusion that it has first to assert its rights against the third party against the third's will (i.e., by litigation) before the seller is liable under its subsidiary liability.⁴⁴⁶⁰

The BGH also considers clauses in developer contracts prohibited in terms of lit. b) aa) by which the control standard of § 307(2) no. 2 is extended. According to the court, clauses by which the purchaser has to endeavour an extrajudicial enforcement of the ceded claims against the artisans infringe § 307(2) no. 2 (limitation of essential rights or duties inherent in the nature of the contract).⁴⁴⁶¹ Such a clause takes away the advantages offered by a developer contract, i.e., the bundling of the obligations to perform in one person, the developer. The field of application of § 309 no. 8 b) aa) can therefore not be limited to its wording,⁴⁴⁶² but the spirit of the provision has to be taken into account too.

Regulation 44(3)(x) of the Act merely greylists clauses that exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, including by requiring that he or she take disputes exclusively to arbitration not covered by the Act. Unlike § 309 no. 8 lit. b) aa), item (x) of the Act does not concern standard clauses that make the granting of claims dependent upon prior court action taken against third parties.

Section 51(1)(b)(i), (ii) of the Act seems to be similar though since such clauses waive or deprive the consumer of a right afforded by the Act or avoid the supplier's obligations or duties in terms of the Act (sections 54, 55 and 56). As discussed above, section 51 has a wider scope of application than § 309 no. 8 lit. b) aa).

⁴⁴⁵⁸ Stoffels *AGB-Recht* 368.

⁴⁴⁵⁹ BGH *NJW* 1998, 904 (905).

⁴⁴⁶⁰ BGH *NJW* 1995, 1675 (1676).

⁴⁴⁶¹ BGH *NJW* 2002, 2470 (2471 *et seq.*).

⁴⁴⁶² Stoffels *AGB-Recht* 369.

b) Limitation to cure (§ 309 no. 8 lit. b) bb)

§ 309 no. 8 lit. b) bb) concerns provisions limiting the other party's claims to cure. A provision by which in contracts relating to the supply of newly produced things and relating to the performance of work claims against the user are limited in whole or in regard to individual parts to a right to cure, to the extent that the right is not expressly reserved for the other party to the contract to reduce the purchase price, if the cure should fail or, save where building work is the object of liability for defects, at its option to revoke the contract is ineffective.

In the case of a defective thing, the buyer normally has the right to demand cure, revoke the agreement or demand damages or reimbursement of futile expenditure (§ 437). A customer of a defective work may demand cure, remedy the defect himself and demand reimbursement for required expenses, revoke the contract or reduce payment, and demand damages or reimbursement of futile expenditure (§ 634 no. 1). No. 8 lit. b) bb) provides that standard clauses limiting the customer's right to cure are ineffective if they do not provide that in the event of failed cure, the client's other rights do not revive.

In order to be effective, the given standard clause must expressly grant the customer the right, after the user has failed to cure, to reduce the price or to revoke the agreement, i.e., the revival of the excluded rights.⁴⁴⁶³ It is sufficient that the clause uses the legal term 'failure'.⁴⁴⁶⁴ Otherwise, the provision must enumerate all possible cases of failure (delivery of a thing/performance without defects, repair, impossibility to cure, further attempts to cure are unacceptable for the client, but also unjustified refusal or delay to repair or to deliver a thing/performance free of defects). In terms of § 440 2nd sent., a repair is deemed to have failed after the second unsuccessful attempt, unless in particular the nature of the thing or of the defect or the other circumstances leads to a different conclusion. Hence, clauses that define a failure after three unsuccessful attempts are ineffective.⁴⁴⁶⁵

No. 8 lit. b) bb) does not mention a revival of the client's right to damages or reimbursement of futile expenditure. This means that these rights are not revived if the given standard clause has effectively excluded them. The standard of control for the exclusion or limitation of the right to damages or reimbursement is therefore particularly § 309 no. 7.⁴⁴⁶⁶

⁴⁴⁶³ Stoffels *AGB-Recht* 369 and 370.

⁴⁴⁶⁴ See, e.g., § 636 *in fine*.

⁴⁴⁶⁵ BGH *NJW* 1998, 677 (678).

⁴⁴⁶⁶ MüKo/*Wurmnest* § 309 no. 8 para 45.

Because of the difficulties to revoke a contract of building work and the danger to destruct economic values and rights, no. 8 lit. b) bb) makes an exception for these clauses, and the user may limit the other party's rights to a reduction of the price.⁴⁴⁶⁷ The BGH does not consider developer contracts as being contracts of building work, however.⁴⁴⁶⁸

The prohibition of no. 8 lit. b) bb) supposes that the client must at least be entitled to demand cure.⁴⁴⁶⁹ The user may define the form of cure (remedy of the defect or supply of a new thing that is free of defects) in its standard terms though.⁴⁴⁷⁰

It is not clear whether for contracts to produce a work the customer's right to self-help in terms of § 637,⁴⁴⁷¹ including the right to reimbursement of futile expenditure and advance payment, can be excluded or must be maintained as a minimal right. Stoffels legitimately indicates that although the right to cure builds on the right of self-help, it is an autonomous right which has to be assessed under the general clause. This right plays a significant role in contracts to produce a work and is closer to the claim for performance aiming at realising the contractual result, which is an 'essential principle of the [applicable] statutory provision' in terms of § 307(1) no. 1.⁴⁴⁷²

Regulation 44(3)(b) of the Act does not contain a similar item since the rights afforded by sections 54, 55 and 56 are non-derogable rights. Section 51(1)(b)(i) and (ii), read in conjunction with sections 54 to 56, are however applicable with the caveats mentioned above.

c) Expenses for cure (§ 309 no. 8 lit. b) cc)

Pursuant to no. 8 lit. b) cc), a provision that excludes or limits the duty of the user to bear the expenses necessary for the purpose of cure, in particular to bear transport, workmen's travel, work and materials costs is ineffective. The seller or contractor must normally bear these expenses in terms of §§ 439(2) or 635(2), respectively.

⁴⁴⁶⁷ Stoffels *AGB-Recht* 370.

⁴⁴⁶⁸ BGH *NJW* 2002, 511.

⁴⁴⁶⁹ Staudinger/*Coester-Waltjen* § 309 no. 8 para 56.

⁴⁴⁷⁰ Palandt/*Grüneberg* § 309 para 68.

⁴⁴⁷¹ § 637: '(1) If there is a defect in the work, the customer may, after the expiry without result of a reasonable period specified by him for cure, remedy the defect himself and demand reimbursement of the necessary expenses, unless the contractor rightly refuses cure. (2) [§] 323 (2) applies with the necessary modifications. A period of time need not be specified even if cure has failed or cannot reasonably be expected of the customer. (3) The customer may demand from the contractor advance payment of the expenses necessary to remedy the defect.'

⁴⁴⁷² Staudinger/*Peters/Jacoby* § 639 para 64.

According to the BGH, clauses that pass these expenses on the customer, especially when the latter's rights have been limited to cure, are problematic.⁴⁴⁷³ The provision is also applicable to standard clauses that do not restrict or exclude the other rights of the purchaser or customer, and where the right to cure is only one amongst others.⁴⁴⁷⁴

In terms of section 56(2) of the Act, the consumer may return the defective goods to the supplier within six months after delivery, without penalty and at the supplier's expense.

A term stipulating that the consumers have to bear their expenses in connection to the transport of a defective good related to a service contract could be prohibited by section 54(2). This provision does not prohibit terms under which the consumer has to bring the defective good to the supplier's place of business if the consumer exercises this right under section 54. A clause under which the consumer has to do so at his or her own expense falls under regulation 44(3)(b) though because it excludes the consumer's common-law right to claim damages for breach by the supplier in cases where the consumer can show that he or she acted reasonably by incurring costs in transporting the goods for the repair, which would have been avoided had the service been adequately performed.⁴⁴⁷⁵

d) Withholding cure (§ 309 no. 8 lit. b) dd)

In terms of item dd), a provision by which the user makes cure dependent upon prior payment of the entire fee or a portion of the fee that is disproportionate taking the defect into account is ineffective.

Such clauses are an obstacle for clients for the enforcement of their right to cure because the user makes this right dependent on the payment of the stipulated price. Hence, the customer cannot exert economic pressure on the supplier by withholding a part of the price.⁴⁴⁷⁶ The provision is thematically linked to § 309 no. 2 that deals with the exclusion or restriction of the right to refuse performance and the right of retention.⁴⁴⁷⁷ Since these cases occur more often in practice, the practical relevance of no. 8 lit. b) dd) is rather little.⁴⁴⁷⁸

Section 51 and regulation 44(3) of the Act do not contain a similar item. Regulation 44(3)(m) mainly concerns provisions in terms of which the consumer has to continue paying although

⁴⁴⁷³ BGHZ 48, 264 *et seq.*

⁴⁴⁷⁴ MüKo/Wurmnest § 309 no. 8 para 55.

⁴⁴⁷⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

⁴⁴⁷⁶ Stoffels *AGB-Recht* 371.

⁴⁴⁷⁷ See discussion of this item above.

⁴⁴⁷⁸ MüKo/Wurmnest § 309 no. 8 para 57.

the goods or services he had contracted for are not provided as agreed. Item (m) therefore concerns the supplier's principal obligation and not secondary claims such as warranties.⁴⁴⁷⁹ Item (n) of regulation 44(3) does not correspond to the German provision either. This item refers to clauses that entitle the supplier to deliver only partially, whereas the consumer would have to pay the entire price. This item does thus not concern cure.⁴⁴⁸⁰

e) Cut-off period for notice of defects (§ 309 no. 8 lit. b) ee)

Item ee) of no. 8 lit. b) concerns cut-off periods for notice of defects. In terms of this provision, standard clauses by which the user sets a cut-off period for the other party to the contract to give notice of non-obvious defects which is shorter than the permissible period of time under double letter (ff) of § 309 no. 8 lit. b) are ineffective.

Such cut-off periods for the notification of defects are in the user's interest because they ensure speedy and certain execution of the agreement. For clients, they are dangerous however because they lose their rights if they miss the given deadline. Especially for non-obvious defects, the economic result is actually a shorter limitation period.⁴⁴⁸¹ The legislator therefore designed item ee) in tandem with item ff) dealing with limitation periods. The general permissible period of time is one year (see item ff). For purchase agreements, it is five years in relation to a building, and in relation to a thing that has been used for a building in accordance with the normal way it is used and which has resulted in the defectiveness of the building (§ 438(1) no. 2). The permissible period in the context of a contract to produce a work is also five years in the case of a building and for a work of which result consists in the rendering of planning or monitoring services for this purpose (§ 634a(1) no. 2). Clauses setting out shorter cut-off periods are thus ineffective, even if the loss of the rights due to a missed deadline is not expressly mentioned in the clause. Hence, the provision 'the buyer must notify the company of any defects after they have been discovered' is ineffective, according to the BGH.⁴⁴⁸²

A contrario, a clause setting out a cut-off period for notice of *obvious* defects that is shorter than the permissible limitation period might be effective, except in consumer contracts. A defect is obvious when it can be discovered without further ado by an average non-

⁴⁴⁷⁹ See discussion of this item in Part I ch 3 para 3.4.2 f).

⁴⁴⁸⁰ See discussion of this item in Part I ch 3 para 3.4.2 g).

⁴⁴⁸¹ Stoffels *AGB-Recht* 372.

⁴⁴⁸² BGH *NJW* 2001, 292 (300).

entrepreneurial customer.⁴⁴⁸³ Such clauses are subject to the general clause.⁴⁴⁸⁴ In this regard, standard business terms should therefore distinguish between latent and patent defects.⁴⁴⁸⁵

In practice, the duration of the cut-off period for obvious defects is problematic. In any event, the period must be sufficiently long so that a typical customer has enough time to discover and assess any defects and consider which claims he or she might assert. Against the backdrop of the withdrawal period for consumer contracts contemplated in § 355(2), the cut-off period for patent defects must at least be two weeks.⁴⁴⁸⁶ A longer or shorter period might however be acceptable depending on the particularities of the given agreement and the parties' interests.⁴⁴⁸⁷

Regulation 44(3)(z) of the Consumer Protection Act greylists clauses imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer. Section 56 of the Act is 'legislation' in terms of this regulation; the parties may not deviate from such provisions by agreement.

In terms of section 56(2), the consumer may return defective goods within six months to the supplier who in return must repair or replace the defective item or refund the consumer. It is submitted that returning defective goods can be qualified as giving notice to the supplier of the defectiveness. Pursuant to section 55(5)(a), it is irrelevant whether a defect was latent or patent, or whether the consumer could have detected it before taking delivery of the item. Hence, the 'cut-off period' of item (z) is at least six months in terms of defective products, irrespective of whether the defects are obvious or non-obvious. This is notably shorter than the limitation periods set out in §§ 438 and 634a BGB (two to five years) and the minimum limitation period of one year pursuant to § 309 no. 8 lit. b) ff) in other cases. It is also shorter than the one-year minimum limitation period for the sale of consumer goods (§ 476).

It is noteworthy that the consumer's right to good quality goods under section 55 of the Act does not apply to goods bought at an auction in terms of section 45. Because of the interplay between sections 55 and 56, it is suggested that this exclusion also applies to section 56. § 474(2) excludes the application of provisions concerning contracts on the sale of consumer goods to used things bought at an auction, whereas section 55(1) does not distinguish between used and unused goods bought at an auction. In practice, this differentiation should only be

⁴⁴⁸³ UBH/*Christensen* § 309 no. 8 para 92.

⁴⁴⁸⁴ *Stoffels AGB-Recht* 372.

⁴⁴⁸⁵ *Stoffels AGB-Recht* 373.

⁴⁴⁸⁶ BGH *NJW* 1998, 3119 (3120), Palandt/*Grüneberg* § 309 para 78.

⁴⁴⁸⁷ *Stoffels AGB-Recht* 372.

relevant where new, unused things are offered at an auction, e.g., the warehouse stock of a company to be liquidated.

f) Making limitation easier (§ 309 no. 8 lit. b) ff)

Pursuant to item ff), a provision providing that the limitation of claims against the user due to defects in the cases cited in § 438 (1) no. 2 and § 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained is ineffective.

Agreements on limitation periods are in principle subject to the freedom of contract. This does not result expressly from the wording of § 202,⁴⁴⁸⁸ but is the logical consequence of the maximal limits of limitation periods set out in this provision.⁴⁴⁸⁹

On the other hand, for the sale of consumer goods, new provisions on the limitation have been inserted which aim to preserve the consumer's rights in the case of defects⁴⁴⁹⁰ as to the limitation period and the beginning of this period (§ 438).⁴⁴⁹¹ A shortening of the limitation period of two years to one year is therefore only permissible for the sale of used goods (§ 476 = ex-§ 475(2)).⁴⁴⁹² Excepted from the prohibition of disadvantageous limitation periods in consumer sale contracts are claims for damages (§ 476(3) = ex-§ 475(3)).⁴⁴⁹³

⁴⁴⁸⁸ § 202: '(1) In the case of liability for intention, the limitation period may not be relaxed in advance by legal transaction. (2) The limitation period may not be extended by legal transaction beyond a period of thirty years from the beginning of the statutory limitation period.'

⁴⁴⁸⁹ Stöffels *AGB-Recht* 373.

⁴⁴⁹⁰ § 437: 'If the thing is defective, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified, 1. under [§] 439, demand cure, 2. revoke the agreement under [§§] 440, 323 and 326 (5) or reduce the purchase price under [§] 441, and 3. under [§§] 440, 280, 281, 283 and 311a, demand damages, or under [§] 284, demand reimbursement of futile expenditure.'

⁴⁴⁹¹ § 438: '(1) The claims cited in [§] 437 no. 1 and 3 become statute-barred 1. in thirty years, if the defect consists a) a real right of a third party on the basis of which return of the purchased thing may be demanded, or b) some other right registered in the Land Register, 2. in five years a) in relation to a building, and b) in relation to a thing that has been used for a building in accordance with the normal way it is used and has resulted in the defectiveness of the building, and 3. otherwise in two years. (2) In the case of a plot of land the limitation period commences upon the delivery of possession, in other cases upon delivery of the thing. (3) Notwithstanding subsection (1) no. 2 and 3 and subsection (2), claims become statute-barred in the standard limitation period if the seller fraudulently concealed the defect. In the case of subsection (1) no. 2, however, claims are not statute-barred before the end of the period there specified. (4) The right of revocation referred to in [§] 437 is subject to [§] 218. Notwithstanding the fact that a revocation is ineffective under [§] 218 (1), the buyer may refuse to pay the purchase price to the extent he would be so entitled on the basis of revocation. If he makes use of this right, the seller may revoke the agreement. (5) [§] 218 and subsection (4) sentence 2 above apply with the necessary modifications to the right to reduce the price set out in [§] 437.'

⁴⁴⁹² § 476: 'The limitation of the claims cited in [§] 437 may not be alleviated by an agreement reached before a defect is notified to an entrepreneur if the agreement means that there is a limitation period of less than two years from the statutory beginning of limitation or, in the case of second-hand things, of less than one year.'

⁴⁴⁹³ Stöffels *AGB-Recht* 373. § 476(3): 'Notwithstanding [§§] 307 to 309, subsections (1) and (2) above do not apply to the exclusion or restriction of the claim to damages.'

In terms of consumer sale contracts, § 309 no. 8 lit. b) ff) therefore finds no application, and for other contracts, one must differentiate. In relation to a building or building materials, the limitation period is five years (§§ 438(1) no. 2 and 634a (1) no. 2)) because defects in this area often show very late so that the customer must have a period long enough to ascertain its rights. Standard clauses making the limitation period in these cases easier are thus not permissible.⁴⁴⁹⁴

The formulation 'making limitation easier' does not only include a shortening of the limitation period, but also any measures that have the same direct or indirect result, such as an earlier beginning of the limitation period.⁴⁴⁹⁵

In all other cases, the limitation period must at least be one year reckoned from the beginning of the statutory limitation period. This minimal period also applies for claims for damages in consumer contracts that are normally excluded in terms of § 476(3).⁴⁴⁹⁶

Another limit for the modification of limitation periods is set out in § 309 no. 7⁴⁴⁹⁷ because according to the leading view, shorter limitation periods are equal to a restriction of liability.⁴⁴⁹⁸ Therefore, a standard clause by which the limitation period for all possible claims is shortened infringes § 309 no. 7 because such a provision restricts personal rights (§ 309 no. 7 lit. a). Since partial retention of an ineffective clause is prohibited, such provisions cannot be partially effective.⁴⁴⁹⁹ When drafting standard business terms, users should therefore distinguish between different claims.⁴⁵⁰⁰

Regulation 44(3)(z) of the Act contains a similar provision. The formulation 'a limitation period that is shorter (...)' is however more restrictive than the wording of § 309 no. 8 lit. b) ff) 'the limitation of claims (...) is made easier'. For defective goods, the prescription period in terms of section 56(2) is six months after delivery, which is notably shorter than the limitation periods set out in §§ 438 and 634a BGB (two to five years) and the minimum limitation period of one year pursuant to § 309 no. 8 lit. b) ff) in other cases. It is also shorter than the one-year minimum limitation period for the sale of consumer goods (§ 476).

⁴⁴⁹⁴ Stoffels *AGB-Recht* 373.

⁴⁴⁹⁵ Staudinger/*Coester-Waltjen* § 309 no. 8 para 95.

⁴⁴⁹⁶ BT-Drs. 14/1640 at 159.

⁴⁴⁹⁷ See BT-Drs. 14/1640 at 159.

⁴⁴⁹⁸ E.g., BGH *NJW* 2013, 2584 (2585), UBH/*Christensen* § 309 no. 7 para 28.

⁴⁴⁹⁹ BGH *NJW* 2009, 1486 (1487).

⁴⁵⁰⁰ HK/*Schulte-Nölke* § 309 para 40.

2.2.8.2.5 Warranty clauses in B2B contracts

The rationale of the prohibited clauses contained in § 309 no. 8 lit. b) is to protect clients from standard terms undermining the right to receive items without defects. Entrepreneurs have to be protected from unbalanced provisions too, which is why the valuations of § 309 no. 8 lit. b), except from some modifications, influence the enquiry of clauses relating to the supply of newly produced things and relating to the performance of work in B2B contracts in terms of the general clause by § 310(1) 2nd sent.⁴⁵⁰¹

Since the practical relevance of no. 8 lit. b) has been restricted due to the insertion of the provisions pertaining to the sale of consumer goods (§§ 474 *et seq.*), the principal field of application of this provision is now B2B contracts by means of the radiating effect of no. 9 on the general clause.⁴⁵⁰² The following modifications or restrictions apply to B2B contracts:

Item aa) of § 309 no. 8 lit. b): In B2B contracts, the exclusion of claims against the user in their entirety in terms of §§ 437 or 634 is also prohibited.⁴⁵⁰³ The user can make its liability dependent on prior court action taken against third parties, however.⁴⁵⁰⁴ **Item bb):** Provisions by which claims against the user are limited to individual parts to a right to cure, are prohibited in contracts with entrepreneurs too.⁴⁵⁰⁵ It is disputable though whether the express reservation for the other party to reduce the purchase price is dispensable.⁴⁵⁰⁶ **Item cc):** The expenses necessary for cure cannot be passed on the other party to the contract also in B2B contracts.⁴⁵⁰⁷ **Item dd):** Clauses that make cure dependent upon prior payment of the price are also prohibited in B2B contracts.⁴⁵⁰⁸ **Item ee):** The prohibition of setting a cut-off period for the other party to give notice of non-obvious defects which is shorter than the permissible period of time under item ff) does not apply to B2B contracts. The valuations for these contracts are contained in § 377 HGB.⁴⁵⁰⁹ The BGH decided that a clause by which the buyer has to notify the seller of

⁴⁵⁰¹ Stoffels *AGB-Recht* 375.

⁴⁵⁰² Stoffels *AGB-Recht* 376.

⁴⁵⁰³ BGH *NJW* 1994, 1060 (1066).

⁴⁵⁰⁴ UBH/*Christensen* § 309 no. 8 para 47.

⁴⁵⁰⁵ BGH *NJW* 1998, 677 (678).

⁴⁵⁰⁶ For dispensability: WLP/*Dammann* § 309 no. 8 lit. b) bb) para 56, against dispensability: UBH/*Christensen* § 309 no. 8 para 70, Staudinger/*Coester-Waltjen* § 309 no. 8 para 66. The BGH has not decided yet in this regard. See BGH *NJW* 1998, 679 (680).

⁴⁵⁰⁷ BGH *NJW* 1981, 1510.

⁴⁵⁰⁸ Erman/*Roloff* § 309 para 112, Palandt/*Grüneberg* § 309 para 71.

⁴⁵⁰⁹ Bamberger/*Roth/Becker* § 309 para 71, Erman/*Roloff* § 309 para 112. **§ 377 HGB:** '(1) If the purchase is a commercial transaction for both parties, the buyer must inspect the goods immediately after delivery by the seller, insofar as this is feasible in the ordinary course of business, and, if a defect becomes apparent, notify the seller immediately. (2) If the buyer fails to notify the Seller, the goods shall be deemed to have been accepted unless the defect was not identifiable during the inspection. (3) If such a defect becomes apparent later, the notification must be made immediately after discovery; otherwise the goods shall be deemed to have been approved even in view

any latent or patent defects within three days is ineffective because it is too short. A total loss of the buyer's claims can only be justified, according to the court, where the buyer does not fulfil its obligations for the normal execution of the contract.⁴⁵¹⁰ **Item ff):** Before the law of obligations was modernised, the BGH was of the view that the prohibition of making limitation easier (then contained in § 11 no. 10 lit. f) AGBG) was also applicable to B2B agreements by application of the general clause.⁴⁵¹¹ It is not clear though whether this prohibition does now generally apply between entrepreneurs, especially after the extension of the limitation periods due to the modernisation of the law of obligations. The fact that many defects contained in buildings or building materials only show after a very long period of time speaks for maintaining the five-year period of §§ 438 no. 2 and 434a no. 2 also in B2B contracts.⁴⁵¹² For other defects and certain constellations in B2B agreements, it is imaginable though to go slightly below the minimum limitation period of one year.⁴⁵¹³

2.2.8.2.6 Manufacturer warranties

Manufacturers of technical equipment often join warranty⁴⁵¹⁴ vouchers to their items in which they warrant that the item sold is free from defects. These manufacturer warranties – which are legally independent warranty agreements – go beyond the seller's warranty and improve the purchaser's position. The buyer can choose if either the seller or the manufacturer should be liable for any defects. Therefore, content control is regularly excluded in terms of § 307(3) because the manufacturer's warranty does not derogate from the legal rights in terms of §§ 434 *et seq.* but supplements them. Such warranties are not a performance (in the broad sense) in terms of § 309 no. 8 lit. b).⁴⁵¹⁵ Manufacturers are thus free concerning the extent of such warranties. Nevertheless, they must formulate them in a fashion that does not infringe the transparency requirement of § 307(1) 2nd sent., e.g., by exactly describing the extent of their (manufacturer) warranty *vis-à-vis* the seller's (legal) warranty.⁴⁵¹⁶

of this defect. (4) The timely dispatch of the notification shall suffice to preserve the purchaser's rights. (5) If the seller has fraudulently concealed the defect, he may not invoke these provisions. My own translation.

⁴⁵¹⁰ BGH NJW 1992, 575 (576).

⁴⁵¹¹ BGH NJW 1984, 1750 (1751). Concerning the former law, see also BGH NJW 2014, 206 (207 *et seq.*).

⁴⁵¹² Stöffels *AGB-Recht* 376 and 377.

⁴⁵¹³ UBH/Christensen § 309 no. 8 para 106, Palandt/*Grüneberg* § 309 para 84.

⁴⁵¹⁴ The German terminology distinguishes between '*Sachmängelhaftung*' in the sense of §§ 434 *et seq.* (i.e., legally granted warranties) and '*Garantien*', such as the manufacturer warranty (i.e., contractual warranties). Both are translated by 'warranties' in English.

⁴⁵¹⁵ Stöffels *AGB-Recht* 377.

⁴⁵¹⁶ BGH NJW 1988, 1726 (1727).

The BGH is of the view that these warranties are subject to content control if the client has to pay a fee for it, and it is merely a complementary performance.⁴⁵¹⁷ Then, the same principles apply as for the seller's warranty in terms of §§ 434 *et seq.* Stoffels and Steimle rightly criticise the BGH's argumentation in that the characteristic of remuneration for a warranty should not determine whether it is subject to content control. They argue that the assessment should be limited to whether the mutual rights and obligations are transparently formulated in the warranty contract and whether their content is surprising in terms of § 305c(1).⁴⁵¹⁸

2.2.9 Duration of continuing obligations (§ 309 no. 9)

Pursuant to § 309 no. 9, in a contractual relationship the subject matter of which is the regular supply of goods or the regular rendering of services or work performance by the user, a) a duration of the contract binding the other party to the contract for more than two years, b) a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract, or c) a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract is ineffective. This does not apply to contracts relating to the supply of things sold as belonging together or to insurance contracts.

2.2.9.1 Rationale of § 309 no. 9

The duration of contracts is significant for customers because they hardly can evaluate their needs, economic situation and interest in the distant future.⁴⁵¹⁹ Restricting the duration of contracts in standard terms ensures not only the freedom of disposal⁴⁵²⁰ of consumers but also market mobility.⁴⁵²¹ In standard business terms law, the other party is protected from too long durations by § 309 no. 9 and the general clause. § 309 no. 9 protects customers from entering into contracts with too long durations by limiting the initial duration to two years, tacit extensions to one year and notice periods to three months for certain continuing obligations (or open-ended agreements).⁴⁵²²

Interestingly, neither the South African blacklist nor the greylist contain a similar item. Regulation 44(3)(i) only prohibits the supplier from terminating an open-ended agreement without reasonable notice, except for breach committed by the consumer. Item (o) greylists

⁴⁵¹⁷ BGH *NJW* 2011, 3510.

⁴⁵¹⁸ Stoffels *AGB-Recht* 378, Steimle *NJW* 2014, 194.

⁴⁵¹⁹ BT-Drs. 7/5422 at 9.

⁴⁵²⁰ *Dispositionsfreiheit*.

⁴⁵²¹ HK/*Schulte-Nölke* § 309 para 43.

⁴⁵²² Stoffels *AGB-Recht* 301.

clauses in terms of which the supplier, but not the consumer, is permitted to renew or not renew the agreement. Section 14 of the Act is only applicable to fixed-term agreements.⁴⁵²³

Hence, clauses stipulating the duration, tacit extension and/or termination of open-ended agreements must be assessed in terms of section 48.

2.2.9.2 Concerned contract types

No. 9 only applies to contractual relationships the subject matter of which is the regular supply of goods or the regular rendering of services or work performances by the user. This means that this provision does not target continuing obligations *per se*. This provision does not concern significant contract types such as lease, usufructuary lease, franchising agreements or leasing contracts. What is more, it clearly sets out that the person who renders performance must be the user and not a third party. Otherwise, the clause must be assessed under § 307.⁴⁵²⁴

The given agreement must govern a continuing obligation, i.e., the more time has passed the more the total volume of the performance has increased.⁴⁵²⁵ This also applies to deliveries or performances that vary during the duration of the contract.⁴⁵²⁶ For the delivery of goods, the regularity of the deliveries is compelling for the application of no. 9. A key service contract, for instance, does not contain such an element of regularity because the performance is rendered randomly, i.e., when the client has lost its key.⁴⁵²⁷ Otherwise, the given contract can stipulate all sorts of movable tangible goods, such as liquid gas, software programmes or beer.⁴⁵²⁸ The official statement mentions newspaper and magazine subscriptions as well as 'memberships' in book clubs where customers have to choose a certain book or product, or at least the 'product of the month' on a regular basis.⁴⁵²⁹

§ 309 no. 9 is also applicable to contracts concerning the regular rendering of services⁴⁵³⁰ or work performances.⁴⁵³¹ Since the legal consequences in terms of no. 9 are the same, a demarcation of both contractual types is superfluous in this regard. The crucial element is that

⁴⁵²³ See discussion of these provisions in Part I ch 3 para 3.4.2 h).

⁴⁵²⁴ Stoffels *AGB-Recht* 301 and 302.

⁴⁵²⁵ Palandt/*Grüneberg* § 314 para 2.

⁴⁵²⁶ Martinek *BB* 1989, 1277 (1284).

⁴⁵²⁷ KG *NJW-RR* 1994, 1267 (1268).

⁴⁵²⁸ Stoffels *AGB-Recht* 302.

⁴⁵²⁹ BT-Drs. 7/3919 at 37. Some of these legal relationships between the 'member' and the book club are designed according to company law. However, the exception of § 310(4) BGB for company law in terms of the application of §§ 305 *et seq* only applies to performances that are based on the articles of association. Otherwise, § 309 no. 9 is applicable. See BGH *NJW-RR* 1992, 379.

⁴⁵³⁰ §§ 611 *et seq*.

⁴⁵³¹ §§ 631 *et seq*.

the performances are rendered within a single contractual relationship and that the parties do not have to enter into a new agreement for each performance.⁴⁵³²

Examples are teaching contracts,⁴⁵³³ memberships of matrimonial agencies,⁴⁵³⁴ window or sidewalk cleaning contracts, or maintenance contracts for technical installations.⁴⁵³⁵ Exclusive real estate brokerage agreements do not contain the regular rendering of a service and therefore do not fall under no. 9.⁴⁵³⁶ The same applies to the so-called 'BahnCard' which grants train tickets at a lower fare. With a BahnCard, the client is only entitled to buy tickets at a lower price, and there is no element of regularity.⁴⁵³⁷

§ 309 no. 9 is applicable to mixed contracts if in the overall view, the element of a purchase, rendering of a service or work performance is dominant with regard to the other contractual elements.⁴⁵³⁸ A contract on assisted living, for instance, is a mixed contract with elements of a service contract (dominant element) and those of a work performance contract and lease. Hence, § 309 no. 9 is applicable to those contracts.⁴⁵³⁹ In gym contracts, usually the fact that the gym owner offers its premises and the equipment for use to its clients is the predominant element. Nonetheless, the fact that a personal trainer gives initial instructions to the customers for the use of the equipment and that the contract often includes the participation in fitness classes has to be considered as well.⁴⁵⁴⁰

On the other hand, no. 9 does not apply to employment contracts.⁴⁵⁴¹ Although these contracts are not excluded from content control *per se* (§ 310(4)), fixed-term employment contracts are regulated in the Part-Time and Fixed-Term Employment Act (TzBfG),⁴⁵⁴² which is *lex specialis* to the BGB provisions. What is more, the legislator's intention with regard to the protection of employment contracts is another than for open-ended agreements under § 309 no. 9. For the legislator, temporary employment is a 'flaw' and not the standard. This is expressed by the fact that fixed-term employments need a special justification,⁴⁵⁴³ and an

⁴⁵³² Stöffels *AGB-Recht* 302.

⁴⁵³³ For distance learning contracts, the compelling provisions of the Fernunterrichtsschutzgesetz (FernUSG) which are *leges speciales* to the BGB provisions, apply.

⁴⁵³⁴ BT-Drs. 7/3919 at 37.

⁴⁵³⁵ Stöffels *AGB-Recht* 303.

⁴⁵³⁶ WLP/Dammann § 309 no. 9 para 29, UBH/Christensen § 309 no. 9 para 11.

⁴⁵³⁷ BGH *NJW* 2010, 2942 (2943).

⁴⁵³⁸ BGH *NJW* 2007, 213 (214).

⁴⁵³⁹ BGH *NJW* 2007, 213 (214).

⁴⁵⁴⁰ Stöffels *AGB-Recht* 303.

⁴⁵⁴¹ Stöffels *AGB-Recht* 303.

⁴⁵⁴² Gesetz über Teilzeitarbeit und befristete Arbeitsverträge or Teilzeitbefristungsgesetz (TzBfG).

⁴⁵⁴³ § 14 TzBfG.

invalid employment agreement with a limited duration is transformed *ex lege* into an open-ended contract.⁴⁵⁴⁴ The temporal limitation of certain labour conditions must be assessed under the general clause though.⁴⁵⁴⁵

2.2.9.3 Exceptions for certain contracts

§ 309 no. 9 *in fine* sets out that the provision does not apply to contracts relating to the supply of things sold as belonging together or to insurance contracts. The reason for these exceptions is that not only the user but also the other party has an interest in a longer duration for these contracts.⁴⁵⁴⁶ This provision is idle though since contracts on things that are sold together (e.g., a multivolume encyclopaedia)⁴⁵⁴⁷ are no open-ended agreements in the sense of no. 9. For such instalment contracts, no. 9 merely has a clarifying function.⁴⁵⁴⁸ Although insurance policies are continuing obligations in the sense of no. 9, they do not concern the regular supply of goods or services or work performances.⁴⁵⁴⁹

2.2.9.4 Duration

§ 309 no. 9 lit. a) prohibits a duration of the contract binding the other party for more than two years. Agreements can be cancelled by giving an ordinary notice of termination. A clause granting a right to an extraordinary termination is not sufficient though because such a right depends on narrowly defined conditions.⁴⁵⁵⁰ Standard clauses that exclude the right to terminate an open-ended agreement not before the expiry of two years also infringe no. 9.⁴⁵⁵¹

The duration in the sense of no. 9 starts at the moment of entering into the agreement, and not when the goods are supplied or the service or work performance is rendered, because the onerous situation for the other party begins with the start of the duration during which it is bound to the contract.⁴⁵⁵² If the parties agree to an initial trial period, such period is not taken into account.⁴⁵⁵³

However, a standard clause that does not infringe no. 9 but provides for a duration of the contract longer than two years is not effective *per se*. The final assessment of the validity of

⁴⁵⁴⁴ § 16 TzBfG.

⁴⁵⁴⁵ Stoffels *AGB-Recht* 303 and 304.

⁴⁵⁴⁶ UBH/*Christensen* § 309 no. 9 para 8.

⁴⁵⁴⁷ This example is mentioned in BT-Drs. 7/3919 at 42.

⁴⁵⁴⁸ WLP/*Dammann* § 309 no. 9 paras 16-21.

⁴⁵⁴⁹ UBH/*Christensen* § 309 no. 9 para 8.

⁴⁵⁵⁰ L/GvW/T/*Trinkner* § 11 no. 12 AGBG para 19.

⁴⁵⁵¹ OLG Frankfurt *NJW-RR* 1987, 438 (439).

⁴⁵⁵² MüKo/*Wurmnest* § 309 no. 9 para 12, UBH/*Christensen* § 309 no. 9 para 13.

⁴⁵⁵³ BGH *NJW* 1993, 326 (327 *et seq.*).

the clause must be undertaken by applying the general clause.⁴⁵⁵⁴ The legislator believed that 'in the view of the diversity of agreements on continuing obligations'⁴⁵⁵⁵ a more generalising approach was necessary and only wished to set out maximum durations⁴⁵⁵⁶ an exceedance of which would always make the clause ineffective. A clause that does not stipulate the duration of the contract of more than two years speaks however for the validity of the clause, and the ineffectiveness of this clause should only result of particular circumstances that are not taken into consideration by no. 9.⁴⁵⁵⁷ For this reason, the BGH ruled that an initial contractual period of two years for newspaper or magazine subscription was valid.⁴⁵⁵⁸

Agreements that do not fall under the scope of application of no. 9 are assessed in terms of the general clause, but the legal valuations of no. 9 are taken into account.⁴⁵⁵⁹

No. 9 does not apply to continuing obligations for which the legislator has provided for particular norms that take into account the interests of both sides. Such a norm is the *Wohnungseigentumsgesetz* (WEG), the Act on the Ownership of Apartments and the Permanent Residential Right.⁴⁵⁶⁰ The owners of apartments have an interest that the duration of the mandate of the administrator is not too short, which is why, after a weighing of all interests, the legislator provided in § 26(1) 2nd sent. WEG that the administrator is appointed for a maximum of five years. A recourse to § 309 no. 9 is not permitted. The BGH assesses though if, despite the maximum duration of five years, the clause is valid in terms of § 307.⁴⁵⁶¹

The problem of standard forms containing blank fields to be filled out by the customer has already been discussed.⁴⁵⁶² A client who can choose between several options given by the supplier concerning the duration of the contract does not have a real choice.⁴⁵⁶³ By doing so, the user could circumvent §§ 305 *et seq.* by giving several inadmissible options. Therefore, if the customer can choose between a duration of three years and a duration of four years for the subscription of a newspaper, both options are prohibited in terms of § 309 no. 9 lit. a) because they impose a contract duration longer than two years.⁴⁵⁶⁴

⁴⁵⁵⁴ Stoffels *AGB-Recht* 305.

⁴⁵⁵⁵ BT-Drs. 7/5422 at 9. My own translation.

⁴⁵⁵⁶ BT-Drs. 7/3919 at 37.

⁴⁵⁵⁷ Palandt/*Grüneberg* § 309 para 94.

⁴⁵⁵⁸ BGH *NJW* 1987, 2012 (2012 *et seq.*).

⁴⁵⁵⁹ MüKo/*Wurmnest* § 309 no. 9 para 11. See also discussion below in this chapter.

⁴⁵⁶⁰ Staudinger/*Coester-Waltjen* § 309 no. 9 para 8, UBH/*Christensen* § 309 no. 9 para 9.

⁴⁵⁶¹ BGH *NJW* 2002, 3240 (3246).

⁴⁵⁶² See ch 2 on the scope of application of §§ 305 *et seq.*

⁴⁵⁶³ MüKo/*Basedow* § 305 para 16.

⁴⁵⁶⁴ Stoffels *AGB-Recht* 45.

2.2.9.5 Tacit extension of the contractual relationship

Many contracts contain a clause by which the duration of the agreement is tacitly extended by a certain period of time. § 309 no. 9 lit. b) prohibits tacit extensions by more than one year in each case that is binding on the other party. The legislator was of the view that this is the maximum duration that is still reasonable for consumers.⁴⁵⁶⁵ The BGH considers that a one-year extension is generally effective.⁴⁵⁶⁶

2.2.9.6 Notice period

According to § 309 no. 9 lit. c), a notice period longer than three months prior to the expiry of the duration of the contract is ineffective. It is irrelevant whether the notice period refers to the contract as originally agreed or tacitly extended. It is also irrelevant if the duration has been agreed in standard business terms or by an individual agreement.⁴⁵⁶⁷ A clause providing that the other party can only give notice three months to quarter-end is also ineffective.⁴⁵⁶⁸

No. 9 is completed by § 309 no. 13, according to which clauses under which a more stringent form than written form or special receipt requirements are not permitted.⁴⁵⁶⁹

2.2.9.7 Legal consequences in the case of a longer extension or notice period

A contract that contains a standard clause providing for an unreasonably long extension period (lit. b) cannot be upheld by assuming a shorter and reasonable period because the law does not provide for an automatic extension of contracts that have been concluded for a fixed term.⁴⁵⁷⁰ Hence, the contract ends with the expiry of the initially agreed term.

For clauses concerning the initial term (lit. a) and notice periods (lit. c) the filling of the existing gap can be delicate. Since in many cases the law does not provide for a duration or notice period, the given period must be ascertained by complementary interpretation.⁴⁵⁷¹ This is relevant for contracts to produce a work because § 648⁴⁵⁷² is often not applicable since the customer's obligation to pay the supplier might be more cumbersome than the ineffective

⁴⁵⁶⁵ BT-Drs. 7/3919 at 37.

⁴⁵⁶⁶ BGH NJW 1997, 739 (739 *et seq.*).

⁴⁵⁶⁷ Palandt/Grüneberg § 309 para 93, UBH/Christensen § 309 no. 9 para 18.

⁴⁵⁶⁸ KG NJW-RR 2009, 1212.

⁴⁵⁶⁹ Stöffels AGB-Recht 306.

⁴⁵⁷⁰ BGH NJW 2000, 1110 (1113 *et seq.*), Staudinger/Coester-Waltjen § 309 para 23.

⁴⁵⁷¹ UBH/Christensen § 309 no. 9 para 21.

⁴⁵⁷² § 648 (ex-§ 649): 'The customer may terminate the contract at any time up to completion of the work. If the customer terminates the contract, then the contractor is entitled to demand the agreed remuneration; however, he must allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five percent of the remuneration accounted for by the part of the work not yet provided.'

clause.⁴⁵⁷³ In service contracts, a recourse to §§ 620(2) and 621⁴⁵⁷⁴ is possible. In other cases, legal provisions can be applied by analogy, e.g., the FernUSG.⁴⁵⁷⁵

2.2.9.8 B2B contracts

The valuations contained in no. 9 are no indication for contracts between entrepreneurs.⁴⁵⁷⁶ Open-ended agreements often have longer durations in B2B contracts, and their effectiveness has to be assessed in terms of the general clause.⁴⁵⁷⁷

2.2.9.9 Content control in terms of the general clause

a) Contract duration clauses

German courts generally do not consider a clause by which the other party is bound to an open-ended contract for several years an unreasonable disadvantage for this party. The courts instead perform a weighing of interests. When assessing whether such a clause is generally fair or if the balance of the parties' rights and obligations is significantly disturbed, they take into account the parties' typical needs.⁴⁵⁷⁸ The maximum commitment period depends above all on how significant the user's counter-performances are. If the counter-performance involves high development and storage costs that are amortised only after a longer contract duration, a more extended commitment period is usually justified.⁴⁵⁷⁹

Hence, a standard clause in a beer delivery contract in terms of which the other party is bound for ten years is generally not considered an unreasonable disadvantage for the innkeeper who is an entrepreneur in the sense of § 14.⁴⁵⁸⁰ Such a contract usually is concluded in conjunction with a loan for the development and continuation of the inn and by which the ongoing receiving

⁴⁵⁷³ UBH/*Christensen* § 309 no. 9 para 21.

⁴⁵⁷⁴ § 620(2): 'If the duration of the service relationship neither is specified nor may be inferred from the nature or the purpose of the services, then either party may terminate the service relationship under the provisions of [§§] 621 to 623.' § 621: 'In the case of a service relationship that is not an employment relationship within the meaning of [§] 622, termination is allowed 1. if the remuneration is assessed by days, on any day to the end of the following day; 2. if the remuneration is assessed by weeks, at the latest on the first working day of a week to the end of the following Saturday; 3. if the remuneration is assessed by months, at the latest by the fifteenth of one month to the end of the calendar month; 4. if the remuneration is assessed by quarters or longer periods of time, observing a notice period of six weeks, to the end of a calendar quarter; 5. if the remuneration is not assessed by time periods, at any time; in the case of a service relationship that completely or mainly takes up the economic activity of the person obliged; however, a notice period of two weeks must be observed.'

⁴⁵⁷⁵ FernUSG = Fernunterrichtsschutzgesetz (Distance Learning Protection Act). UBH/*Christensen* § 309 no. 9 para 21.

⁴⁵⁷⁶ BGH *NJW* 2003, 886 (887).

⁴⁵⁷⁷ Stoffels *AGB-Recht* 307.

⁴⁵⁷⁸ BGH *NJW* 1997, 3022 (3023).

⁴⁵⁷⁹ BGH *NJW-RR* 2012, 249 (250).

⁴⁵⁸⁰ § 14: '(1) An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession. (2) A partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities.'

of beer deliveries is amortised. A ten-year commitment is usual practice in this domain and takes sufficiently into consideration both parties' interests.⁴⁵⁸¹ On the other hand, a ten-year duration of a consumption meter is disadvantageous in the sense of § 307.⁴⁵⁸² Furthermore, a ten-year duration for a franchising agreement, which is the general practice in the fast-food industry, does hardly reflect a fair balancing of the parties' interests.⁴⁵⁸³ The same applies to a 20-year duration for a 'supply contract' where the entrepreneur is entitled to install, operate and market telecommunication devices in apartment buildings.⁴⁵⁸⁴ Invalid are also clauses by which the insured person (personal liability insurance)⁴⁵⁸⁵ is bound for ten years.⁴⁵⁸⁶ Such a long duration impairs the insured person's freedom of disposal when its personal or economic situation changes within the duration of the contract and prevents it from reacting when the market changes (e.g., better premiums).⁴⁵⁸⁷

b) Extension clauses

aa) Automatic extension clauses

A pre-formulated extension clause infringes the transparency requirement if it might give the impression that the contract has a fixed term, and customers therefore might shy away from terminating the agreement at any time in terms of § 627 (termination without notice in the case of a position of trust).⁴⁵⁸⁸ In this regard, the BGH decided that the following standard clause of a gym membership contract does not disadvantage the other party unreasonably and is therefore not ineffective in terms of § 307: 'The contract is tacitly extended for a further six months if it is not terminated in due form and time.'⁴⁵⁸⁹

bb) Option clauses

When confronted with an option clause in terms of content control, one has to consider the total duration of the contract because the unreasonableness might result from the initial and

⁴⁵⁸¹ BGH *NJW* 2001, 2331.

⁴⁵⁸² BGH *NJW-RR* 2008, 818.

⁴⁵⁸³ Stöffels *AGB-Recht* 308.

⁴⁵⁸⁴ BGH *NJW* 1997, 3022.

⁴⁵⁸⁵ The exclusion of § 309 no. 9 *in fine* concerning insurance contracts does not apply to § 307.

⁴⁵⁸⁶ BGH *NJW-RR* 1997, 1000.

⁴⁵⁸⁷ Stöffels *AGB-Recht* 308.

⁴⁵⁸⁸ BGH *NJW* 1999, 276. § 627: '(1) In a service relationship that is not an employment relationship within the meaning of [§] 622, notice of termination is allowed, even without the requirement specified in [§] 626, if the person obliged to perform services, without being in a permanent service relationship with fixed earnings, must perform services of a higher nature with which people are customarily entrusted on the basis of special trust. (2) The person obliged to perform services may only give notice in such a manner that the person entitled to services can obtain the services elsewhere, unless there is a compelling reason for untimely notice of termination. If he should give notice in untimely fashion without such cause, then he must compensate the person entitled to services for damage arising from this.'

⁴⁵⁸⁹ BGH *NJW* 1997, 739. My own translation.

subsequent duration of the agreement.⁴⁵⁹⁰ In this regard, it is referred to the aforementioned explanations.

c) Termination clauses

Termination clauses for which § 309 no. 9 lit. c) is not applicable are to be assessed in terms of the general clause. With regard to the diversity of such clauses, it is difficult to give a general assessment. Such clauses exclude the right to cancel the agreement or modify the conditions for the termination or the notice period. Hence, the mutual interests of the parties have to be taken into consideration. Sometimes, normative evaluations must be taken into account because they are mandatory, or offer at least an evaluative guideline.⁴⁵⁹¹

The employment protection norms, mainly laid down in the Kündigungsschutzgesetz (KSchG),⁴⁵⁹² are mandatory and cannot be modified to the employee's disadvantage.⁴⁵⁹³ A standard clause in a commercial agency contract according to which the sideline agent can terminate the agreement only after three years and by giving notice twelve months before the end of the calendar year is ineffective under § 92b(1) 2nd sent. HGB.⁴⁵⁹⁴ In terms of § 89(2) 1st sent., the period of notice to be observed by the principal may not be shorter than that to be observed by the commercial agent.⁴⁵⁹⁵

2.2.10 Change of other party to contract (§ 309 no. 10)

§ 309 no. 10 provides that a provision according to which in the case of purchase, loan or service agreements or agreements to produce a result a third party enters into, or may enter into, the rights and duties under the contract in place of the user, unless, in that provision, a) the third party is identified by name, or b) the other party to the contract is granted the right to free himself from the contract is ineffective.

The fact that such a clause is valid if the third party is identified (lit. a) or the other party is granted the right to free itself from the agreement (lit. b) makes this provision much less acrimonious, however.⁴⁵⁹⁶

⁴⁵⁹⁰ BGH *NJW* 2000, 1110 (1112).

⁴⁵⁹¹ Stoffels *AGB-Recht* 309.

⁴⁵⁹² The German Kündigungsschutzgesetz (Protection Against Dismissal Act) is not to be confused with the Austrian Consumer Protection Act (Konsumentenschutzgesetz) that is also abbreviated 'KSchG'.

⁴⁵⁹³ *ErFK/Oetker* § 1 KSchG para 13.

⁴⁵⁹⁴ BGH *NJW* 2013, 2111 *et seq.* § 92b(1) 2nd sent. HGB: 'Where the agency contract is entered into for an indefinite period, it can be terminated by giving one month's notice of termination to become effective at the end of a calendar month; if a different period of notice is agreed upon, it must be the same for both parties.'

⁴⁵⁹⁵ Stoffels *AGB-Recht* 309.

⁴⁵⁹⁶ UBH/*Habersack* § 309 no. 10 para 1.

Contrary to the BGB provision that prohibits such clauses (with the exceptions in lit. a) and b)), regulation 44(3)(t) greylists clauses giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement. The South African provision covers all types of agreements and is not limited to certain contract types, unlike the German BGB provision. What is more, contrary to the German or the similar EU⁴⁵⁹⁷ provision, the item in the South African greylist only refers to the transfer of obligations, and not to the transfer of rights. This means that the free assignability of claims (rights) – an important factor in the credit economy – is not concerned by item (t) of regulation 44(3).⁴⁵⁹⁸ On the other hand, item (t) contains the requirement of a 'detriment to the consumer', which is inexistent in § 309 no. 10. The German legislature considers all transfers of rights and obligations without the other party's consent detrimental to the consumer (with the exceptions set out in lit. a) and b)), whereas the South African item presumes such a clause unfair, if he or she relied on the supplier's market reputation, goodwill, or a personal relation with the supplier (e.g., in a contract with an architect or lawyer).⁴⁵⁹⁹

2.2.10.1 Rationale of § 309 no. 10

No. 10 has the objective to ensure that the other party is able to check, before entering into the contract or withdrawing from it in terms of § 355, that the third party who shall become its new contractual partner is reliable and solvent.⁴⁶⁰⁰ The customer shall be protected from a contractual partner that it does not know or that he expressly did not want to choose in the first place, e.g., because of a bad experience with this supplier in the past. The supplier's information given to the consumer in its offer, its ability to perform and its reliability would lose any meaning if it were possible to get rid of one's obligations easily.⁴⁶⁰¹ Clauses such as 'we are entitled to transfer our rights and obligations under the contract to a third party' were quite common, above all in agreements for newspaper or book series subscriptions or distance learning contracts.⁴⁶⁰² Today, the prohibition has rather little practical relevance.⁴⁶⁰³

⁴⁵⁹⁷ Under item (p) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993 clauses 'giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement' may be regarded as unfair. See also art II-9:410(o) of the Draft Common Frame of Reference.

⁴⁵⁹⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 104.

⁴⁵⁹⁹ See discussion on reg 44(3)(t) in Part I ch 3 para 3.4.4 a).

⁴⁶⁰⁰ See BGH *NJW* 1980, 2518.

⁴⁶⁰¹ BT-Drs. 7/3919 at 38.

⁴⁶⁰² BT-Drs. 7/3919 at 38.

⁴⁶⁰³ Stoffels *AGB-Recht* 310.

2.2.10.2 Contents of the provision

a) Concerned contract types

No. 10 includes purchase,⁴⁶⁰⁴ loan,⁴⁶⁰⁵ service agreements⁴⁶⁰⁶ and agreements to produce a result.⁴⁶⁰⁷ Not expressly mentioned, but also included are contracts dealing with the supply of movable things to be produced or manufactured.⁴⁶⁰⁸ Contracts concerning the cession of rights to use a thing, such as leasing agreements, are not included.⁴⁶⁰⁹ If clauses concerning a leasing agreement, for instance, are not already surprising under § 305c(1), content control takes place by applying § 307.⁴⁶¹⁰ It is noteworthy that for leases concerning apartments and farm leases as well as employment contracts, the transfer of the contractual partner occurs *ex lege*.⁴⁶¹¹ A clause in such a contract is merely declaratory and not submitted to content control.⁴⁶¹²

b) Change of the contractual partner

No. 10 concerns clauses by which the user is entitled to transfer its position under the contract with all its rights and obligations to a third party, without the other party's involvement.⁴⁶¹³ Typical cases are the transfer of the agreement,⁴⁶¹⁴ which is a subrogation of the rights and obligations by the third party or substitution where the user is merely responsible for a careful selection of the third party.⁴⁶¹⁵ The legislative purpose of no. 10 is fulfilled in these cases because the other party shall be protected from a change of its contractual partner so that he or she is always certain with whom it is conducting business.⁴⁶¹⁶

On the other hand, no. 10 is not applicable where the user remains the other party's contractual partner. This is namely the case where the user merely transfers single rights in terms of an assignment⁴⁶¹⁷ (for such a transfer the consent of the debtor is not necessary either by the way),⁴⁶¹⁸ or the use of subcontractors or vicarious agents.⁴⁶¹⁹ The same applies to an

⁴⁶⁰⁴ Kaufvertrag, §§ 433 *et seq.*

⁴⁶⁰⁵ Darlehensvertrag, §§ 488 *et seq.*

⁴⁶⁰⁶ Dienstvertrag, §§ 611 *et seq.*

⁴⁶⁰⁷ Werkvertrag, §§ 631 *et seq.*

⁴⁶⁰⁸ Werklieferungsvertrag, § 650 (ex-§ 651). WLP/Dammann § 309 no. 10 para 10.

⁴⁶⁰⁹ MüKo/Wurmnest § 309 no. 10 para 5, UBH/Habersack § 309 no. 10 para 5.

⁴⁶¹⁰ Stöffels AGB-Recht 310.

⁴⁶¹¹ In terms of §§ 566(1) for apartment leases, 581(2) for farm leases and 613a for employment contracts.

⁴⁶¹² See § 307(3). Bamberger/Roth/Becker § 309 no. 10 para 5, Staudinger/Coester-Waltjen § 309 no. 10 para 10.

⁴⁶¹³ Stöffels AGB-Recht 310.

⁴⁶¹⁴ Vertragsübernahme.

⁴⁶¹⁵ WLP/Dammann § 309 no. 10 para 12-15.

⁴⁶¹⁶ UBH/Habersack § 309 no. 10 para 6, WLP/Dammann § 309 no. 10 paras 12-15.

⁴⁶¹⁷ §§ 398 *et seq.*

⁴⁶¹⁸ UBH/Habersack § 309 no. 10 para 6.

⁴⁶¹⁹ Erfüllungsgehilfen. WLP/Dammann § 309 no. 10 paras 12-15.

assumption of an obligation⁴⁶²⁰ in terms of § 329⁴⁶²¹ and an assumption of debt⁴⁶²² pursuant to § 415(3)⁴⁶²³ where no change of the contractual partner takes place.⁴⁶²⁴

An assumption of debt with a full discharge of the original debtor⁴⁶²⁵ has to be seen against the backdrop of no. 10 though.⁴⁶²⁶ In spite of the fact that merely the original debtor's obligations are transferred to the third party, the customer must be protected against the possibility that the new contractual partner is not willing or able to perform.⁴⁶²⁷

If the user changes its legal personality (e.g., a former company with limited liability becomes a stock company), no. 10 does not apply because the contractual partner stays the same and only its legal 'framework' changes.⁴⁶²⁸ Notwithstanding, clauses by which the agreement shall also be applicable 'vis-à-vis a possible legal successor' are invalid.⁴⁶²⁹

c) Identification by name

§ 309 no. 10 lit. a) provides that the clause is valid if the third party is identified by name. The BGH decided however that the identification by name is not sufficient, and that the third party's address must be given too.⁴⁶³⁰

d) Right to free oneself from the contract

According to lit. b), the clause is valid if the other party to the contract is granted the right to free itself from the agreement. This right is either a right to withdraw from the contract in terms of §§ 346 *et seq.*, or in open-ended agreements a right to give notice.⁴⁶³¹ When exerting the

⁴⁶²⁰ *Erfüllungsübernahme*.

⁴⁶²¹ § 329: 'Where one party to a contract agrees to satisfy an obligee of the other party without assuming the obligation, then in case of doubt it may not be assumed that the obligee is to acquire the right to demand satisfaction from him directly.'

⁴⁶²² *Schuldbeitritt*.

⁴⁶²³ § 415: '(1) If the assumption of the debt is agreed between the third party and the obligor, its effectiveness is subject to ratification by the obligee. Ratification may only occur when the obligor or the third party has informed the obligee of the assumption of the debt. Until ratification, the parties may alter or cancel the contract. (2) If ratification is refused, assumption of the debt is deemed not to have occurred. If the obligor or the third party requests the obligee, specifying a period of time, to make a declaration relating to the ratification, the ratification may only be declared before the end of the period of time; if it is not declared it is deemed to be refused. (3) As long as the obligee has not granted ratification, then in case of doubt the transferee is obliged to the obligor to satisfy the obligee in good time. The same applies if the obligee refuses ratification.'

⁴⁶²⁴ *Stoffels AGB-Recht* 311.

⁴⁶²⁵ *Befreiende Schuldübernahme*, §§ 414 and 415. § 414: 'A debt may be assumed by a third party by contract with the obligee in such a way that the third party steps into the shoes of the previous obligor.'

⁴⁶²⁶ *Palandt/Grüneberg* § 309 para 98, *UBH/Habersack* § 309 no. 10 para 6.

⁴⁶²⁷ *Stoffels AGB-Recht* 311, *UBH/Habersack* § 309 no. 10 para 6.

⁴⁶²⁸ *WLP/Dammann* § 309 no. 10 para 16.

⁴⁶²⁹ *LG Cologne NJW-RR* 1988, 1084.

⁴⁶³⁰ *BGH NJW* 1980, 2518, *Staudinger/Coester-Waltjen* § 309 no. 10 para 14.

⁴⁶³¹ *Stoffels AGB-Recht* 311.

right to free itself from the contract, the other party must not suffer any negative consequences or enter into a contractual relationship with the third.⁴⁶³² Hence, a clause which provides for a term of notice of one month is ineffective because the customer would be obliged to maintain a contractual relationship with the third party until the expiry of this period. The client must therefore have the right to terminate the contract immediately.⁴⁶³³

The right to free oneself from the contract only exists if there is a change of the contractual partner. It is not sufficient if there is merely a possibility of such a change.⁴⁶³⁴ This would require a contractual clause by which the other party is entitled to give notice at any time. Stoffels maintains that the legislator's wording in the official report in terms of which the clause is valid if the other party is granted the right to liberate itself from the contract 'in the case of a change [of the contractual partner]' means that the legislator originally did not intend to require an actual change of the contractual partner, but that a possible change would suffice. It is submitted that the formulation '*für den Fall des Wechsels*' is merely another way of saying that the right only exists in case of an actual change of the contractual partner though. This becomes clear when reading the passage in its entirety.⁴⁶³⁵

2.2.10.3 Item (p) of the Annex of the Unfair Terms Directive

According to item (p) of the Annex of the Directive 93/13/EEC, clauses giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement are invalid. This item goes further than § 309 no. 10. Harmonisation can be achieved by applying § 307.⁴⁶³⁶ This applies to contracts that do not fall under no. 10 (e.g., leasing agreements), or a reduction of the consumer's guarantees.⁴⁶³⁷ The fact that the Directive declares clauses that infringe item (p) invalid, and that, on the other hand, no. 10 provides that it is sufficient that the other party is entitled to free itself from the contract so that the clause is valid, does not infringe the

⁴⁶³² Palandt/*Grüneberg* § 309 para 99, WLP/*Dammann* § 309 no. 10 para 34.

⁴⁶³³ LG Cologne NJW-RR 1987, 885 (886).

⁴⁶³⁴ MüKo/*Wurmnest* § 309 no. 10 para 8, UBH/*Habersack* § 309 no. 10 para 12.

⁴⁶³⁵ 'Klauseln über die Ersetzung des Vertragspartners sollen deshalb nur wirksam sein, wenn (...) dem Kunden für den Fall des Wechsels ein Rücktritts- oder Kündigungsrecht eingeräumt wird.' BT-Drs. 7/3919 at 38.

⁴⁶³⁶ Palandt/*Grüneberg* § 309 para 97, WLP/*Pfeiffer* Anhang RiLi para 139.

⁴⁶³⁷ Stoffels *AGB-Recht* 312.

Directive. On the contrary, the German provision is more consumer-friendly because the consumer can decide whether he or she wishes to continue the contract with the third party.⁴⁶³⁸

2.2.10.4 B2B contracts

The application of the general clause may result in the invalidity of a transfer clause by balancing the parties' interests.⁴⁶³⁹ The other party has, for example, an interest in knowing the third party in advance in long-term agreements where the third party must be solvent and reliable.⁴⁶⁴⁰ This must be assessed on a case-to-case basis. An innkeeper who enters into a contract with a brewery for the delivery of beer has an interest that the beer brand to be delivered by the third party stays the same, for instance. Otherwise, such a clause is invalid in terms of § 307.⁴⁶⁴¹

2.2.11 Liability of an agent with the power to enter into a contract (§ 309 no. 11)

2.2.11.1 Rationale of § 309 no. 11

§ 309 no. 11 sets out that a provision by which the user imposes on an agent who enters into a contract for the other party to the contract a) a liability or duty of responsibility for the principal on the part of the agent himself, without an explicit and separate declaration to this effect, or b) in the case of agency without authority, liability going beyond § 179 is ineffective.

No. 11 concerns provisions, such as 'the purchaser as well as the person who signs the order on behalf of the purchaser or in its own name are obliged to pay the amount due.'⁴⁶⁴²

A declaration of intent made by an agent in the name of another takes effect directly in favour of and against the principal if the requisites of § 164(1)⁴⁶⁴³ are met. This means that an agent normally is not liable for legal transactions undertaken for another person.⁴⁶⁴⁴ Since the agent makes a declaration of intent in its own name though, the temptation for standard terms users

⁴⁶³⁸ Staudinger/*Coester-Waltjen* § 309 no. 10 para 17. According to art 8 of the Directive, Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by the Directive, to ensure a maximum degree of protection for the consumer.

⁴⁶³⁹ Staudinger/*Coester-Waltjen* § 309 no. 10 para 18.

⁴⁶⁴⁰ BGH *NJW* 1985, 53 (54).

⁴⁶⁴¹ BGH *NJW* 1998, 2286 (2288).

⁴⁶⁴² Example from BT-Drs. 7/3919 at 38. My own translation.

⁴⁶⁴³ § 164(1): 'A declaration of intent which a person makes within the scope of his own power of agency in the name of a principal takes effect directly in favour of and against the principal. It is irrelevant whether the declaration is made explicitly in the name of the principal, or whether it may be gathered from the circumstances that it is to be made in his name.'

⁴⁶⁴⁴ An exception of this principle is the *culpa in contrahendo* liability in terms of § 311(3), i.e., where the agent gives a particularly high degree of trust and substantially influences the negotiations or the entering into of the contract.

to foist liability on the agent is undeniable, which is why such clauses are rather widespread.⁴⁶⁴⁵ Although the incorporation requirements of § 305(2) are regularly not met, there is still some risk that the agent is confronted with a civil procedure the outcome of which is uncertain. Hence, § 309 no. 11 aims at the agent's protection.⁴⁶⁴⁶

This provision is a specification of the prohibition of surprising clauses in terms of § 305c(1).⁴⁶⁴⁷ Such clauses are invalid because they are most of the time not duly incorporated into the contract in terms of § 305(2) because an explicit and separate declaration to this effect is required. Alternatively, they are surprising under § 305c(1), or individually agreed clauses according to § 305b take precedence.⁴⁶⁴⁸ No. 11 therefore rather has a clarifying and preventive function⁴⁶⁴⁹ because it is aimed to protect agents from hidden liability clauses.⁴⁶⁵⁰

The inclusion of an agent in another's liability is not reprehensible *per se* as long as certain transparency requirements are met.⁴⁶⁵¹ Situations may arise where the user has a reasonable interest in such an inclusion of the agent's liability.⁴⁶⁵² This is the case, for instance, where parents conclude a contract for music lessons on behalf of their minor child, and where the music school's standard terms set out that the parents are liable for the payment of the fees.⁴⁶⁵³

The Act does not contain a similar provision. Regulation 44(3)(c) concerns commitments undertaken by the *supplier's* agents, whereas item (d) the supplier's vicarious liability for its agents. On the other hand, § 309 no. 11 pertains to the other party's agents.⁴⁶⁵⁴

2.2.11.2 Scope of application

No. 11 of § 309 provides for two different cases in lit. a) and b). Both have in common that it is irrelevant whether the agent's power of attorney is based on an agreement or a legal provision.⁴⁶⁵⁵

⁴⁶⁴⁵ Staudinger/*Coester-Waltjen* § 309 no. 11 para 2.

⁴⁶⁴⁶ Stöffels *AGB-Recht* 297 and 298.

⁴⁶⁴⁷ BGH *NJW* 2006, 996 (997).

⁴⁶⁴⁸ Staudinger/*Coester-Waltjen* § 309 no. 11 para 3, Palandt/*Grüneberg* § 309 para 101.

⁴⁶⁴⁹ Palandt/*Grüneberg* § 309 para 101.

⁴⁶⁵⁰ BT-Drs. 7/3919 at 38.

⁴⁶⁵¹ UBH/*Habersack* § 309 no. 11 para 1.

⁴⁶⁵² Stöffels *AGB-Recht* 298.

⁴⁶⁵³ Example found in Stöffels *AGB-Recht* 298.

⁴⁶⁵⁴ See discussion on reg 44(3)(c) and (d) in Part I ch 3 paras 3.4.1 c) and d). See also item (n) in the Annex of the EU Unfair Terms Directive that largely corresponds to item (c) of reg 44(3) CPA.

⁴⁶⁵⁵ MüKo/*Wurmnest* § 309 no. 11 para 3, Erman/*Roloff* § 309 para 140.

a) Own liability or duty of responsibility of the agent

§ 309 no. 11 lit. a) sets out that clauses that impose a liability or duty of responsibility for the principal on the part of the agent himself, without an explicit and separate declaration to this effect are ineffective. In other words, the agent's liability cannot be triggered by such a standard clause. This also applies to its joint and several liability, or subordinate liability (e.g., surety or guarantee).⁴⁶⁵⁶

Hence, the following clause of a travel agent by which the teacher's liability is involved for the organisation of a school trip is invalid: 'By the booking, I agree to the standard business terms and expressly declare to be liable for the contractual obligations of the participants.'⁴⁶⁵⁷ Also invalid is a clause of a car rental company that says that 'the driver is liable for all obligations of the lessee'.⁴⁶⁵⁸

From the inadmissible own liability of the agent, one has to distinguish the admissible obligation of several parties to the contract. No. 11 is therefore not applicable where the agent also concludes the contract in its own name.⁴⁶⁵⁹ If the director of a limited liability company concludes a franchise agreement not only in the name of the company but also in her own name, she becomes a party to the contract and is liable.⁴⁶⁶⁰

The role of the acting person (principal or agent) can be judged in most cases by the circumstances. Persons that accompany the party do regularly not wish to be involved in the contract.⁴⁶⁶¹ Hence, a standard clause of a hospital by which the person accompanying the patient is referred to as 'applicant' and which stipulates that this person has a joint and several liability together with the patient for the payment of the treatment is invalid. If the role of the given person cannot be evaluated by considering external circumstances, the wording of the clause must be assessed.⁴⁶⁶² For instance, from the formulation 'tenant 2' in a lease one can conclude that this person is actually another party to the contract and not merely an agent.⁴⁶⁶³

§ 309 no. 11 lit. a) requires an explicit and separate declaration in order to include the agent's liability. This provision has a warning function. This declaration does not need to be made in

⁴⁶⁵⁶ Staudinger/*Coester-Waltjen* § 309 no. 11 para 8.

⁴⁶⁵⁷ OLG Frankfurt *NJW* 1986, 1941. My own translation.

⁴⁶⁵⁸ LG Osnabrück *NJW* 1985, 389. My own translation.

⁴⁶⁵⁹ UBH/*Habersack* § 309 no. 11 para 7.

⁴⁶⁶⁰ BGH *NJW* 2006, 996 (1997).

⁴⁶⁶¹ LG Düsseldorf *NJW* 1995, 3062 *et seq.*

⁴⁶⁶² Stoffels *AGB-Recht* 299.

⁴⁶⁶³ BGH *NJW* 1988, 1908 (1909).

a separate document. However, the text of the declaration and the signature referring to it must be clearly separate from the rest of the text so that it is obvious that the document is of a dual nature, i.e., the contract involving the principal on the one hand, and the agent's liability on the other.⁴⁶⁶⁴ This is not the case where the declaration is incorporated into the contract in a manner that makes it impossible to distinguish it from the actual agreement.⁴⁶⁶⁵

b) Liability beyond § 179

§ 179⁴⁶⁶⁶ sets out the liability of an unauthorised agent (*falsus procurator*). Pursuant to § 309 no. 11 lit. b), a provision by which the user imposes on an agent in the case of agency without authority, liability going beyond § 179 is ineffective.

In practice, such clauses deny the agent's liability that is restricted to the damage which the other party suffers as a result of relying on the power of agency⁴⁶⁶⁷ if it is not aware of its lack of power of agency (§ 179(2)), or is liable although the other party (user) knew or ought to have known of the lack of power of agency (§ 179(3)).⁴⁶⁶⁸

In a pre-formulated hospital treatment contract, a clause by which the person who is accompanying the patient has to sign a clause by which the patient confers power of agency to the accompanying person is ineffective. If there are no family relations between the patient and the accompanying person, the hospital cannot presume this person's power of agency and therefore must have known its absence.⁴⁶⁶⁹

2.2.11.3 B2B contracts

As an emanation of the general rules of §§ 305c(1) (surprising clauses) and 305b (priority of individually agreed clauses), § 309 no. 11 indirectly also applies to B2B contracts in terms of § 310(1) 2nd sent.⁴⁶⁷⁰ No. 11 typically applies in relations with final consumers. This provision

⁴⁶⁶⁴ BGH *NJW* 2001, 3186; 2002, 3464.

⁴⁶⁶⁵ See BGH *NJW* 1988, 2465; 2001, 3186 *et seq.*

⁴⁶⁶⁶ § 179: '(1) A person who has entered into a contract as an agent is, if he does not furnish proof of his power of agency, obliged to the other party at the other party's choice either to perform the contract or to pay damages to him, if the principal refuses to ratify the contract. (2) If the agent was not aware of his lack of power of agency, he is obliged to make compensation only for the damage which the other party suffers as a result of relying on the power of agency; but not in excess of the total amount of the interest which the other or the third party has in the effectiveness of the contract. (3) The agent is not liable, if the other party knew or ought to have known of the lack of power of agency. The agent is also not liable if he had limited capacity to contract, unless he acted with the consent of his legal representative.'

⁴⁶⁶⁷ *Vertrauensschaden*.

⁴⁶⁶⁸ Stoffels *AGB-Recht* 300.

⁴⁶⁶⁹ LG Düsseldorf *NJW* 1995, 3062 (3063).

⁴⁶⁷⁰ Staudinger/*Coester-Waltjen* § 309 no. 11 para 14.

does obviously not apply to the *del credere* liability of commercial agents under § 86b HGB,⁴⁶⁷¹ as it merely concerns the contractual relationship between the agent and the principal.⁴⁶⁷²

2.2.12 Modification of the burden of proof (§ 309 no. 12)

In terms of § 309 no. 12, a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or b) having the other party to the contract confirm certain facts is ineffective. Letter b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature.

Before § 309 no. 12 lit. a) and b) are discussed, some general remarks on this provision are necessary.

2.2.12.1 Rationale of § 309 no. 12

Rules concerning the burden of proof are not merely considerations of expediency but an emanation of substantive principles of fairness and justice. This applies to general principles of burden of proof, e.g., that the party who claims a particular right has to prove it, or that the party who is closer to the facts to be proved bears the onus of proof.⁴⁶⁷³ A modification of these principles by standard business terms might jeopardise the other party's situation in that it might make its legal defence more difficult or even impossible. For this reason, no. 12 prohibits the modification of the burden of proof to the other party's disadvantage.⁴⁶⁷⁴

Such modifications of the burden of proof came into the awareness of the expert public for the first time after a BGH ruling of 1964.⁴⁶⁷⁵ The court had to decide on a standard clause by which the depositor (client) had to prove the responsibility of the warehouse keeper's staff after stored items had disappeared. The BGH decided that the user could not relieve itself from

⁴⁶⁷¹ § 86b HGB: '(1) If a commercial agent undertakes to guarantee performance of the obligation arising from a transaction, he shall be entitled to claim special remuneration (*del credere* commission); such right cannot be excluded in advance. The guarantee may be undertaken only for a specific transaction or for transactions with specific third parties which the commercial agent negotiates or concludes. Such undertaking must be in writing. (2) The right to *del credere* commission shall arise upon conclusion of the transaction. (3) Sub-[\$] (1) shall not apply if the principal or the third party has his establishment, or, in the absence of such, his residence, abroad. Furthermore, it shall not apply to transactions for the conclusion and execution of which the commercial agent has unlimited authority.'

⁴⁶⁷² BT-Drs. 7/3919 at 38.

⁴⁶⁷³ BT-Drs. 7/ 3919 at 38.

⁴⁶⁷⁴ § 309 no. 12 is the transposition of item (q) of the Annex of the Unfair terms Directive 93/13/EEC.

⁴⁶⁷⁵ BGH NJW 1964, 1123.

circumstances lying in the sphere of its own responsibility to the client's disadvantage. This principle is now expressed in no. 12 lit. a).⁴⁶⁷⁶

2.2.12.2 Conditions and scope of the prohibition

a) Principles of burden of proof

A modification of the burden of proof to the other party's disadvantage is prohibited *per se*, irrespective of whether the given burden of proof rule is a statutory provision or has been developed by jurisprudence.⁴⁶⁷⁷ This applies therefore to modifications of the 'objective' burden of proof concerning the effects of the unprovability of specific facts, but also to the 'subjective' burden of proof which determines which party bears the onus.⁴⁶⁷⁸ An increase in the requirements of the evidence modifies the burden of proof too because the given clause deviates from statutory provisions and affects the onus of proof.⁴⁶⁷⁹

No. 12 applies to all principles of burden of proof, such as the general principle according to which each party must prove the facts entailing legal consequences that are advantageous for it. Furthermore, the BGB contains special burden of proof rules according to the sphere of responsibility, such as §§ 280(1) 2nd sent.⁴⁶⁸⁰ and 286(4).⁴⁶⁸¹ Also other provisions contain such rules (e.g., §§ 269, 271, 891 and 1006). Further burden of proof rules are the *prima facie* evidence and the assumption that official documents are complete and correct.⁴⁶⁸²

b) Modification to the disadvantage of the other party

The question of whether there is a prohibited modification of the burden of proof must be assessed in two steps. First, one must determine which party would have the burden of proof without the given clause. Then, in a second step, it must be assessed whether the clause modifies the onus to the other party's disadvantage.⁴⁶⁸³

The legislator wanted to exclude any disadvantageous modification of the burden of proof, irrespective of the wording of the clause. Hence, a modification of the burden of proof not only

⁴⁶⁷⁶ Stoffels *AGB-Recht* 404.

⁴⁶⁷⁷ Stoffels *AGB-Recht* 404.

⁴⁶⁷⁸ WLP/Dammann § 309 no. 12 para 11 *et seq.*

⁴⁶⁷⁹ WLP/Dammann § 309 no. 12 para 15 *et seq.*

⁴⁶⁸⁰ § 280(1): 'If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.'

⁴⁶⁸¹ § 286(4): 'The obligor is not in default for as long as performance is not made as the result of a circumstance for which he is not responsible.'

⁴⁶⁸² Stoffels *AGB-Recht* 404.

⁴⁶⁸³ Stoffels *AGB-Recht* 404.

exists where the onus is reversed⁴⁶⁸⁴ but also other aggravations fall under this provision. A distinction between a reversal of the onus and other obstructions in terms of no. 12 is not necessary. Other aggravations are restrictions to certain evidence (e.g., a clause requiring the consumer to provide the original invoice in order to have corrected a defect on the purchased good)⁴⁶⁸⁵ as well as modifications of the principle of *prima facie* evidence.⁴⁶⁸⁶ On the other hand, also facilitations of the burden of proof concerning the user fall under this provision.⁴⁶⁸⁷

The leading view does not apply this provision to promises to fulfil an obligation,⁴⁶⁸⁸ declaratory acknowledgements of a debt⁴⁶⁸⁹ or submissions to execution.⁴⁶⁹⁰ Stoffels correctly points out in this regard that it is irrelevant that these are recognised legal institutes,⁴⁶⁹¹ and that the determining factor is that these institutes create an independent title without modifying the burden of proof. Thus, §§ 305c and 307 apply in these cases.⁴⁶⁹²

‘Conclusive proof certificates’ under South African common law⁴⁶⁹³ are invalid as they are against public policy, *contra bonos mores* and unenforceable.⁴⁶⁹⁴ Van Zyl argues that the legality of such certificates should be reconsidered because ‘account should be taken of business and commercial efficacy in considering a ‘conclusive proof provision’.⁴⁶⁹⁵ Such certificates are unilaterally established by the creditor though and therefore no equivalent to promises to fulfil an obligation⁴⁶⁹⁶ or declaratory acknowledgements of a debt⁴⁶⁹⁷ in German law. The latter are ‘contracts’ between the parties.⁴⁶⁹⁸ Hence, so-called ‘conclusive proof certificates’ should always be considered unfair.⁴⁶⁹⁹

⁴⁶⁸⁴ BGH NJW 1987, 1634 (1635), UBH/Habersack § 309 no. 12 para 8.

⁴⁶⁸⁵ See Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005)191.

⁴⁶⁸⁶ UBH/Habersack § 309 no. 12 para 11 *et seq.* This is also applicable in South African law as reg 44(3)(y) CPA expressly greylists ‘clauses restricting the evidence available to the consumer’.

⁴⁶⁸⁷ Stoffels *AGB-Recht* 405.

⁴⁶⁸⁸ *Abstrakte Schuldversprechen*. See BGH NJW 1991, 1677.

⁴⁶⁸⁹ *Deklatorische Schuldanerkenntnisse*. See BGH NJW 2003, 2386 (2388).

⁴⁶⁹⁰ *Vollstreckungsunterwerfungen*. See BGH NJW 2002, 138 (139).

⁴⁶⁹¹ §§ 780, 781 BGB and § 794(5) ZPO.

⁴⁶⁹² Stoffels *AGB-Recht* 406. See also Staudinger/*Coester-Waltjen* § 309 no. 12 para 5.

⁴⁶⁹³ These are certificates established by the creditor and purporting to be conclusive proof of a certain balance due by the debtor,

⁴⁶⁹⁴ *Sasfin v Beukes* 1989 (1) SA 1 (A) 15A, *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Donnelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A).

⁴⁶⁹⁵ Van Zyl J in *Society of Lloyd’s v Romahn* 2006 (4) SA 23 (C) at para [125].

⁴⁶⁹⁶ *Abstrakte Schuldversprechen*. See BGH NJW 1991, 1677.

⁴⁶⁹⁷ *Deklatorische Schuldanerkenntnisse*. See BGH NJW 2003, 2386 (2388).

⁴⁶⁹⁸ See wording of §§ 780, 781 BGB.

⁴⁶⁹⁹ In this regard, see discussion in Part I ch 3 para 3.4.6 b).

c) Teleological reduction of § 309 no. 12?

Some authors are of the opinion that the other party's disadvantage is less if the user does not waive the client's claims for damages where this would be possible, but instead 'only' modifies the burden of proof. These authors therefore plead for a teleological reduction of no. 12 and argue that as long as the user could exclude its liability, it is permissible to uphold it while reversing the burden of proof.⁴⁷⁰⁰ Others correctly aver that such a clause is nevertheless ineffective because the modification of the burden of proof is not a 'less' compared to a waiver of the user's liability. A waiver of liability modifies the substantive legal position of the other party, whereas a modification of the burden of proof rather leads to a costly misjudgement of the other party because it most likely loses the trial for misjudging the requirements for proving certain facts. The other party is most likely to estimate its prospects of success, which is why burden of proof provisions are often in conflict with the transparency requirement.⁴⁷⁰¹ What is more, also item (q) of the Annex of the Unfair Terms Directive⁴⁷⁰² does not contain such a restriction, although the problem was generally known before this EU provision was drafted.⁴⁷⁰³

2.2.12.3 § 309 no. 12 lit. a)

In terms of § 309 no. 12 lit. a), a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user is ineffective.

No. 12 lit. a) has no autonomous significance *vis-à-vis* the general prohibition of modifications of the burden of proof but merely reflects a general principle. Otherwise, the other party would be hindered from proving certain circumstances because they lie in the user's sphere.⁴⁷⁰⁴

The transport terms and conditions of the German carrier Lufthansa⁴⁷⁰⁵ contained a clause by which the carrier was only liable if the passenger could prove the carrier's negligence. Since

⁴⁷⁰⁰ Palandt/*Grüneberg* § 309 para 107, Staudinger/*Coester-Waltjen* § 309 no. 12 para 7.

⁴⁷⁰¹ UBH/*Habersack* § 309 no. 12 para 9, Erman/*Roloff* § 309 para 148.

⁴⁷⁰² **Item (q) of the Annex of the Unfair Terms Directive:** 'Terms which have the object or effect of: (...) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' are ineffective.

⁴⁷⁰³ Stöffels *AGB-Recht* 407.

⁴⁷⁰⁴ Stöffels *AGB-Recht* 406.

⁴⁷⁰⁵ Allgemeine Beförderungsbedingungen für Fluggäste und Gepäck.

the passenger bore the burden of proof for circumstances that lay in the carrier's sphere of responsibility, this clause was considered ineffective.⁴⁷⁰⁶

Section 65 of the Act provides that when a supplier has possession of any property belonging to or ordinarily under the control of a consumer, the supplier is liable to the owner of the property for any loss resulting from a failure to comply with the requirements mentioned in paragraphs (a) and (b) of this provision. This provision seems to place the burden of proof on the consumer of whether the loss or damage of the goods in the supplier's possession was caused by the supplier's failure to take reasonable care. Section 65 therefore deviates from the common-law rule according to which the supplier who takes the goods of the consumer into its safekeeping in the context of a depositum or bailment for reward⁴⁷⁰⁷ will be presumed to be at fault if the goods are damaged. In terms of section 2(10), a consumer can however rely on the residual rules, and a term which excludes such common-law rules and places the onus on the consumer will be presumed to be unfair under regulation 44(3)(y).

In this regard, it is referred to the discussion on terms changing the onus of proof in contracts for safekeeping and the related arguments drawn from the praetor's edict on seamen, innkeepers and stablekeepers in Part I.⁴⁷⁰⁸ A term placing the burden of proof on the consumer will, in any case, be presumed to be unfair under regulation 44(3)(y).

As a result, section 65 of the Act deviates from the principle expressed in § 309 no. 12 lit. a). Because of section 2(10) and the application of the common law rules, the same result is achieved though, and clauses shifting the burden of proof on the other party (consumer) are unfair in terms of item (y) of regulation 44(3).

2.2.12.4 § 309 no. 12 lit. b)

According to § 309 no. 12 lit. b), a provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by having the other party to the contract confirm certain facts, is prohibited. Letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature.

⁴⁷⁰⁶ BGH *NJW* 1983, 1322.

⁴⁷⁰⁷ Bailment describes the transfer of the possession of goods from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It arises when a person gives property to someone else for safekeeping, hiring of goods, the loan of goods, the pledge of goods, and the delivery of goods for carriage or repair. It is a cause of action independent of contract or tort. See *Law Oxford Dictionary of Law* s.v. 'Bailment'.

⁴⁷⁰⁸ Chapter 3 para 3.4.6 b).

Regulation 44(3)(y) corresponds to § 309 no. 12 lit. a), and item (v) of regulation 44(3) corresponds to § 308 no. 5.⁴⁷⁰⁹ The effect of entire agreement and no-representation clauses that are targeted by section 51(1)(g)(i) as well as acknowledgements in terms of section 51(1)(g)(ii) have the effect of modifying the burden of proof.

a) Rationale of § 309 no. 12 lit. b)

The fact that the legislator underlines the prohibition of the confirmation of certain facts by the other party as a special case of the modification of the burden of proof (§ 309 no. 12 1st sent.) is legitimate because of the substantial practical implications of this phenomenon.⁴⁷¹⁰ The danger of such clauses lies in the fact that users usually present such confirmations as a mere formal matter, and the customer is not aware of the legal implications such a provision may have. Moreover, such clauses are often not immediately visible in the standard terms and thus easily overlooked.⁴⁷¹¹ These clauses lead to a factual shift of the burden of proof, and users have no legitimate interest to require such a declaration from their clients.⁴⁷¹²

b) Scope of application

aa) Modification to the other party's disadvantage

As set out in the 1st half-sentence of no. 12, the confirmation of certain facts requires a modification of the burden of proof with regard to legally significant facts, the other party's knowledge about certain facts or factual events in order to be subject of this norm. In other words, the confirmation of facts that would have to be proven by the other party in any event, is not subject to no. 12 lit. b).⁴⁷¹³

The classification of so-called 'completeness clauses'⁴⁷¹⁴ ('no oral collateral agreements have been made')⁴⁷¹⁵ is subject to discussion. Because of the assumption that the written contract is complete, the other party has the onus in this regard, which means that such a clause does not shift the burden of proof to the customer's disadvantage. The argument that § 309 no. 12 lit. b) offers no connecting factor for completeness clauses is however erroneous because the scope of application of the norm goes further. Completeness clauses may prevent customers from

⁴⁷⁰⁹ See discussion on reg 44(3)(v) and (y) in Part I ch 3 para 3.4.5 a).

⁴⁷¹⁰ Stoffels *AGB-Recht* 288.

⁴⁷¹¹ BT-Drs. 7/3919 at 39.

⁴⁷¹² Stoffels *AGB-Recht* 288.

⁴⁷¹³ BGH *NJW* 1985, 2329 (2331).

⁴⁷¹⁴ *Vollständigkeitsklauseln*.

⁴⁷¹⁵ BGH *NJW* 2000, 207. See also BT-Drs. 7/3919 at 39.

referring to possible verbal agreements,⁴⁷¹⁶ which means that to this extent, an indirect shift of the onus of proof exists, or at least a modification of the requirements for the production of evidence.⁴⁷¹⁷ Such a broad comprehension of the phrase 'modification of the burden of proof' is the law's objective and the legislator's intention.⁴⁷¹⁸ The objective of the provision is to prohibit clauses by which a contrary assertion of the client is 'impeded or made impossible'.⁴⁷¹⁹ This means that already an aggravation of the other party's position is prohibited.⁴⁷²⁰

It is irrelevant whether the modification of the burden of proof comes in the guise of a reversal or a shift of the burden of proof or a refutable assumption.⁴⁷²¹ The BGH pointed out that already the user's attempt to degrade the other party's position in terms of proof is sufficient.⁴⁷²²

bb) Forms of a confirmation of facts

For the application of no. 12 lit. b) it is irrelevant whether the confirmation of a certain fact is a declaration of intent,⁴⁷²³ a declaration of knowledge⁴⁷²⁴ or a declaration of factual events.⁴⁷²⁵ Hence, there is a wide array of prohibited clauses.⁴⁷²⁶

A clause by which the client declares that he or she asked for a home visit in the context of a consumer contract (§§ 312 to 319) is ineffective under § 309 no. 12 lit. b) because such a provision excludes the right to revoke the agreement in terms of § 312g.⁴⁷²⁷ The standard clause of a gym by which the client declares that he or she has no health problems and is able to participate at the training is also prohibited because it has the objective to make the client's proof more difficult that he has been duly informed and advised by the gym staff.⁴⁷²⁸ Furthermore, a clause in a contract of delivery of built-in furniture by which the client declares that the user's sketches and measurements are correct is ineffective. Without this clause, and under the general rules of evidence, the user would have to prove that it has duly performed

⁴⁷¹⁶ UBH/*Habersack* § 309 no. 12 para 22.

⁴⁷¹⁷ *Stoffels AGB-Recht* 289.

⁴⁷¹⁸ The BGH also referred to this fact, but in another context. See BGH *NJW* 1987, 1634 (1635).

⁴⁷¹⁹ BT-Drs. 7/3919 at 39.

⁴⁷²⁰ WLP/*Dammann* § 309 no. 12 para 115 *et seq.*

⁴⁷²¹ BGH *NJW* 1987, 1634 (1635), UBH/*Habersack* § 309 no. 12 para 18.

⁴⁷²² BGH *NJW* 1987, 1634 (1635).

⁴⁷²³ *Willenserklärung*.

⁴⁷²⁴ *Wissenserklärung*.

⁴⁷²⁵ *Erklärung über tatsächliche Vorgänge*.

⁴⁷²⁶ *Stoffels AGB-Recht* 289.

⁴⁷²⁷ OLG Zweibrücken *NJW-RR* 1992, 565, UBH/*Habersack* § 309 no. 12 para 19. § 312g(1): '(Right of withdrawal) In the case of off-premises contracts and of distance contracts, the consumer has a right of withdrawal pursuant to [§] 355.'

⁴⁷²⁸ BGH *NJW-RR* 1989, 817, UBH/*Habersack* § 309 no. 12 para 22.

what has been ordered.⁴⁷²⁹ Numerous (invalid) clauses concern the circumstances in which the contract has been concluded, such as 'I have received a copy of the contract'.⁴⁷³⁰ Also invalid are so-called 'negotiation clauses'⁴⁷³¹ that stipulate that the standard business terms have been negotiated in detail in the sense of § 305(1) 3rd sent. ('We agreed that you are not allowed to conclude agreements directly').⁴⁷³²

cc) Acknowledgement of receipt

Under § 309 no. 12 2nd sent., the prohibition does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature. The objective of this exception is to permit pre-formulated acknowledgements of receipt for which the user has a legitimate interest.⁴⁷³³ This provision applies to receipts in the sense of § 368,⁴⁷³⁴ i.e., a written confirmation that the other party has received performance.⁴⁷³⁵

The acknowledgement of receipt has to be clearly distinguishable from the rest of the text and separately signed by the client.⁴⁷³⁶ It is not necessary to provide for a separate document though.⁴⁷³⁷ The requirement of a 'separate signature' means that the signature merely refers to the acknowledgement of receipt and not to other declarations, such as the legal evaluation of the performance.⁴⁷³⁸

The clause 'goods received without defaults', followed by the client's signature is therefore ineffective because the client not only acknowledges receipt of the given performance (goods) but also declares that it is free of defects.⁴⁷³⁹ The same applies to the clause of a car rental company 'the lessee declares, when receiving the vehicle, that it is in a safe and roadworthy condition and has no defects'. The BGH decided that such clauses cannot relieve the company from its burden of proof with regard to the car's roadworthiness.⁴⁷⁴⁰

⁴⁷²⁹ BGH *NJW* 1986, 2574 (2575).

⁴⁷³⁰ BGH *NJW* 1987, 2012 (2014).

⁴⁷³¹ *Aushandlungsklauseln*.

⁴⁷³² BGH *NJW* 1987, 1634.

⁴⁷³³ Stoffels *AGB-Recht* 290.

⁴⁷³⁴ § 368: 'Upon receiving performance, on demand, the obligee must issue a written acknowledgement of receipt (receipt). If the obligor has a legal interest in having the receipt issued in another form, he may demand issue in that form.'

⁴⁷³⁵ WLP/*Dammann* § 309 no. 12 para 61.

⁴⁷³⁶ UBH/*Habersack* § 309 no. 12 para 24. See also BT-Drs. 7/3919 at 39.

⁴⁷³⁷ Staudinger/*Coester-Waltjen* § 309 no. 12 para 13.

⁴⁷³⁸ Palandt/*Grüneberg* § 309 para 109, UBH/*Habersack* § 309 no. 12 para 24.

⁴⁷³⁹ OLG Koblenz *NJW* 1995, 3392.

⁴⁷⁴⁰ BGH *DB* 1967, 118. See also BT-Drs. 7/3919 at 39.

dd) Relation to other provisions

§ 309 no. 5 (lump-sum claims for damages) and no. 6 (contractual penalty) are *leges speciales* to no. 12 in respect of the ineffectiveness of lump-sum claims for damages or compensation of a decrease in value.⁴⁷⁴¹ § 308 no. 5 and no. 6 are also *leges speciales* to this provision.⁴⁷⁴²

c) Legal consequences in case of violation

If a clause is invalid under § 309 no. 12 lit. b), the legal rules of evidence developed by jurisprudence apply.⁴⁷⁴³ The ineffective clause has no indicative effect in court.⁴⁷⁴⁴

d) B2B contracts

Since the burden of proof rules are based on the principle of justice and fairness, one could assume that they are also applicable to B2B contracts by application of the general clause.⁴⁷⁴⁵ One must distinguish between the two items mentioned in no. 12, however. Lit. a) is an emanation of the allocation of the burden of proof according to the sphere of influence of the parties, which is why it has an indicative effect on § 307.⁴⁷⁴⁶

On the other hand, the evaluations contained in § 309 no. 12 lit. b) can be applied to B2B contracts in terms of the general clause only on a case-to-case basis. Because of the commercial experience of business people, one can assume that they will not be taken by surprise by clauses that modify the burden of proof.⁴⁷⁴⁷ With regard to so-called 'traditional naïve clauses'⁴⁷⁴⁸ ('I declare that I have not been persuaded')⁴⁷⁴⁹ entrepreneurs do not need protection.⁴⁷⁵⁰ A different evaluation is necessary for 'negotiation clauses' by which the conditions of § 305(1) 3rd sent. (individually agreed clauses) are confirmed by the client. Such clauses require a 'legal transfer capacity'⁴⁷⁵¹ that cannot be expected from an entrepreneur.⁴⁷⁵²

⁴⁷⁴¹ UBH/Habersack § 309 no. 12 para 4, Staudinger/Coester-Waltjen § 309 no. 12 para 2.

⁴⁷⁴² Staudinger/Coester-Waltjen § 309 no. 12 para 2.

⁴⁷⁴³ UBH/Habersack § 309 no. 12 para 27.

⁴⁷⁴⁴ Erman/Roloff § 309 para 153, Staudinger/Coester-Waltjen § 309 no. 12 para 14.

⁴⁷⁴⁵ Palandt/Grüneberg § 309 para 110.

⁴⁷⁴⁶ BGH NJW 1964, 1123.

⁴⁷⁴⁷ UBH/Habersack § 309 no. 12 para 27.

⁴⁷⁴⁸ 'Klassische Naivklauseln'. The term has been coined by Staudinger/Coester-Waltjen § 309 no. 12 para 11.

⁴⁷⁴⁹ See BT-Drs. 7/3919 at 39.

⁴⁷⁵⁰ UBH/Habersack § 309 no. 12 para 27, Stoffels AGB-Recht 291.

⁴⁷⁵¹ Juristische Transferleistung.

⁴⁷⁵² Stoffels AGB-Recht 291.

2.2.13 Form of notices and declarations (§ 309 no. 13)

2.2.13.1 Rationale of § 309 no. 13

In terms of § 309 no. 13, a provision by which notices or declarations that are to be made to the user or a third party are tied a) to a more stringent form than written form for a contract for which the law requires notarial recording, or b) to a more stringent form than written form in other contracts than those mentioned under lit. a), or c) to special receipt requirements, is invalid.⁴⁷⁵³

Clauses prescribing a stricter form than the written form are an obstacle for the other party to exercise its rights and are often overseen or forgotten.⁴⁷⁵⁴ Consumers should be free to choose a more stringent form than the written form in order to prove the reception of their notice or declaration.⁴⁷⁵⁵ § 309 no. 13 is the counterpart of § 308 no. 6. Where the former restricts the facilitation of the proof that the other party has received a declaration, the latter aims to impede restrictions for declarations of the customer *vis-à-vis* the user.⁴⁷⁵⁶

2.2.13.2 Content of the prohibition of § 309 no. 13

§ 309 no. 13 covers all kinds of declarations of the other party with regard to the conclusion, execution and termination of the agreement, such as declarations of intent (e.g., notice of rescission or termination) or acts similar to legal transactions⁴⁷⁵⁷ (e.g., overdue notice or notice of defect). The provision does not cover the declarations of the user.⁴⁷⁵⁸

§ 309 no. 13 has no corresponding provision in section 51 or regulation 44(3) of the Consumer Protection Act nor in the Unfair Terms Directive. Item (c) of regulation 44(3) of the Act only applies to entire agreement and non-variation clauses and to conditions that depend exclusively on the supplier, which is not the case in § 309 no. 13 as the observance of a specific form prescribed by the user ultimately depends on the other party. What is more, both regulation 44(3)(c) and item (n) of the Directive apply to commitments undertaken by the supplier's agent and thus have another scope of application.

⁴⁷⁵³ My own translation.

⁴⁷⁵⁴ BT-Drs. 7/3919 at 39.

⁴⁷⁵⁵ BT-Drs. 7/3919 at 39.

⁴⁷⁵⁶ Stoffels *AGB-Recht* 285.

⁴⁷⁵⁷ *Geschäftsähnliche Handlungen*.

⁴⁷⁵⁸ Erman/*Roloff* § 309 para 156, WLP/*Dammann* § 309 no. 13 para 11 *et seq.*

A 'more stringent form than written form' is any requirement that goes beyond the requirements set out in §§ 126⁴⁷⁵⁹ and 127,⁴⁷⁶⁰ i.e., the handwritten signature of the issuer. Therefore, a clause that prescribes notarial recording (§ 128)⁴⁷⁶¹ or official certification (§ 129)⁴⁷⁶² of the declaration is invalid under § 309 no. 13.⁴⁷⁶³ Other clauses too may prescribe a more stringent form than written form, for instance, if the other party has to draft its declaration personally or if the declaration has to indicate the place where it was drafted.⁴⁷⁶⁴ Restrictions to specific means of communication, e.g., 'in order to ensure prompt handling, declarations must be transmitted by telefax' are ultimately also a more stringent form than written form.⁴⁷⁶⁵

It is subject to discussion whether the use of certain (pre-printed) forms of the user is permitted for the other party's declarations. The legal committee of the Bundestag was of the view that because of the replacement of the initially planned formulation 'simple written form' by 'written form', the requirement of the use of certain forms is allowed.⁴⁷⁶⁶ This view is however not supported by the legal text. The necessary elements for 'written form' are conclusively contained in §§ 126 and 127. An obligation to use only a particular standard form goes beyond

⁴⁷⁵⁹ § 126: '(Written form) (1) If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials. (2) In the case of a contract, the signature of the parties must be made on the same document. If more than one counterpart of the contract is drawn up, it suffices if each party signs the document intended for the other party. (3) Written form may be replaced by electronic form, unless the statute leads to a different conclusion. (4) Notarial recording replaces the written form.'

§ 126a: '(Electronic form) (1) If electronic form is to replace the written form prescribed by statute, the issuer of the declaration must add his name to it and provide the electronic document with a qualified electronic signature in accordance with the Electronic Signature Act [Signaturgesetz]. (2) In the case of a contract, the parties must each provide a counterpart with an electronic signature as described in subsection (1).' § 126b: '(Text form) If text form is prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium. A durable medium is any medium that 1. enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and 2. that allows the unchanged reproduction of such declaration.'

⁴⁷⁶⁰ § 127: '(Agreed form) (1) The provisions under [§§] 126, 126a or 126b also apply, in case of doubt, to the form specified by legal transaction. (2) For compliance with the written form required by legal transaction, unless a different intention is to be assumed, it suffices if the message is transmitted by way of telecommunications and, in the case of a contract, by the exchange of letters. If such a form is chosen, notarial recording in accordance with [§] 126 may be demanded subsequently. (3) For compliance with the electronic form required by legal transaction, unless a different intention is to be assumed, an electronic signature other than provided for in [§] 126a also suffices and, in the case of a contract, the exchange of a declaration of an offer and of acceptance which are each provided with an electronic signature. If such a form is chosen, an electronic signature in accordance with [§] 126a may be demanded subsequently, or if this is not possible for one of the parties, notarial recording in compliance with [§] 126.'

⁴⁷⁶¹ § 128: '(Notarial recording) If the notarial recording of a contract is prescribed by statute, it suffices if first the offer and then the acceptance of the offer is recorded by a notary.'

⁴⁷⁶² § 129: '(Official certification) (1) If the official certification of a declaration is prescribed by law, the declaration must be put in writing and the signature of the person declaring be certified by a notary. If the declaration is signed by the issuer making his mark, the certification of the initials provided for in [§] 126 (1) is necessary and sufficient. (2) The notarial recording of the declaration replaces the official certification.'

⁴⁷⁶³ WLP/Dammann § 309 no. 13 para 23 and 24.

⁴⁷⁶⁴ Staudinger/Coester-Waltjen § 309 no. 13 para 5.

⁴⁷⁶⁵ Palandt/Grüneberg § 309 para 112, Staudinger/Coester-Waltjen § 309 no. 13 para 5.

⁴⁷⁶⁶ BT-Drs. 7/5422 at 10.

these requirements. Besides, this does not create an obstacle to a smooth business transaction as the user is free to suggest the use of certain forms. It only cannot make their use mandatory for the validity of the other party's declaration.⁴⁷⁶⁷

On the other hand, the wording of the provision does not prohibit that the user prescribes the written form for the other party's declarations in general.⁴⁷⁶⁸

Moreover, the prohibition of § 309 no. 13 includes clauses that prescribe special requirements for the reception of the other party's declaration. These are conclusively set out in §§ 130⁴⁷⁶⁹ *et seq.* According to § 130, a declaration has reached the other party to the contract when the declaration has reached its 'sphere of influence', and one can assume under normal circumstances that it will take knowledge of it.⁴⁷⁷⁰ Other clauses prescribing at which moment the declaration has reached the user in order to be valid are ineffective.⁴⁷⁷¹ Hence, a clause by which 'the termination of the agreement is only valid if the notice has been sent by registered letter' is ineffective.⁴⁷⁷² Since it is sufficient that the declaration reaches the user's 'sphere of influence', clauses prescribing that the declaration must be sent to a specific department, such as 'the notice of defect has to be sent to the management', are invalid.⁴⁷⁷³

2.2.13.3 Legal consequences in case of violation

If a clause is invalid in terms of § 309 no. 13, the statutory provisions apply under § 306(2), e.g., §§ 568⁴⁷⁷⁴ or 623.⁴⁷⁷⁵ Where these do not provide for a specific form, the declaration can be made informally, e.g., orally.⁴⁷⁷⁶

2.2.13.4 B2B contracts

The evaluations of § 309 no. 13 do not apply to B2B contracts⁴⁷⁷⁷ because they are too diverse and not comparable to B2C agreements. As professionals are used to specific form

⁴⁷⁶⁷ Stoffels *AGB-Recht* 286. See MüKo/Wurmnest § 309 no. 13 para 4, UBH/Habersack § 309 no. 13 para 5, Palandt/*Grüneberg* § 309 para 112, Staudinger/*Coester-Waltjen* § 309 no. 13 para 5.

⁴⁷⁶⁸ UBH/Habersack § 309 no. 13 para 6.

⁴⁷⁶⁹ § 130: '(Effectiveness of a declaration of intent to absent parties) (1) A declaration of intent that is to be made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him. It does not become effective if a revocation reaches the other previously or at the same time. (2) The effectiveness of a declaration of intent is not affected if the person declaring dies or loses capacity to contract after making a declaration. (3) These provisions apply even if the declaration of intent is to be made to a public authority.'

⁴⁷⁷⁰ BGH *NJW* 1983, 929 (930); 1999, 1633 (1635).

⁴⁷⁷¹ Stoffels *AGB-Recht* 286.

⁴⁷⁷² WLP/*Dammann* § 309 no 13 para 25.

⁴⁷⁷³ UBH/Habersack § 309 no. 13 para 8.

⁴⁷⁷⁴ Prescribes written form for the termination of a lease.

⁴⁷⁷⁵ Prescribes written form for the termination of employment or separation agreement.

⁴⁷⁷⁶ Stoffels *AGB-Recht* 287.

⁴⁷⁷⁷ See § 310(1) 1st sent.

requirements, a clause in a B2B contract by which declarations must be made by registered letter can therefore be valid.⁴⁷⁷⁸

2.2.14 Waiver of a right of action (§ 309 no. 14)

2.2.14.1 Content and rationale of the provision

In terms of § 309 no. 14, a provision according to which the other party to the contract⁴⁷⁷⁹ may assert its claims against the user in court only after it has attempted an amicable settlement in a procedure for extrajudicial resolution is ineffective.⁴⁷⁸⁰

This provision has been inserted into § 309⁴⁷⁸¹ only in 2016 and is effective since 26 February 2016. It is also applicable to contracts that already existed as of this date because the law does not provide for a transitory provision for these agreements.⁴⁷⁸²

No. 14 prohibits standard clauses that require Alternative Dispute Resolution before the other party can assert its claims in court. The provision hence addresses mandatory arbitration and mediation clauses where the client cannot choose this type of dispute resolution voluntarily. The title of the provision ('Waiver of action')⁴⁷⁸³ is misleading since the provision also aims at clauses that merely lead to a temporary - or dilatory - waiver of action.⁴⁷⁸⁴ Naturally, the provision addresses standard clauses that intend to achieve permanent waivers of action, and where the client has no other choice than asserting its claims by ADR.⁴⁷⁸⁵

Regulation 44(3)(x) of the Act contains a similar item, based on item (q) of the Annex of the Unfair Terms Directive.⁴⁷⁸⁶ Also in terms of item (x), the given clause must make arbitration mandatory. Although this provision does exclusively mention arbitration, it is submitted that it also applies to mediation because otherwise, the objective of the norm, i.e., greylisting clauses that are an obstacle for the consumer to take legal action, would not be attained. Item (x) seems to be more restrictive than § 309 no. 14 though in that it sets out that the clause requires the

⁴⁷⁷⁸ WLP/Dammann § 309 no. 13 para 71.

⁴⁷⁷⁹ Interestingly, the legislator refers to the 'other party to the contract' (*'der andere Vertragsteil'*) instead of the 'other party' (*'andere Vertragspartei'*). The same pattern can be found in § 305(1) ('other party') and § 307(1) ('contractual partner'). It is submitted though that the different wording has no meaning in practice since the contractual partner, the other party to the contract or the other party are always the user's counterpart.

⁴⁷⁸⁰ My own translation. To date, there is no official translation of this provision.

⁴⁷⁸¹ Gesetz zur Umsetzung der Richtlinie über alternative Streitbeilegung in Verbraucherangelegenheiten und zur Durchführung der Verordnung über Online-Streitbeilegungen in Verbraucherangelegenheiten of 19 February 2016, BGBl. 2016 I 254.

⁴⁷⁸² UBH/Schmidt (2016) § 309 no. 14 para 1.

⁴⁷⁸³ *Klageverzicht*. My own translation of the title.

⁴⁷⁸⁴ *Dilatorischer Klageverzicht*.

⁴⁷⁸⁵ UBH/Schmidt (2016) § 309 no. 14 para 2.

⁴⁷⁸⁶ See discussion of this item in Part I ch 3 para 3.4.6 a).

consumer to take disputes *exclusively* to arbitration. Thus, it targets permanent exclusions of a judicial dispute resolution, whereas no. 14 merely requires a dilatory clause, i.e., a temporary exclusion.

No. 14 is not applicable to the standard terms of banks and saving banks,⁴⁷⁸⁷ or to standard clauses providing for ADR on a voluntary basis or referring to such proceedings.⁴⁷⁸⁸

The rationale of the provision can be summarised as preventing any obstacle for the consumer for the assertion of its rights in court.⁴⁷⁸⁹ Another aspect is the consumers' protection from mandatory standard clauses that require ADR before they can go to court.⁴⁷⁹⁰ Without the prohibition contained in no. 14, clauses that make ADR compulsory before any court action is taken would lead to the result that the consumer's action would be dismissed as inadmissible 'at present' if the user puts forward the clause as defence.⁴⁷⁹¹

Naudé correctly argues that compulsory arbitration clauses under which the consumer agrees in advance to submit any future disputes to 'private arbitration' bear the risk that the consumer is unlikely to have read them, especially when they are non-negotiated or pre-formulated terms. Furthermore, the consumer is unlikely to understand the usually higher costs involved with arbitration.⁴⁷⁹² And if the consumer is aware of these higher costs, he or she is unlikely to proceed to arbitration, especially when the goods or services subject to the dispute are of comparatively low value. This will dissuade consumers from taking any legal action against the supplier.⁴⁷⁹³ A cooling-off period, as suggested by the South African Law Commission in 2001 and implemented in the Dutch Civil Code,⁴⁷⁹⁴ would not protect consumers, especially if

⁴⁷⁸⁷ AGB Banken, AGB Sparkassen.

⁴⁷⁸⁸ § 36 **Verbraucherstreitbeilegungsgesetz (VSBG)** provides, among other things, that a user of standard business terms must inform the consumer 'together with its standard business terms' of the possibility of such proceedings. § 36 VSBG came into effect on 1 February 2017 (see § 24(1) 2nd sent. of the *Umsetzungsgesetz* of 19 February 2016, BGBl. 2016 I 254).

⁴⁷⁸⁹ Ausschuss für Recht und Verbraucherschutz des Bundestages, BT-Drs. 18/6904 at 1, 36 and 74.

⁴⁷⁹⁰ See *Stellungnahme des Bundesrates zum Regierungsentwurf*, BR-Drs. 258/15 (Beschluss) at 38 *et seq* and BT-Drs. 18/5760 at 22.

⁴⁷⁹¹ BGH *NJW* 1999, 647 (648), BGH *NJW-RR* 2009, 637.

⁴⁷⁹² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 109.

⁴⁷⁹³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 111.

⁴⁷⁹⁴ **Article 6:236(n) BW** blacklists 'a stipulation which provides for the settlement of a dispute other than by a court with jurisdiction pursuant to law or by one or more arbitrators, unless it still allows the counterparty to choose for a settlement of the dispute by the court with jurisdiction pursuant to law and this choice can be made within a period of at least one month after the user has invoked the stipulation in writing.'

they are not aware of the high costs involved. In addition, the cooling-off period will most probably have lapsed before the dispute arises.⁴⁷⁹⁵

It should be noted that item (x) does not greylist terms requiring compulsory arbitration covered by the Act or other legislation. § 309 no. 14 does not provide for such a caveat. What is more, clauses providing that the consumer first take a dispute to the applicable industry ombud in terms of section 69 of the Consumer Protection Act, are not greylisted either.

The main function of no. 14 is not a 'market cleansing' from prohibited clauses because pre-formulated compulsory arbitration and mediation clauses are scarcely found in consumer contracts. The provision's objective is rather to prevent widespread use of such mandatory clauses in the future because the ADR Directive⁴⁷⁹⁶ and the Verbraucherstreitbeilegungsgesetz (VSBG)⁴⁷⁹⁷ both encourage *voluntary* ADR. No. 14 is thus not in conflict with the Directive or the aforementioned law because it only prohibits clauses that make ADR *mandatory*.

A differentiation between arbitration and mediation clauses is not necessary in terms of § 309 no. 14 as both are prohibited to the extent that ADR is mandatory before any court action. Mediation often takes place in relationships that are characterised by a personal relationship between the parties, such as company law or family law. These areas are excluded from the application of no. 14 by § 310(4) so that mediation clauses have practically no relevance in this regard. On the other hand, the use of arbitration clauses in standard terms has more relevance in practice; hence, the emphasis of no. 14 lies here.⁴⁷⁹⁸

⁴⁷⁹⁵ Section 58 of the Bill published in SALRC *Report on Domestic Arbitration* (Project 94) (2001) at 161-162. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 112.

⁴⁷⁹⁶ Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

⁴⁷⁹⁷ VSBG = Act on Alternative Dispute Resolution in Consumer Matters.

⁴⁷⁹⁸ UBH/*Schmidt* (2016) § 309 no. 14 para 9. Mediation clauses with consumers must comply with § 1031 ZPO: '(1) The arbitration agreement must be set out either in a document signed by the parties, or in letters, telefax copies, telegrams, or other forms of transmitting messages as exchanged by the parties, and that ensure proof of the agreement by supporting documents. (2) The requirement as to form stipulated by subsection (1) shall be deemed to have been met also in those cases in which the arbitration agreement is contained in a document transmitted by one party to another party, or by a third party to both parties, the content of which document is regarded, in the event an opposition is lodged late and in accordance with customary standards, to be the content of an agreement. (3) Where an agreement that is in compliance with the requirements as to form set out in subsection (1) or (2) makes reference to a document containing an arbitration clause, this establishes an arbitration agreement wherever the reference is made such that this clause is included as a component part of the agreement. (4) (repealed). (5) Arbitration agreements in which a consumer is involved must be contained in a record or document signed by the parties in their own hands. The written form as set out in the first sentence may be replaced by the electronic form pursuant to [§] 126a of the [BGB]. The record or document, or the electronic document may not contain agreements other than those making reference to the arbitration proceedings; this shall not apply if the agreement is recorded by a notary. (6) Any failure to comply with formal requirements shall be remedied

Because of the wide wording of § 309 no. 14, this provision applies to all types of claims of the client, and a restriction of an 'ADR standard clause' to specific claims of the customer does therefore not exclude its application.⁴⁷⁹⁹

Although the title of no. 14 ('waiver of action') indicates that the provision only concerns actions in court, it also includes other proceedings, such as for the preservation of evidence,⁴⁸⁰⁰ dunning procedures⁴⁸⁰¹ or preliminary injunctions.⁴⁸⁰² A restriction to court actions would not sufficiently honour the normative objective of the provision.⁴⁸⁰³

For the application of no. 14, the requirements of the given standard clause concerning the ADR proceedings and as regards the client's attempt to find an amicable solution, e.g., the seriousness and intensity of its efforts and readiness to find a solution or the duration of its efforts, are irrelevant. It is also irrelevant whether the client may terminate the ADR proceedings 'at any time' or by fulfilling only few preconditions.⁴⁸⁰⁴

Standard clauses that fall under the ambit of no. 14 'hinder[...] the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions' in terms of item (q) of the Annex of the Unfair Terms Directive. Therefore, the normative content of no. 14 does not fall behind item (q) of the Directive.⁴⁸⁰⁵

2.2.14.2 Application to consumer contracts

Under § 310(3) no. 2, § 309 no. 14 applies to pre-formulated contract terms to the extent that the consumer did not influence their contents due to the pre-formulation. Although § 310(3) no. 3 modifies the criteria for the evaluation for content control in terms of § 307(1) and (2) for contract terms by also considering 'other circumstances attending the entering into of the contract', such a modification does not apply to no. 14. This item does not allow for any evaluative criteria because § 309 aims at prohibited clauses without the possibility of evaluation.⁴⁸⁰⁶

by an appearance being made, in the hearing before the arbitral tribunal, on the merits of the case.' See Jauernig/Stadler § 309 para 23.

⁴⁷⁹⁹ UBH/Schmidt (2016) § 309 no. 14 para 12.

⁴⁸⁰⁰ *Beweissicherungsverfahren*.

⁴⁸⁰¹ *Mahnverfahren*.

⁴⁸⁰² *Verfahren des vorläufigen Rechtsschutzes*.

⁴⁸⁰³ UBH/Schmidt (2016) § 309 no. 14 para 13.

⁴⁸⁰⁴ UBH/Schmidt (2016) § 309 no. 14 para 16.

⁴⁸⁰⁵ UBH/Schmidt (2016) § 309 no. 14 para 2.

⁴⁸⁰⁶ UBH/Schmidt (2016) § 309 no. 14 paras 6 and 7.

2.2.14.3 B2B contracts

The evaluations contained in § 309 no. 14 do not apply to B2B contracts. Since this provision is characterised by the safeguarding of consumer interests, it has no radiating effect.⁴⁸⁰⁷ Where a standard clause provides for mandatory ADR proceedings between companies though, it is regularly not invalid because of its mandatory character but rather in terms of the general clause of § 307. This does not apply to cases where a particular contract type and the customs of the given branch justify extrajudicial dispute resolution before any court action is taken, and where this is in the interest of both parties. This is, e.g., the case for arbitration clauses in the construction business providing for a reasonably designed procedure (e.g., a neutral arbitrator, the right to be heard and a reasonable duration of the proceedings).⁴⁸⁰⁸ It is in the interest of the parties to avoid the high costs involved in this sector, and to attempt to achieve an extrajudicial solution first. The same applies to open-ended agreements, e.g., with an agent, or in commercial leases or franchise agreements,⁴⁸⁰⁹ where both parties are interested in maintaining good relations that could be affected by litigation. On the other hand, clauses that exclude a court action not only temporarily but also permanently are always void.⁴⁸¹⁰

2.2.14.4 Legal consequences in case of invalidity

A standard clause that falls under the ambit of no. 14 is invalid and void. The client may take the user to court, and the latter cannot defend itself by putting forward the invalid ADR clause. Where the clause provides that *both* parties must undertake ADR proceedings before bringing the case before a court, the user is bound to the clause according to the principle of personal partial invalidity.⁴⁸¹¹ This principle concerns clauses that provide for a uniform provision for both parties, as opposed to content control that only concerns provisions that create an unreasonable disadvantage for the other party.⁴⁸¹² Therefore, in cases where the user asserts any claims against its client, it must carry out ADR beforehand. Otherwise, its action in court will be dismissed as inadmissible. The other party is however not obliged to accept such ADR proceedings that have been initiated 'by precaution'.⁴⁸¹³

⁴⁸⁰⁷ UBH/Schmidt (2016) § 309 no. 14 paras 18.

⁴⁸⁰⁸ UBH/Schmidt (2016) § 309 no. 14 paras 21.

⁴⁸⁰⁹ OLG Saarbrücken 29/04/2015 – 2 U 31/14 = BeckRS 2015, 20819 (para 15).

⁴⁸¹⁰ UBH/Schmidt (2016) § 309 no. 14 paras 18.

⁴⁸¹¹ *Personale Teilunwirksamkeit*.

⁴⁸¹² UBH/Schmidt (2016) § 306 para 16.

⁴⁸¹³ UBH/Schmidt (2016) § 309 no. 14 para 17.

2.2.15 Advance payment and security (§ 309 no. 15)

Under § 309 no. 15, a provision according to which, in the case of a contract to produce a work, the user a) may demand part payments from the other party to the contract⁴⁸¹⁴ for part performances which are substantially higher than the advance payments to be made pursuant to § 632a(1) and § 650m(1), or b) is not obliged to provide the security pursuant to § 650m(2) or is only obliged to provide the security to a lesser extent, is invalid.⁴⁸¹⁵

No. 15 was inserted into § 309 with effect of 1 January 2018.⁴⁸¹⁶ Its objective is to prevent that standard terms users restrict the consumers' rights with regard to the modified § 632a and the newly inserted § 650m.⁴⁸¹⁷ The provision hence concerns contracts to produce a work and construction contracts.

In terms of § 632a, the contractor may demand a part payment from the customer for work carried out in accordance with the contract. If the performances rendered are not in accordance with the contract, the customer may refuse payment of a reasonable part of the part payment. This also applies to required materials or building components that are supplied or specially prepared and made available if ownership of the materials or building components is transferred to the customer or appropriate security is provided for this, at his option.

§ 650m provides that, if the entrepreneur demands part payments pursuant to § 632a, the total amount of the part payments may not exceed 90 per cent of the agreed total remuneration. This provision also provides that upon the first part payment, the consumer shall be provided with security for the timely production of the work without significant defects in the amount of 5 percent of the agreed total remuneration.

The South African Consumer Protection Act does not contain a similar provision.

⁴⁸¹⁴ Here too, the legislator refers to the 'other party to the contract' (*'der andere Vertragsteil'*) instead of the 'other party' (*'andere Vertragspartei'*). The different wording has no practical meaning though as the other party to the contract or the other party are always the user's counterpart.

⁴⁸¹⁵ My own translation. To date, there is no official translation of this provision.

⁴⁸¹⁶ Gesetz zur Reform des Bauvertragsrechts, BGBl. 2017 I at 969.

⁴⁸¹⁷ Jauernig/Stadler § 309 para 24.

2.3 Prohibited clauses with the possibility of evaluation (§ 308)

2.3.1 Period of time for acceptance and performance (§ 308 no. 1)

2.3.1.1 Period of time for acceptance (§ 308 no. 1 1st sent. 1st var.)

2.3.1.1.1 Rationale of § 308 no. 1 1st sent. 1st var.

Pursuant to § 145, a person who offers to another to enter into a contract is bound by the offer, unless he or she has excluded being bound by it. If the offeror has determined a period of time for the acceptance of an offer, the acceptance may only take place within this period (§ 148). In terms of § 147(1), an offer made to a person who is present may only be accepted immediately. This also applies to an offer made by one person to another using a telephone or another technical facility. According to § 147(2), an offer made to a person who is absent may be accepted only until the time when the offeror may expect to receive the answer under ordinary circumstances.⁴⁸¹⁸ For the calculation of this period of time, the necessary time for the communication of the offer, the time for processing the offer and for reflecting it as well as the time for the communication of the answer (acceptance or rejection) is taken into account.⁴⁸¹⁹ This means that the legal period of time for acceptance of the offer depends on the circumstances of the given case.⁴⁸²⁰ This uncertainty during the time the offeror is bound by its offer ends only after the other's rejection or the expiry of the acceptance period. In terms of § 146, the offer expires if a refusal is made to the offeror, or if no acceptance is made to this person in good time.⁴⁸²¹

The first variation of § 308 no. 1 1st sent. prohibits provisions by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer. This presumes that the offer is made by the other party, i.e., the client. This kind of situation may arise where the customer has to use a form (e.g., order form) in which the user stipulated an acceptance period. Contrary to the wording of § 148, it is the recipient of the offer who determines the acceptance period, which is possible because § 148 is non-mandatory.⁴⁸²² The user's 'offering' of its goods or services to the general public is no offer in the legal sense, but an *invitatio ad offerendum*.⁴⁸²³

⁴⁸¹⁸ BT-Drs. 7/3919 at 24.

⁴⁸¹⁹ Palandt/*Ellenberger* § 146 para 6.

⁴⁸²⁰ Stoffels *AGB-Recht* 292.

⁴⁸²¹ Stoffels *AGB-Recht* 292.

⁴⁸²² WLP/*Dammann* § 308 no. 1 para 5, Palandt/*Grüneberg* § 308 para 3.

⁴⁸²³ Stoffels *AGB-Recht* 293.

The provision aims to prevent that the user binds the other party to its offer for a too long or insufficiently specific period of time, whereas the user allows itself an unreasonably long reflection period. During the period in which the client is bound to its offer, it is limited in its freedom of disposal and does not know whether the contract will be concluded. If she enters into an agreement with another supplier, she risks ending up with two binding contracts.⁴⁸²⁴ On the other hand, the user's position is strengthened as it may speculate at the client's costs.⁴⁸²⁵

From a dogmatic point of view, standard provisions on acceptance periods are no contractual provisions but rather clauses stipulating the conclusion of the contract.⁴⁸²⁶ Since § 305(1) is extended by § 308 no. 1, an acceptance period that has been unilaterally set by the user is open to scrutiny in terms of content control under § 308 no. 1, however.⁴⁸²⁷

The South African Consumer Protection Act or its Regulation does not contain a similar provision. Hence, section 48 of the Act applies. The Unfair Terms Directive contains in item (c) of its Annex a provision by which terms making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone is ineffective. This provision is restricted to services and not applicable to goods though. The German provision thus goes beyond the protective purpose of the Directive.

2.3.1.1.2 Scope of application of the provision

§ 308 no. 1 applies to offers to conclude any type of contract, i.e., agreements under the law of obligations and real contracts.⁴⁸²⁸ The provision is also applicable to amendments or supplements of contracts already concluded.⁴⁸²⁹

It aims to protect the other party of the contract, and not the user. Hence, in cases where the user offers to conclude an agreement which provides for an acceptance period for the other party, no. 1 finds no application.⁴⁸³⁰ If the conclusion of the contract depends on a suspensive condition, no. 1 applies by analogy because this is also a case in which the legislator wants to protect the other party: the contract has not yet come into being, whereas the other party is

⁴⁸²⁴ UBH/Schmidt § 308 no. 1 para 1, WLP/Dammann § 308 no. 1 para 1.

⁴⁸²⁵ BT-Drs. 7/3919 at 24, MüKo/Wurmnest § 308 no. 1 para 5.

⁴⁸²⁶ *Vertragsabschlussklauseln*. In this regard, see BGH NJW 2010, 2873.

⁴⁸²⁷ UBH/Schmidt § 308 no. 1 para 8.

⁴⁸²⁸ Bamberger/Roth/Becker § 308 no. 1 para 4, WLP/Dammann § 308 no. 1 para 3.

⁴⁸²⁹ WLP/Dammann § 308 no. 1 para 3.

⁴⁸³⁰ WLP/Dammann § 308 no. 1 para 9.

bound to its offer.⁴⁸³¹ This can be expressed by a clause, such as 'the contract is concluded when the goods arrive from the importer or preliminary supplier'.⁴⁸³²

Real estate contracts sometimes contain so-called 'continued validity clauses'.⁴⁸³³ These clauses provide that the other party is bound by its offer until the expiry of a certain period of time, whereas the user can accept this offer at any time, also after its expiry and until it has been revoked (which is possible at any time). The BGH is of the view that such provisions infringe no. 1 because they provide the contrary of §§ 147(2) and 146, i.e., a short-term decision in the transactional interest. According to the BGH, the possibility to revoke the offer at any time can by far not balance the disadvantages of an unlimited continued validity clause.⁴⁸³⁴

Standard forms for credit card agreements often contain a clause by which the agreement comes only into being after the client has taken knowledge of the standard business terms and signed or used the credit card. In such a case, and despite its thematic proximity, § 308 no. 1 is not applicable. The deferral of the conclusion of the contract can be seen here as a rejection of the original offer of the client, in conjunction with a new offer in terms of § 150(2),⁴⁸³⁵ and not as a period of time that has been set in the standard form. Therefore, such clauses must be assessed under §§ 305c(1) and 307(2) no. 1, and not in terms of § 308 no. 1.⁴⁸³⁶

2.3.1.1.3 Content of the provision

a) Unreasonably long periods of time

The enquiry of whether the period of time contained in the standard clauses is unreasonable in terms of § 308 no. 1 requires a balancing of the user's and the other party's interests and a consideration of the typical circumstances for the given contract type.⁴⁸³⁷ If the period of time is significantly longer than in § 147(2) (for the communication of the declarations and the processing and reflection), it is only effective if the user has an interest worthy of protection that is more significant than the other party's interests.⁴⁸³⁸

⁴⁸³¹ WLP/Dammann § 308 no. 1 para 24.

⁴⁸³² Example (modified) from WHL/Wolf § 10 no. 1 AGBG para 8.

⁴⁸³³ Fortgeltungsklauseln.

⁴⁸³⁴ BGH NJW 2013, 3434.

⁴⁸³⁵ § 150(2): 'An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer.'

⁴⁸³⁶ OLG Nuremberg ZIP 1997, 1781. The court held that such a clause violates § 308 no. 1 and that it is also surprising.

⁴⁸³⁷ BGH NJW 2001, 303.

⁴⁸³⁸ MüKo/Wurmnest § 308 no. 1 para 5.

Such an interest of the user might exist where the user has to make calculations or negotiate with third parties beforehand,⁴⁸³⁹ assess the creditworthiness of the offeror, or make enquiries concerning the availability of the given goods. Besides, the time needed within a company with divided responsibilities⁴⁸⁴⁰ and the interest of rationalisation have to be considered.⁴⁸⁴¹ The more complex the transaction is in terms of its financing and approval, the bigger is the user's margin for the acceptance period.⁴⁸⁴² The user can nonetheless be expected to proceed as swiftly as possible.⁴⁸⁴³ On the other hand, the customer's interests not to stay too long in a state of uncertainty must be taken into account too,⁴⁸⁴⁴ since it is bound to its offer and cannot conclude an agreement with another supplier. This can have a significant impact where the agreement concerns goods with fluctuating market prices.⁴⁸⁴⁵

For everyday transactions, a period of time of over ten days is considered unreasonable,⁴⁸⁴⁶ whereas others are of the view that two weeks are not unreasonable.⁴⁸⁴⁷ Any generalisation of the duration of reasonable periods of time must be seen with scepticism though because the given circumstances might differ considerably.⁴⁸⁴⁸

For contracts for the purchase of a new vehicle, a period of time of four weeks is considered reasonable.⁴⁸⁴⁹ If the car is available at the car dealer's premises and no further questions have to be clarified, four weeks are considered unreasonable in terms of no. 1.⁴⁸⁵⁰ For utility vehicles, a period of time of six weeks,⁴⁸⁵¹ and for used cars, ten days are considered reasonable.⁴⁸⁵² Credit agreements require the checking of the client's creditworthiness so that a one-month period is still reasonable, whereas six weeks are too long.⁴⁸⁵³ The same applies to a purchase agreement for an apartment where the buyer has to finance its purchase, and where notarial

⁴⁸³⁹ BGH *NJW* 1986, 1807 (1808).

⁴⁸⁴⁰ UBH/*Schmidt* § 308 no. 1 para 11.

⁴⁸⁴¹ WHL/*Wolf* § 10 no. 1 AGBG para 14.

⁴⁸⁴² Staudinger/*Coester-Waltjen* § 308 no. 1 para 10.

⁴⁸⁴³ UBH/*Schmidt* § 308 no. 1 para 11.

⁴⁸⁴⁴ WLP/*Dammann* § 308 no. 1 para 12.

⁴⁸⁴⁵ MüKo/*Wurmnest* § 308 no. 1 para 5.

⁴⁸⁴⁶ Staudinger/*Coester-Waltjen* § 308 no. 1 para 11.

⁴⁸⁴⁷ Palandt/*Grüneberg* § 308 no. 4.

⁴⁸⁴⁸ UBH/*Schmidt* § 308 no. 1 para 13.

⁴⁸⁴⁹ BGH *NJW* 1990, 1784, with further references.

⁴⁸⁵⁰ OLG Frankfurt/M. *NJW-RR* 1998, 566.

⁴⁸⁵¹ LG Marburg *DAR* 1996, 148 (149). In LG Lüneburg *NJW-RR* 2002, 564, a duration of four weeks is considered too long, however.

⁴⁸⁵² OLG Cologne *NJW-RR* 1993, 1404.

⁴⁸⁵³ BGH *NJW* 1986, 1807 (1808).

certification is required. Hence, an acceptance period of four weeks is considered reasonable.⁴⁸⁵⁴

b) Insufficiently specific periods of time

Periods of time that are insufficiently specified in standard terms are also ineffective. Whether such a period of time is insufficient has to be assessed by applying the standard of an average contractual partner of the given transaction.⁴⁸⁵⁵ If the latter is able to calculate the acceptance period without any difficulties, it is sufficiently specified. This is however not the case where the beginning, the duration or the end of the period of time cannot be determined with certainty, but only with difficulties (e.g., if this is costly and time-consuming, or even requires legal counselling).⁴⁸⁵⁶ This is especially the case where for the determination of the period of time indeterminate temporal terms are used (e.g., 'reasonable time'), or where the calculation depends on circumstances in the user's sphere, or even on the discretion of the user or third parties.⁴⁸⁵⁷ Clauses that merely reword § 147(2) are not critical, however.⁴⁸⁵⁸

A clause in a loan agreement, in terms of which 'I am bound by this request from today until two weeks after receipt of the offer by you. If further documents have to be submitted in order to examine the offer, this commitment period ends two weeks after you have received them' is ineffective under § 308 no. 1. The acceptance period cannot be calculated by the other party because its duration depends on circumstances that are not exclusively in its sphere of influence. For the period of time beyond the initial two weeks, the other party is still in a state of uncertainty of whether the contract will be concluded or not.⁴⁸⁵⁹ For the same reason, the clause 'the client is bound by its order until reception of an answer' is also ineffective.⁴⁸⁶⁰ The same applies to the provision 'the customer is bound by its offer until the offeree sends its acceptance within a reasonable period of time'.⁴⁸⁶¹

In any event, the interpretation of the given clause can have the result that a provision that merely reflects the statutory provisions, such as 'the order is irrevocable' can be construed in that the client is bound by the offer indefinitely, so that the provision is invalid under no. 1.⁴⁸⁶²

⁴⁸⁵⁴ BGH *NJW* 2010, 2873.

⁴⁸⁵⁵ WLP/Dammann § 308 no. 1 para 19.

⁴⁸⁵⁶ WLP/Dammann § 308 no. 1 para 19.

⁴⁸⁵⁷ OLG Hamm *NJW-RR* 1992, 1075.

⁴⁸⁵⁸ BGH *NJW* 2013, 926.

⁴⁸⁵⁹ OLG Hamm *NJW-RR* 1992, 1075.

⁴⁸⁶⁰ BT-Drs. 7/3919 at 24.

⁴⁸⁶¹ BT-Drs. 7/3919 at 24.

⁴⁸⁶² Staudinger/*Coester-Waltjen* § 308 no. 1 para 12.

2.3.1.1.4 Legal consequences in case of violation of the provision

In terms of § 306(2), if a clause is ineffective pursuant to § 308 no. 1, the legal acceptance period set out in § 147(2) applies for offers made to a person who is absent. If the user accepts the offer within the ineffective period of time, but after the expiry of the period set out in § 147, its declaration must be considered a new offer in terms of § 150(1).⁴⁸⁶³ A partial retention in terms of which an unreasonably long period of time is shortened to a reasonable one is excluded. A complementary interpretation that has the same objective is not possible either.⁴⁸⁶⁴

2.3.1.1.5 B2B contracts

In B2B contracts, the direct application of § 308 no. 1 1st sent. 1st var. is excluded pursuant to § 310(1). The acceptance periods set out in these contracts must be reasonable in terms of § 307 though. B2B contracts are characterised by trust between the contractual partners as well as promptness and straightforwardness so that unnecessary long or insufficiently specific periods of time are rather to be seen as more unreasonable as in B2C contracts.⁴⁸⁶⁵ In this context, one must consider the expectations and knowledge of an average business partner as well as different interpretational standards for the given industry.⁴⁸⁶⁶

2.3.1.2 Period of time for performance (§ 308 no. 1 1st sent. 2nd var.)

a) Rationale of the provision

In terms of § 308 no. 1 1st sent. 2nd var., a provision by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time (...) for rendering performance is ineffective. This does not include the reservation of the right not to perform until after the end of the period of time for withdrawal provided for consumer contracts under § 355(1) and (2).

Regulation 44(3)(p) of the Consumer Protection Act contains a similar item.⁴⁸⁶⁷

The period of time for performance is usually individually agreed⁴⁸⁶⁸ or contained in the user's standard terms and is part of the main modalities for the user's performance, besides the place of performance. Where no time for performance has been specified or is evident from the circumstances, the other party may demand performance immediately, and the user may effect

⁴⁸⁶³ WLP/Dammann § 308 no. 1 para 52.

⁴⁸⁶⁴ BGH NJW 2010, 2873 (2874).

⁴⁸⁶⁵ WLP/Dammann § 308 no. 1 para 63.

⁴⁸⁶⁶ Staudinger/Coester-Waltjen § 308 no. 1 para 21 and 23.

⁴⁸⁶⁷ For more details, see discussion on item (p) in Part I ch 3 para 3.4.2 i).

⁴⁸⁶⁸ This is quite common also in B2C contracts. See UBH/Schmidt § 308 no. 1 para 17.

it immediately (§ 271(1)).⁴⁸⁶⁹ Standard terms users therefore try to have a generous margin for their time of performance which may lead to an aggravation of the customer's contractual position. If the legislature had not intervened by § 308 no. 1, it would be difficult for the other party to serve notice of default⁴⁸⁷⁰ because the user's standard terms provide for a lax determination of the period for performance and the performance is not due (yet). The customer could not free itself from the contract and would be restricted, whereas the user could freely determine the time of performance.⁴⁸⁷¹ What is more, clients often face harsh consequences if they do not pay in time, whereas a too long period of time for the user's performance would lead to an obvious imbalance.⁴⁸⁷²

The legislator has recognised this danger to the contractual balance. § 308 no. 1 1st sent. 2nd var. supplements § 309 no. 8 lit. a) because this provision would be ineffective in certain circumstances.⁴⁸⁷³

b) Contents of the provision

aa) Period for performance

The period of time for performance in this provision only concerns periods of time that the user has determined for his or her performance.⁴⁸⁷⁴ All kinds of periods for performance are included, i.e., for the delivery of goods, the payment or the obligation to accept a work produced in terms of § 640. Besides 'real periods of time for performance'⁴⁸⁷⁵ (e.g., 'delivery in two weeks after the conclusion of the contract'), the provision also includes so-called 'quasi periods of time for performance'.⁴⁸⁷⁶ These are grace and extension periods that provide an

⁴⁸⁶⁹ Stöffels *AGB-Recht* 315. § 271: '(1) Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately. (2) Where a time has been specified, then in case of doubt it must be assumed that the obligee may not demand performance, but the obligor may effect it prior to that time.'

⁴⁸⁷⁰ See § 280(3) read in conjunction with § 281; § 280(2) read in conjunction with § 286; § 323.

⁴⁸⁷¹ BT-Drs. 7/3919 at 24, UBH/Schmidt § 308 no. 1 para 12.

⁴⁸⁷² BT-Drs. 7/3919 at 24.

⁴⁸⁷³ BGH *NJW* 1984, 2468 (2469).

⁴⁸⁷⁴ WLP/Dammann § 308 no 1 para 37 *et seq.*

⁴⁸⁷⁵ *Echte Leistungsfristen.*

⁴⁸⁷⁶ *Unechte Leistungsfristen.*

additional period of time after the expiry of the actual period of time for performance,⁴⁸⁷⁷ or those applicable after a certain event (e.g., strike⁴⁸⁷⁸ or force majeure⁴⁸⁷⁹).⁴⁸⁸⁰

Where the user reserves the right to delay its performance, one has to differentiate between two scenarios: If the clause merely concerns the due date ('period of time for performance subject to reservation', 'period of time for performance approximate' or 'reasonable extension of the period of time for performance'), § 308 no. 1 1st sent. 2nd var. is applicable.⁴⁸⁸¹ On the other hand, where the clause concerns an exemption from the obligation to perform ('delivery subject to reservation', 'delivery subject to prior sale'), § 308 no. 3 applies.⁴⁸⁸²

bb) Unreasonably long period for performance

For the assessment of whether a period for performance is reasonable or not, one has to consider the type of performance, the given branch and the time necessary for the user to procure or produce the goods, but also the client's interests to receive delivery as soon as possible.⁴⁸⁸³ If the goods in question are easy to produce or to stock, the period for performance will likely be shorter than for goods produced according to the customer's special wishes.⁴⁸⁸⁴

A period for delivery of furniture of 3 weeks is considered reasonable,⁴⁸⁸⁵ whereas three months after an 'approximate' date are unreasonably long.⁴⁸⁸⁶ For an individually assembled kitchen, an additional period of 4 weeks has been considered reasonable.⁴⁸⁸⁷ In a contract to produce a work, a clause by which the acceptance in terms of § 640 is stipulated for a date that lies two months after termination of the work is invalid.⁴⁸⁸⁸

⁴⁸⁷⁷ BGH NJW 1982, 331 (333); 1983, 1320.

⁴⁸⁷⁸ The former OFT was of the view however that factors such as shortage of stock, labour problems, strike or labour shortage may be attributable to the supplier. Hence, clauses in terms of which these factors allow the supplier an unreasonably long time to perform are likely to be unfair. See OFT *Unfair Contract Terms Guidance* (2008) paras 2.6.1-2.6.7 at 31-32.

⁴⁸⁷⁹ In a South African context, Hawthorne and Kuschke are of the view that terms such as 'force majeure' or 'Act of God' should be avoided since they are legal jargon. See Hutchison *et al Law of Contract* 412.

⁴⁸⁸⁰ Palandt/*Grüneberg* § 308 para 6, WLP/*Dammann* § 308 no. 1 para 34.

⁴⁸⁸¹ WLP/*Dammann* § 308 no. 1 para 35.

⁴⁸⁸² UBH/*Schmidt* § 308 no. 1 para 20.

⁴⁸⁸³ BGH NJW 2007, 1198 (1200).

⁴⁸⁸⁴ Stoffels *AGB-Recht* 317.

⁴⁸⁸⁵ Palandt/*Grüneberg* § 308 para 7.

⁴⁸⁸⁶ BGH NJW 1983, 1320 *et seq*; 1984, 48.

⁴⁸⁸⁷ BGH NJW 2007, 1198 (1200 *et seq*).

⁴⁸⁸⁸ BGH NJW 1989, 1602 (1603).

cc) Insufficiently specific period for performance

The user has to determine the period of time for performance sufficiently specific. This is not the case where an average customer is not able to calculate the date of performance, or where he or she has no influence on, or cannot provoke delivery.⁴⁸⁸⁹

Hence, a clause of a window maker by which the period of time for delivery only starts after its written confirmation by the producer is invalid because the client has no influence on this condition.⁴⁸⁹⁰ Clauses such as 'customary period of time for performance' are also ineffective because the other party is not able to calculate the date of performance.⁴⁸⁹¹ On the other hand, so-called 'approximate clauses'⁴⁸⁹² ('delivery in approximately one month') are considered effective,⁴⁸⁹³ but not clauses such as 'our goods are normally delivered in one month'.⁴⁸⁹⁴

dd) Exceptions for consumer contracts

Pursuant to the 2nd sent. of § 308 no. 1, the reservation of the right not to perform until after the end of the period of time for withdrawal under section 355 subsections (1) and (2)⁴⁸⁹⁵ is not prohibited in terms of § 308 no. 1. This provision concerns consumer contracts, and its rationale is to enable the user to withhold its performance until the other party's right to withdraw has expired in order to avoid an unnecessary back and forth of the performance.⁴⁸⁹⁶ This exception does however not apply to distance contracts⁴⁸⁹⁷ and distance learning contracts⁴⁸⁹⁸ where the right of withdrawal only begins after delivery.⁴⁸⁹⁹

⁴⁸⁸⁹ WLP/Dammann § 308 no. 1 para 50. BT-Drs. 7/3919 at 24 refers to clauses such as 'delivery as soon as possible', 'delivery after reception of the goods at the warehouse', considering them insufficiently specific.

⁴⁸⁹⁰ BGH NJW 1985, 855 (856 *et seq.*).

⁴⁸⁹¹ OLG Cologne BB 1982, 638.

⁴⁸⁹² Circa-Fristen.

⁴⁸⁹³ Palandt/Grüneberg § 308 para 8.

⁴⁸⁹⁴ KG NJW 2007, 2266 (2267).

⁴⁸⁹⁵ § 355(1) and (2): '(1) If a consumer is given, by statute, a right of withdrawal according to this provision, then the consumer and the trader are no longer bound by their declarations of intention to conclude the contract if the consumer withdraws from his declaration of intention within the period specified. The withdrawal is effected by a declaration being made to the trader. The declaration must unambiguously reflect the consumer's decision to withdraw from the contract. The withdrawal does not have to provide any grounds. Dispatch of the withdrawal in good time is sufficient to comply with the time limit. (2) The withdrawal period is fourteen days. Unless otherwise provided, it begins upon the contract having been concluded.'

⁴⁸⁹⁶ MüKo/Wurmnest § 308 no. 1 para 23.

⁴⁸⁹⁷ Fernabsatzverträge. See § 312d.

⁴⁸⁹⁸ Fernunterrichtsverträge. See § 4 FernUSG.

⁴⁸⁹⁹ Palandt/Grüneberg § 308 para 9.

c) Legal consequences in case of violation

If a provision is ineffective in terms of § 308 no. 1 1st sent. 2nd var., the legal period of time for performance under § 271⁴⁹⁰⁰ applies. A partial retention of the clause by shortening the delay is not allowed.⁴⁹⁰¹

d) B2B contracts

Usually, the parties to a B2B contract determine the time of performance by individual agreement, so that a pre-formulated clause would not apply in terms of § 305b.⁴⁹⁰² If the time of performance is agreed on by a standard clause, the latter has to be assessed in terms of the general clause, however. The commercial experience of business partners justifies a more generous standard in this regard.⁴⁹⁰³ Clauses that hinder the other party from calculating the date of performance are invalid as well.⁴⁹⁰⁴ Hence, a clause such as 'date of delivery non-binding' should also be invalid in B2B contracts.⁴⁹⁰⁵

2.3.1.3 Period of time for payment, review and acceptance (§ 308 no. 1 lit. a), b)

§ 308 no. 1 lit. a) and b) have been inserted into the BGB in 2014 on the basis of the Act for Fighting of Default of Payment in Business Transactions.⁴⁹⁰⁶ § 308 no. 1 lit. a) and b) are 'special provisions'⁴⁹⁰⁷ to § 271a⁴⁹⁰⁸ which has also been inserted.⁴⁹⁰⁹

In terms of no. 1 lit. a) (period of time for payment), a provision by which the user reserves the right to unreasonably long periods of time for the performance of his payment to his contractual partner⁴⁹¹⁰ is ineffective. If the user is not a consumer, in case of doubt it is to be assumed that a period of more than 30 days after reception of the counter-performance or, in the case where

⁴⁹⁰⁰ § 271: '(1) Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately. (2) Where a time has been specified, then in case of doubt it must be assumed that the obligee may not demand performance, but the obligor may effect it prior to that time.'

⁴⁹⁰¹ WLP/Dammann § 308 no. 1 para 56.

⁴⁹⁰² UBH/Schmidt § 308 no. 1 para 30.

⁴⁹⁰³ UBH/Schmidt § 308 no. 1 para 30.

⁴⁹⁰⁴ It is submitted that Grüneberg's view that these clauses are valid in B2B contracts must be rejected as also commercial business partners must be able to know when they can expect delivery in terms of their planning security. See Palandt/Grüneberg § 308 para 10.

⁴⁹⁰⁵ UBH/Schmidt § 308 no. 1 para 30.

⁴⁹⁰⁶ Gesetz zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr, BGBl. I 2014 at 1218 *et seq.*

⁴⁹⁰⁷ The legislative materials refer to a 'special provision' ('*Sonderregelung*'). See BT-Drs. 18/1309 at 20.

⁴⁹⁰⁸ § 271a concerns agreements on periods of time for payment, review and acceptance. Unfortunately, to date no official translation of this provision exists.

⁴⁹⁰⁹ Stoffels *AGB-Recht* 319.

⁴⁹¹⁰ Interestingly, the legislator refers to the 'contractual partner' ('*Vertragspartner*') instead of the 'other party' ('*andere Vertragspartei*'). The same pattern can be found in § 305(1) ('other party') and § 307(1) and in the newly inserted § 309 no. 14 and 15 ('contractual partner'). It is submitted though that the different wording has no meaning in practice since both cases always concern the user's counterpart.

the obligor receives an invoice or an equivalent payment schedule after reception of the counter-performance, a period of more than 30 days after reception of that invoice or equivalent payment schedule is unreasonably long.⁴⁹¹¹

Pursuant to no. 1 lit. b) (period of time for review and acceptance), a provision by which the user reserves the right to unreasonably long periods of time for review and acceptance of the counter-performance is ineffective. If the user is not a consumer, in case of doubt it is to be assumed that a period of more than 15 days after reception of the counter-performance is unreasonably long.⁴⁹¹²

In other words, no. 1 lit. a) and b) apply to cases where the user reserves the right to pay the other party only after an unreasonably long period of time, or to review or to accept the other party's performance after an unreasonably long period of time.⁴⁹¹³

The 2nd sent. of each of these provisions sets out what is to be considered an unreasonably long period of time (30 or 15 days, respectively) if the user is not a consumer. The formulation 'in case of doubt' means that the user has to argue why the period contained in its standard terms is reasonable. This 'case of doubt' provision is however restricted to cases where the user is not itself a consumer, following the European Directive 2011/7/EU.⁴⁹¹⁴

In terms of § 310(1), § 308 no. 1 lit. a) and b) are expressly applicable to standard terms which are used in contracts with entrepreneurs, legal persons under public law or a special funds under public law. The legislative materials suggest that the prohibitions of § 308 no. 1 lit. a) and b) are particularly aimed at standard clauses that are used for these entities.⁴⁹¹⁵ The fact that lit. a) and b) expressly set out periods of time for agreements that are not consumer contracts speaks for their main application to B2B contracts.

2.3.2 Additional period of time (§ 308 no. 2)

In terms of § 308 no. 2, a provision by which the user, contrary to legal provisions, reserves to himself the right to an unreasonably long or insufficiently specific additional period of time for the performance he is to render is ineffective.

⁴⁹¹¹ My own translation. Unfortunately, to date no official translation of this provision exists.

⁴⁹¹² My own translation.

⁴⁹¹³ Stoffels *AGB-Recht* 319.

⁴⁹¹⁴ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

⁴⁹¹⁵ See BT-Drs. 18/1309 at 21.

No. 2 of § 308 concerns clauses such as 'if delivery is not made at the date specified above, after 2 months the customer has the right to set an additional period of time of ... and declare that he or she will revoke the agreement unless delivery is made within the additional period of time.'⁴⁹¹⁶

The Act does not explicitly regulate this issue. Item (p) of regulation 44(3) rather corresponds to § 308 no. 1, i.e., 'a provision by which the user reserves the right to unreasonably long or insufficiently specific periods of time (...) for rendering performance.'⁴⁹¹⁷ This item could nonetheless be interpreted in that a clause providing for an unreasonably long time to perform also covers unreasonable grace periods for the benefit of the supplier.

2.3.2.1 Rationale of § 308 no. 2

If an obligor (user) is non-compliant with a duty arising from the obligation, the obligee (other party) may demand damages for the harm caused thereby. Damages for the delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.⁴⁹¹⁸ The main obligation is not affected in this case. The other party cannot be expected to wait until the user is ready to perform. Hence, to the extent that the user does not render performance when it is due or does not render performance as owed, the other party may, subject to the requirements of § 280(1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure.⁴⁹¹⁹ If in the case of a reciprocal contract, the obligor does not render an act of performance that is due, or does not render it in conformity with the contract, the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.⁴⁹²⁰ What is more, damages in lieu of performance may be demanded by the obligee if the user is in breach.⁴⁹²¹

An additional period of time, or grace period, in terms of § 308 no. 2 aims not to enable the user to get underway the execution of its performance but to grant him or her the last opportunity to terminate a performance already underway. Thus, a grace period can be much shorter than the delivery deadline.⁴⁹²² Granting an additional period of time is not necessary if

⁴⁹¹⁶ Example from BT-Drs. 7/3919 at 25. My own translation.

⁴⁹¹⁷ See discussion on § 308 no. 1 above and reg 44(3)(p) in Part I ch 3 para 3.4.2 i).

⁴⁹¹⁸ § 280(1) and (2).

⁴⁹¹⁹ § 281(1) 1st sent.

⁴⁹²⁰ § 323(1).

⁴⁹²¹ §§ 280(1) and (3), 281.

⁴⁹²² BGH *NJW* 1985, 320 (323).

the user seriously and definitively refuses performance or where special circumstances exist which justify immediate revocation after weighing the interests of both parties.⁴⁹²³

Standard terms users often wish to avert these legal consequences and therefore insert clauses that grant an unreasonably long or insufficiently specific additional period of time for the performance. Since §§ 281 and 323 are *ius dispositivum* provisions⁴⁹²⁴ users may insert a clause by which they stipulate a minimum grace period.⁴⁹²⁵ The danger of this type of clauses is that customers are ultimately confronted with unreasonably long delivery deadlines and that they are hindered from exerting their right to rescind from the agreement or to ask for damages. This regularly creates unfairness because the customer is nonetheless strictly bound to pay punctually.⁴⁹²⁶ Therefore, § 308 no. 2 – which complements the provisions of §§ 308 no. 1 and 309 no. 8 – provides that clauses granting an unreasonably long or insufficiently specific additional period of time for the performance are ineffective.⁴⁹²⁷ *A fortiori*, clauses that oblige the other party to grant an additional period of time for the performance although this is unnecessary under §§ 323(2), 326(5), 636⁴⁹²⁸ are invalid. This can be deducted from § 307(2) no. 1 according to which an unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates.⁴⁹²⁹

2.3.2.2 Content of the provision

'Additional period of time' in the sense of § 308 no. 2 only includes clauses that determine the moment from which the other party may ask for damages or revoke the contract.⁴⁹³⁰

The enquiry of the unreasonableness of the additional period of time is done by a balancing of the parties' interests.⁴⁹³¹ First, a reasonable additional period of time for the given transaction must be determined according to the applicable legal provisions. An adjustment of this period of time considering the unification of standard terms is nevertheless possible.⁴⁹³² Then, in

⁴⁹²³ §§ 281, 323(2).

⁴⁹²⁴ Palandt/*Grüneberg* § 308 para 2.

⁴⁹²⁵ Stöffels *AGB-Recht* 350.

⁴⁹²⁶ BT-Drs. 7/3919 at 25.

⁴⁹²⁷ UBH/*Schmidt* § 308 no. 2 para 3.

⁴⁹²⁸ This is the case where the user seriously and definitely refuses performance, or does not perform by a date specified in the contract or within a period of time specified in the contract, or special circumstances exist which, when the interests of both parties are weighed, justify immediate revocation.

⁴⁹²⁹ WLP/*Dammann* § 308 no. 2 para 5.

⁴⁹³⁰ Staudinger/*Coester-Waltjen* § 308 no. 2 para 3.

⁴⁹³¹ WLP/*Dammann* § 308 no. 2 para 8.

⁴⁹³² Palandt/*Grüneberg* § 308 para 13.

consideration of the objective of the additional period of time and the particularities of the given branch, one must consider that the additional period of time does not become a 'surrogate delivery deadline' or significantly extends the originally agreed delivery deadline.⁴⁹³³ Where the original deadline is already generous, a rather short grace period is permitted.⁴⁹³⁴ The fair balancing of the parties' interests is obviously disturbed where the supplier's standard terms provide for a generous clause for its delay in performance, whereas the clause concerning the customer's late payment is very strict.⁴⁹³⁵

The courts held, for instance, that an additional period of time of 4 weeks for the delivery of furniture was unreasonable.⁴⁹³⁶ A period of 6 weeks for the delivery of windows⁴⁹³⁷ or the renovation of a house façade⁴⁹³⁸ was also considered too long. For 'normal' consumer contracts, 2 weeks are regularly considered reasonable.⁴⁹³⁹ This is merely a rule of thumb because a case-by-case assessment is necessary.⁴⁹⁴⁰

The criterion of an insufficiently specified additional period of time in terms of § 308 no. 2 is fulfilled if the other party is unable to calculate the duration of the period of time and therefore has no clarity of its legal position. This is similar to § 308 no. 1.⁴⁹⁴¹ A clause which stipulates a 'reasonable' grace period is indeed uncertain (indeterminate legal term) but corresponds to the legal provision and is thus exempt from content control in terms of § 307(3).⁴⁹⁴²

2.3.2.3 Legal consequences in case of violation

If a clause is ineffective in terms of § 308 no. 2, the statutory provisions apply, namely §§ 281 and 323, and a reasonable additional period of time has to be determined. Maintaining the clause by shortening the grace period is not allowed.⁴⁹⁴³

⁴⁹³³ BGH *NJW* 1985, 855 (857).

⁴⁹³⁴ UBH/*Schmidt* § 308 no. 2 para 6.

⁴⁹³⁵ BT-Drs. 7/3919 at 25.

⁴⁹³⁶ BGH *NJW* 1985, 320 (323).

⁴⁹³⁷ BGH *NJW* 1985, 855 (857).

⁴⁹³⁸ OLG Stuttgart *NJW-RR* 1988, 786 (788).

⁴⁹³⁹ Palandt/*Grüneberg* § 308 para 13, WLP/*Dammann* § 308 no. 2 para 7.

⁴⁹⁴⁰ MüKo/*Wurmnest* § 308 no. 2 para 5.

⁴⁹⁴¹ See discussion on § 308 no. 1 above.

⁴⁹⁴² UBH/*Schmidt* § 308 no. 2 para 7, Staudinger/*Coester* § 308 no. 2 para 8. In terms of § 307(3), content control only applies to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed.

⁴⁹⁴³ UBH/*Schmidt* § 308 no. 2 para 8.

2.3.2.4 B2B contracts

For B2B contracts, the evaluations contained in § 308 no. 2 are an important indication for content control in terms of § 307.⁴⁹⁴⁴ In order to ensure speedy and smooth transactions, it can be reasonable to apply even shorter additional period of times than in B2C agreements.⁴⁹⁴⁵

2.3.3 Reservation of the right to revoke (§ 308 no. 3 and 8)

§ 308 no. 3 has the title 'Reservation of the right to revoke' and sets out that an agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract is ineffective. This does not apply to continuing obligations. In terms of § 308 no. 8, an agreement, admissible under no. 3, of the reservation by the user of a right to free himself from the duty to perform the contract *in the absence of availability of performance*, if the user does not agree to a) inform the other party to the contract without undue delay, of the unavailability, and b) reimburse the other party to the contract for consideration, without undue delay is also ineffective.

2.3.3.1 Rationale of § 308 no. 3 and 8

In principle, the parties have to honour their respective obligations set out in the contract. The agreement of a right to free oneself from the contractual obligations is not prohibited *per se* as, e.g., § 346(1)⁴⁹⁴⁶ sets out the conditions for such a right. Any reservation of the user to free itself from the agreement might infringe the *pacta sunt servanda* principle however, which is why such a disengagement requires the indication of an objectively justified reason.⁴⁹⁴⁷

The rationale of no. 3 and 8 is to prevent the situation where the other party is bound to the agreement, whereas the user is entitled to free itself at any time from its obligations so that the client would be in a sort of limbo because the fulfilment of the contract is in the user's discretion.⁴⁹⁴⁸

In this regard, § 308 no. 3 also aims to prevent that the user circumvents the other party's rights in terms of § 309 no. 7 lit. b)⁴⁹⁴⁹ and no. 8 lit. a) by freeing itself from the contract in order to

⁴⁹⁴⁴ WLP/Dammann § 308 no. 2 para 40, with further references.

⁴⁹⁴⁵ MüKo/Wurmnest § 308 no. 2 para 8.

⁴⁹⁴⁶ § 346(1): 'If one party to a contract has contractually reserved the right to revoke or if he has a statutory right of revocation, then, in the case of revocation, performance received and emoluments taken are to be returned.'

⁴⁹⁴⁷ Stöffels *AGB-Recht* 319.

⁴⁹⁴⁸ BT-Drs. 7/3919 at 25.

⁴⁹⁴⁹ § 309 no. 7 lit. b): '(Gross fault) [A]ny exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user' is ineffective. § 309 no. 8 lit. a): '(Exclusion of the right to free oneself from the contract) [A] provision which, where there is a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or

escape the payment of damages. To the extent that the right to free oneself from the contract concerns the unavailability of the given performance, the additional conditions of § 308 no. 8 must be considered. This provision completes § 308 no. 3.⁴⁹⁵⁰

No. 3 and 8 are compatible with EU law ⁴⁹⁵¹ but go beyond the provisions contained in the Annex of the Unfair Terms Directive. There, several clauses that enable the user to free itself from the contract are set out, namely items (c), (f) and (g).⁴⁹⁵² Since continuing obligations are excluded from the scope of application of § 308 no. 3 and 8, they must be assessed under § 307. In this regard, the evaluations of the provisions contained in the Annex of the Directive must be taken into account.⁴⁹⁵³

In contrast to § 308 no. 3 and 8, regulation 44(3)(k) of the Act has another legal purpose. The main criterion for greylisting terms according to which the supplier may terminate the contract at will where the same right is not granted to the consumer is the excessive one-sidedness,⁴⁹⁵⁴ whereas § 308 no. 3 and 8 aim to ensure compliance with the *pacta sunt servanda* principle.⁴⁹⁵⁵

2.3.3.2 Contents of § 308 no. 3 and 8

a) The user's right to free itself from its obligation

The heading of § 308 no. 3 is 'Reservation of the right to revoke'. The provision itself refers to 'a right to free [one]self from [one's] obligations' though. Therefore, it applies to more scenarios than the heading suggests. In the BGB, the term 'right to free oneself' (*Lösungsrecht*) cannot be found, and as no. 3 suggests, it is to be interpreted widely.⁴⁹⁵⁶ Hence, it includes all possibilities for the user to free itself from the principal obligations or those which lead to their fulfilment, provided they are not merely declaratory. These are the right to revoke, to cancel,

restricts the right of the other party to free himself from the contract; this does not apply to the terms of transport and tariff rules referred to in no. 7 under the conditions set out there.' In this regard, see also discussion of these provisions.

⁴⁹⁵⁰ BT-Drs. 14/2658 at 51.

⁴⁹⁵¹ Palandt/*Grüneberg* § 308 para 14, UBH/*Schmidt* § 308 no. 3 para 2c.

⁴⁹⁵² **Item (c) of the Annex of the Unfair Terms Directive 93/13/EEC:** Terms which have the object or effect of 'making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone' are ineffective. **Item (f):** Terms 'authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract' are ineffective. **Item (g):** Terms 'enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so' are ineffective.

⁴⁹⁵³ UBH/*Schmidt* § 308 no. 3 para 2c.

⁴⁹⁵⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 75.

⁴⁹⁵⁵ Stoffels *AGB-Recht* 319.

⁴⁹⁵⁶ Palandt/*Grüneberg* § 308 para 16.

to withdraw or to rescind as well as resolutive conditions.⁴⁹⁵⁷ If the conclusion of the contract depends on a suspensive condition, § 308 no. 3 does not apply because the contractual commitment does not cease *after* the parties have entered into their agreement.⁴⁹⁵⁸

§ 308 no. 3 only applies to contracts but not where a standard clause excludes that the user makes an offer to enter into an agreement (*invitatio ad offerendum*) in terms of § 145.⁴⁹⁵⁹ This is the case for clauses such as 'without obligation', 'non-binding', and alike.⁴⁹⁶⁰ In some instances, the user intends by such clauses to have the option to revoke the offer until it has been accepted by the other party.⁴⁹⁶¹ The content of these clauses must therefore be assessed by means of interpretation. Any doubts in the interpretation of whether the clause refers to the offer or the contract are resolved against the user, however (§ 305c(2)).⁴⁹⁶²

It should be noted that in terms of § 307(3) 1st sent., § 308 no. 3 does not apply to a right to free oneself from the contract that has been granted by law.⁴⁹⁶³

b) Indication of the reason in the contract

The right to free oneself from the contract is not excluded *per se*, as shown above. However, no. 3 requires that the clause be transparent and that the reason for the disengagement be indicated explicitly in the clause so that an average client can assess when the user is entitled to use this right.⁴⁹⁶⁴ Clauses such as 'operational problems of any kind'⁴⁹⁶⁵ or 'for compelling reasons'⁴⁹⁶⁶ are too vague and hence insufficient. On the other hand, indications like 'in the case of force majeure, strike or shortage of raw materials'⁴⁹⁶⁷ sufficiently restrict the instances in which the user may free itself from the contract and give the other party a clear understanding.

The former UK Office of Fair Trading took a similar stance. According to the Office, a clause which does not merely allow the supplier to cancel at will may be fair if it would be impractical or impossible to complete the contract, provided that it clearly and accurately describes the circumstances in which the supplier may terminate the contract, and require that the supplier

⁴⁹⁵⁷ BAG NZA 2006, 539 (541).

⁴⁹⁵⁸ WLP/Dammann § 308 no. 3 para 17.

⁴⁹⁵⁹ Bamberger/Roth/Becker § 308 no. 5 para 33. § 145: 'Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it.'

⁴⁹⁶⁰ Stöffels AGB-Recht 320.

⁴⁹⁶¹ BGH NJW 1984, 1885.

⁴⁹⁶² Stöffels AGB-Recht 321.

⁴⁹⁶³ Stöffels AGB-Recht 321.

⁴⁹⁶⁴ BAG NZA 2006, 539 (541).

⁴⁹⁶⁵ See BGH NJW 1983, 1320 (1321).

⁴⁹⁶⁶ See OLG Cologne NJW-RR 1998, 926.

⁴⁹⁶⁷ See OLG Koblenz NJW-RR 1989, 1459 (1460).

find out and inform the consumer as soon as possible. The circumstances must be beyond the supplier's control. In such circumstances, it may also be fair only to return prepayments without any further liability⁴⁹⁶⁸ This position corresponds to § 308 no. 8 lit. b) according to which the other party's counter-performance has to be reimbursed immediately in the performance is not available.

c) Objectively justified reason

The specifically indicated reason for the user's disengagement must also be objectively justified. This means that the reason indicated in the contract must concern – in an abstract manner – significant interests of the user in order to be legitimate. No. 3 therefore requires a weighing of both parties' interests. The user can only free itself from the contract if it has an outweighing or at least a reasonable interest to end the agreement. This is not the case if it could have predicted at the moment when entering into the contract, while applying due diligence, the circumstances that would lead to such a right.⁴⁹⁶⁹ For this reasons, a clause such as 'revocable at any time' is ineffective as the right to free itself from its obligations merely depends on the user's will.⁴⁹⁷⁰

What is more, one can distinguish between scenarios where the reason justifying the right to free oneself from the contract lies in the other party's or in the user's sphere.

aa) Other party's sphere

A reason stemming from the client's sphere justifies to end the contract if the user cannot be expected to continue the agreement and is not in conflict with § 309 no. 4, i.e., the user must have given the other party a warning notice or have set a period of time for the latter to perform or cure.⁴⁹⁷¹ As §§ 323 *et seq.* are applicable to cases of default and impossibility to perform and provide for a legal right to revoke, and, on the other hand, for warning notices and the determination of a period of time to perform or cure § 309 no. 4 applies, content control under § 308 no. 3 takes place especially in case of the violation of other contractual obligations.⁴⁹⁷²

Hence, a standard clause of a key service company according to which the latter is free to produce a spare key and to keep the money paid by the customer if he or she has not gotten back in touch for over four months is valid.⁴⁹⁷³ Furthermore, a clause in which the seller

⁴⁹⁶⁸ OFT *Unfair Contract Terms Guidance* (2008) para 6.1.5 at 44. See also § 308 no. 8 BGB.

⁴⁹⁶⁹ BGH *NJW* 1987, 831 (833), BAG *NZA* 2006, 539 (541).

⁴⁹⁷⁰ WLP/*Dammann* § 308 no. 3 para 27.

⁴⁹⁷¹ UBH/*Schmidt* § 308 no. 3 para 11.

⁴⁹⁷² Stoffels *AGB-Recht* 322.

⁴⁹⁷³ BGH *NJW* 1992, 1628.

reserves the right to revoke from the agreement if the purchaser infringes the explicitly indicated obligations (e.g., to treat the item subject to a retention of title with care, to inform the owner of any address change or change of the possessor) is valid because the owner has a legitimate interest that its property be treated with care. A clause by which the owner must be informed of certain changes as otherwise, the user has the right to revoke the agreement, is effective too.⁴⁹⁷⁴

For the scrutiny of a client's creditworthiness, loan providers usually require their clients to furnish extensive disclosures of their financial situation. If the user's standard clauses provide for a reservation to free itself from the contract in the case of wrong information given by the client, such a clause is only valid if it is restricted to information which is relevant for the assessment of the customer's creditworthiness. Hence, a clause by which the seller is entitled to revoke the contract if the buyer makes false or incomplete declarations on which its creditworthiness depends is valid.⁴⁹⁷⁵ On the other hand, a standard clause that grants the same right 'if the purchaser makes false declarations on its financial situation' is ineffective since it is not restricted to cases in which such false declarations are only minor or have no impact on the given contract at all.⁴⁹⁷⁶ Provisions by which the seller can revoke the agreement if the buyer provides wrong or incomplete personal data (e.g., marital status) are ineffective too because this kind of information has no relevance for the given agreement.⁴⁹⁷⁷

For clauses concerning objective credit unworthiness or insolvency that appears subsequently, the standard of § 321⁴⁹⁷⁸ applies.⁴⁹⁷⁹ The credit unworthiness must actually occur and not only be potential.⁴⁹⁸⁰ The agreement of the right to revoke a contract by which the client buys furniture in the case of the customer's insolvency infringes § 308 no. 3. A revocation is not justified after the furniture has been delivered. The insolvent client is not in default yet and must have the possibility to prevent the severe consequences of revocation.⁴⁹⁸¹

⁴⁹⁷⁴ BGH *NJW* 1985, 320 (325).

⁴⁹⁷⁵ BGH *NJW* 1985, 320 (325).

⁴⁹⁷⁶ BGH *NJW* 1985, 2271 (2272).

⁴⁹⁷⁷ BGH *NJW* 1985, 320 (325); 1985, 2271 (2272).

⁴⁹⁷⁸ § 321(1): 'A person who is obliged to perform in advance under a reciprocal contract may refuse to render his performance if, after the contract is entered into, it becomes apparent that his entitlement to consideration is jeopardised by the inability to perform of the other party. The right to refuse performance is not applicable if consideration is rendered or security is given for it.'

⁴⁹⁷⁹ WLP/*Dammann* § 308 no. 3 para 79, MüKo/*Wurmnest* § 308 no. 3 para 12.

⁴⁹⁸⁰ BGH *NJW* 2001, 292 (298).

⁴⁹⁸¹ UBH/*Schmidt* § 308 no. 3 para 15.

bb) User's sphere

Any obstacles that prevent the standard terms user from performing its obligations may justify a right to free itself from the agreement. The objective justification is measured against the distribution of risk provided for by the law.⁴⁹⁸² An objective justification cannot be assumed where the user could already foresee the circumstances justifying a revocation when entering into the agreement.⁴⁹⁸³ The given clause must exclude temporary obstacles or those for which the user is responsible.⁴⁹⁸⁴

This is why a clause entitling the user to revoke the contract in the cases of force majeure or strike must be restricted in that temporary disruptions, which only cause a momentary delay, do not entitle the user to free itself from its obligations.⁴⁹⁸⁵ A clause by which the user reserves the right to deliver can be interpreted in that the user must make all reasonable endeavours to perform. It is nonetheless ineffective because the impossibility of the delivery does not justify *per se* a right of revocation, and the user itself might be responsible for the impossibility.⁴⁹⁸⁶

In B2C contracts, so-called 'supply clauses' that unrestrictedly grant the right to revoke the agreement are ineffective. The seller can only free itself from its obligation to deliver if it has concluded a congruent covering transaction⁴⁹⁸⁷ with its wholesaler and is let down by the third party. The clause must make clear that a non-delivery based on the user's fault does not entitle the latter to revoke the contract.⁴⁹⁸⁸ For so-called 'self-delivery clauses'⁴⁹⁸⁹ ('the right and timely self-delivery is reserved') and 'supply clauses'⁴⁹⁹⁰ ('while stock lasts'), also the formal conditions of § 308 no. 8 must be taken into account.⁴⁹⁹¹

d) No application to continuing obligations

§ 308 no. 3 *in fine* regulates that this provision does not apply to continuing obligations. The legislator was of the view that it is the characteristic of open-ended agreements to be ended without any particular reason, by ordinary termination. According to the legislator, an ordinary termination would be an objectively justified reason for this type of agreements. If standard

⁴⁹⁸² UBH/Schmidt § 308 no. 3 para 12.

⁴⁹⁸³ BGH NJW 1987, 831 (833).

⁴⁹⁸⁴ MüKo/Wurmnest § 308 no. 3 para 7.

⁴⁹⁸⁵ BGH NJW 1985, 855 (857).

⁴⁹⁸⁶ Baumbach/Hopt/Hopt § 346 HGB para 40.

⁴⁹⁸⁷ *Kongruentes Deckungsgeschäft*.

⁴⁹⁸⁸ BGH NJW 1983, 1320 (1321). See also BT-Drs. 7/3919 at 25.

⁴⁹⁸⁹ *Selbstbelieferungsklauseln*.

⁴⁹⁹⁰ *Vorratsklauseln*.

⁴⁹⁹¹ Stoffels *AGB-Recht* 324 and 325.

business terms provided for an ordinary termination of continuing obligations, it would not make sense to require also the indication of a justified reason.⁴⁹⁹²

If the user reserves the right to end the agreement without objectively justified reason, the clause can be assessed in terms of § 307 as to the notice period and the reason to terminate the agreement. If the clause applies to a termination of the contract before the agreement is executed, § 308 no. 3 is applicable.⁴⁹⁹³ The same applies to preliminary contracts that are executed before the open-ended agreement.⁴⁹⁹⁴

Regulation 44(3)(k) of the Act does not apply to open-ended agreements either (see regulation 44(3)(l)) or fixed-term agreements. For the latter, section 14(2)(b) applies in terms of cancellation. Hence, item (k) is only applicable to 'once-off' transactions, such as the purchase of a product or service which is not continual. As section 14 does not apply to juristic persons, regardless of their annual turnover or asset value, juristic persons do not seem to have the protection of section 14.⁴⁹⁹⁵

2.3.3.3 Legal consequences in case of a violation of the provision

Clauses that do not contain the restrictions mentioned above are invalid in their entirety.⁴⁹⁹⁶ A partial retention⁴⁹⁹⁷ must be ruled out. If the wording and subject matter of the clause can be split into a valid and an invalid part, the BGH nevertheless upholds the valid part.⁴⁹⁹⁸

2.3.3.4 B2B contracts

No. 3 can serve as a guideline for clauses in B2B contracts where the user reserves the right to free itself from its obligations.⁴⁹⁹⁹ According to the BGH, also here this right requires an objective reason.⁵⁰⁰⁰ In agreements between entrepreneurs, the right to revoke is admitted more generally since commercial practice might justify a more lenient standard.⁵⁰⁰¹

So-called 'self-delivery clauses' in B2B contracts by which 'the right and timely self-delivery is reserved' are effective. In B2B agreements, they are to be interpreted restrictively though in

⁴⁹⁹² BT-Drs. 7/3919 at 26.

⁴⁹⁹³ UBH/Schmidt § 308 no. 3 para 17.

⁴⁹⁹⁴ BAG NZA 2006, 539 (541).

⁴⁹⁹⁵ Section 14(1) CPA.

⁴⁹⁹⁶ BGH NJW 1985, 855 (857).

⁴⁹⁹⁷ *Geltungserhaltende Reduktion*.

⁴⁹⁹⁸ BGH NJW 1985, 320 (325).

⁴⁹⁹⁹ Palandt/Grüneberg § 308 para 23.

⁵⁰⁰⁰ BGH NJW 2009, 575 (576).

⁵⁰⁰¹ Stöffels AGB-Recht 325.

that the seller can only free itself from its obligations if he or she concluded a congruent covering transaction⁵⁰⁰² and the third party (the seller's wholesaler) does not deliver.⁵⁰⁰³

2.3.3.5 The complementary prohibition of § 308 no. 8

By transposing the Distance Contract Directive,⁵⁰⁰⁴ the German legislator has imposed additional formal requirements for the user's right to free itself from the contract in the case of unavailability of performance. The said self-delivery and supply clauses are the most relevant cases in this regard. For these clauses, the requirements set out in no. 3 are completed by no. 8. The requisites of both provisions must be fulfilled cumulatively.⁵⁰⁰⁵ Under no. 8, the reservation of the user's right to free itself from its duty to perform in the absence of availability of performance is ineffective if the user does not agree to inform the other party without undue delay of the unavailability and reimburse the latter immediately for consideration.

2.3.4 Reservation of the right to modify (§ 308 no. 4)

§ 308 no. 4 sets out that the agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account are ineffective.

Regulation 44(3)(i) of the Act contains a similar item.⁵⁰⁰⁶ According to this provision, clauses enabling the supplier to alter the terms of the agreement including the characteristics of the product or service unilaterally are presumed to be unfair. The South African provision does not contain a reasonableness qualification like § 308 no. 4 BGB though.⁵⁰⁰⁷

2.3.4.1 Rationale of the provision

Pursuant to § 362(1), an obligation is extinguished if the performance owed is rendered to the obligee. If the user reserves the right to modify its performance, its obligation extinguishes despite a modification or deviation of the performance. Since such a performance would be contractual, the other party has to accept it and pay for it, and if the performance is without any defects, he or she cannot assert any warranty claims or claims for non-performance.⁵⁰⁰⁸ A right

⁵⁰⁰² *Kongruentes Deckungsgeschäft*.

⁵⁰⁰³ BGH NJW 1994, 1060 (1062).

⁵⁰⁰⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁵⁰⁰⁵ Stöffels *AGB-Recht* 325.

⁵⁰⁰⁶ See discussion on reg 44(3)(i) in Part I ch 3 para 3.4.2 b).

⁵⁰⁰⁷ § 6(2) no. 3 of the Austrian KSchG also contains a reasonableness qualification.

⁵⁰⁰⁸ Stöffels *AGB-Recht* 326.

to modify the performance promised can be more disadvantageous for the other party than a refusal to render performance.⁵⁰⁰⁹ What is more, if one party can alter the terms unilaterally, this balance is disturbed in favour of the party who alters the terms.⁵⁰¹⁰ Moreover, the consumer should receive what he or she has bought and not merely something similar.⁵⁰¹¹

The performance owed is defined in the contract. Where the user owes a thing defined only by class⁵⁰¹² in terms of § 243, it must supply a thing of average kind and quality. The other party must only accept minor deviations from the initially agreed performance in terms of § 242 (good faith), provided that the client has no contrary legitimate interests and the economic objective of the contract is fulfilled.⁵⁰¹³

Insofar, no. 4 completes § 308 no. 3 in that the standard terms user cannot extend its possibilities with respect to fulfilment of its performance. The agreement of a modification of, or deviation from the performance is therefore only possible if it can reasonably be expected of the client to accept such modification or deviation.⁵⁰¹⁴

2.3.4.2 Scope of application

No. 4 only concerns modifications of the user's performance.⁵⁰¹⁵ For modifications of the other party's performance, the given clause has to be assessed by the general clause.⁵⁰¹⁶ Hence, the BGH held that an interest rate adjustment clause in a mortgage contract according to which the bank is entitled to modify the interest rate if it deems necessary to do so (e.g., due to the evolution in the capital market) is ineffective in terms of § 307.⁵⁰¹⁷ On the other hand, for saving contracts, the BGH decided that a pre-formulated interest adjustment clause by which the bank has the right to modify the interest rate at will infringes § 308 no. 4.⁵⁰¹⁸ Unlike in the first example, the interests are here the client's, and not the bank's performance.

Contrary to § 308 no. 3, no. 4 is also applicable to continuing obligations because the danger inherent to a modification or deviation is the same in this type of contracts.⁵⁰¹⁹ In terms of

⁵⁰⁰⁹ BT-Drs. 7/3919 at 26. See also WLP/Dammann § 308 no. 4 para 1.

⁵⁰¹⁰ See OFT *Unfair Contract Terms Guidance* (2008) para 10.1 at 52.

⁵⁰¹¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 70.

⁵⁰¹² *Gattungsschuld*.

⁵⁰¹³ MüKo/Roth/Schubert § 242 para 179.

⁵⁰¹⁴ Stoffels *AGB-Recht* 326.

⁵⁰¹⁵ UBH/Schmidt § 308 no. 4 para 4. Regulation 44(3)(i) read in conjunction with reg 44(4)(c) comes to the same result in the case of interest rates and other financial charges payable by the consumer by simply excluding them from the application of reg 44(3)(i).

⁵⁰¹⁶ Stoffels *AGB-Recht* 326.

⁵⁰¹⁷ BGH *NJW* 2009, 2051 (2053 *et seq*).

⁵⁰¹⁸ BGH *NJW* 2004, 1588 (1589).

⁵⁰¹⁹ Stoffels *AGB-Recht* 327.

regulation 44(4)(c)(iv), open-ended agreements⁵⁰²⁰ are excluded from the scope of application of regulation 44(3)(i) provided that the supplier informs the consumer thereof and the consumer is free to dissolve the agreement immediately.

2.3.4.3 Contents of the provision

a) Modification or deviation

The differentiation between a modification of, and a deviation from the performance is not always simple, and sometimes both are overlapping. Generally, a modification of the performance is given where the characteristics or quantity delivered deviate from the originally agreed performance. In contrast, a deviation is to be assumed where the performance is not identical with the originally agreed performance as regards its type or nature.⁵⁰²¹ In practice, this differentiation is idle as no. 4 covers both instances.⁵⁰²²

The prohibition does however not only cover the principal obligation since the wording ('modify the performance promised') covers any modifications of ancillary obligations and performances as well as the modalities of the performance.⁵⁰²³ What is more, also a clause by which the user is entitled to render part performance (§ 266) is subject to no. 4.

b) Reasonableness

The modification of the performance must also be reasonable ('*zumutbar*') for the client. According to the BGH, pre-formulated and unilateral modification clauses of the user are only effective if the clause indicates serious grounds for the modifications, and if the conditions and the consequences for the other party are reasonably considered.⁵⁰²⁴ The user must produce evidence in this regard.⁵⁰²⁵

When weighing the parties' interests, a generalised-typified standard has to be applied,⁵⁰²⁶ i.e., the circumstances of the given case are irrelevant.⁵⁰²⁷ A modification is reasonable if the user's

⁵⁰²⁰ These are contracts of indeterminate duration. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 64.

⁵⁰²¹ UBH/Schmidt § 308 no. 4 para 4.

⁵⁰²² Stoffels *AGB-Recht* 327.

⁵⁰²³ WLP/Dammann § 308 no. 4 paras 5 and 7.

⁵⁰²⁴ BGH NJW 2000, 515 (521). According to the OFT, variation clauses allowing minor technical amendments which do not affect the performance of the product, or amendments required by law should not be considered unfair. See OFT *Unfair Contract Terms Guidance* (2008) para 11.3 at 54.

⁵⁰²⁵ This results from the wording of § 308 no. 4 ('unless'). WLP/Dammann § 308 no. 4 para 4, Palandt/*Grüneberg* § 308 para 25.

⁵⁰²⁶ UBH/Schmidt § 308 no. 4 para 9. The OFT also suggested such a generalised-typified standard by taking the stance that an alteration of terms is reasonable 'where fair-minded persons in the position of the consumer and supplier would be likely to share a common view as to what would be 'reasonable'. See OFT *Unfair Contract Terms Guidance* (2008) para 10.5 at 53.

⁵⁰²⁷ Stoffels *AGB-Recht* 327.

interests have more or at least equal weight with the other party's interests. Moreover, the clause must enable the other party to be prepared for a possible modification of the originally agreed performance.⁵⁰²⁸ This is the case where the modification or deviation is due to the particularity of the performance, or inevitable due to serious circumstances. A rise of the user's costs is irrelevant though because this would lead to a significant shift of the risks to the customer's disadvantage.⁵⁰²⁹

The other party's interest in performance generally enjoys prior protection, and even if the user has a legitimate interest to modify its performance, the balance between performance and consideration⁵⁰³⁰ must not be disturbed.⁵⁰³¹

According to the wording of no. 4, and contrary to § 308 no. 3, the reason for the modification or deviation needs not to be mentioned in the contract. A clause by which the originally agreed performance is modified can only be reasonable though if the conditions and the scope of the modification or deviation are sufficiently indicated in the clause.⁵⁰³² The standard for such a concretisation depends on the specific problems of the given branch.⁵⁰³³ It is not sufficient that the user reserves the right to modify its performance 'insofar that a modification can reasonably be expected of the client'.⁵⁰³⁴

According to the BGH, a pre-formulated standard clause of a mail-order company stipulating that 'if a certain article cannot be delivered, we will deliver an article equivalent in quality and price' is invalid because this clause does not sufficiently consider that clients choose numerous articles according to their individual needs and wishes. Even if the user grants the right to exchange the product, the clause would still be ineffective.⁵⁰³⁵ A clause in a pay-TV contract by which the user may 'modify, complete or extend the programme offer, single channels or the use of certain channels as well as programme packages to the client's advantage' is also invalid because it does not sufficiently indicate the reasons for such a modification.⁵⁰³⁶ The same applies to a standard clause of a workshop according to which 'the client's agreement for necessary repairs is not necessary if the client could not be reached'. The notion of 'necessary

⁵⁰²⁸ BGH *NJW* 2008, 360 (362), WLP/Dammann § 308 no. 4 para 24.

⁵⁰²⁹ UBH/Schmidt § 308 no. 4 para 9, Stoffels *AGB-Recht* 328.

⁵⁰³⁰ *Äquivalenzverhältnis*.

⁵⁰³¹ MüKo/Wurmnest § 308 no. 4 para 7.

⁵⁰³² This was also the OFT's view. See OFT *Unfair Contract Terms Guidance* (2008) para 10.3 at 52.

⁵⁰³³ MüKo/Wurmnest § 308 no. 4 para 8.

⁵⁰³⁴ Erman/Roloff § 308 para 34.

⁵⁰³⁵ BGH *NJW* 2005, 3567 (3569).

⁵⁰³⁶ BGH *NJW* 2008, 360 (362).

repairs' is too vague and can go against the client's interests.⁵⁰³⁷ A clause by which the user is entitled to render part performance is likely to be invalid,⁵⁰³⁸ but if the user differentiates between the different performance objects, it might be valid.⁵⁰³⁹ For products that belong together (e.g., a furniture group) or 'packages' (e.g., a PC with its screen and software), a modification of performance is always unreasonable.⁵⁰⁴⁰ On the other hand, a clause by which the user reserves the right to deliver furniture that slightly deviates in colour and structure from the furniture exhibited in the store is valid as long the deviation is due to the material (e.g., wood) and it is customary in the given branch.⁵⁰⁴¹

Items (j) and (k) of the Annex of the Unfair Terms Directive require a 'valid reason' for alterations. This corresponds with the 'reasonableness' requirement in § 308 no. 4 because where a modification of the performance is reasonable, there is a 'valid reason' for it.⁵⁰⁴²

2.3.4.4 Legal consequences in case of violation

If a clause is ineffective under no. 4, the promised performance is due without any modification or deviation. Where the other party has accepted the performance without reservation, she bears the burden of proof if she does not wish to have the performance considered contractual because it was different from the performance owed or incomplete (§ 363).⁵⁰⁴³

A partial retention⁵⁰⁴⁴ of the invalid clause is not permitted. If the clause can be split into a valid and an ineffective part, the valid part can be maintained, however.⁵⁰⁴⁵

2.3.4.5 B2B contracts

The danger of modification clauses is not lesser in B2B contracts. Therefore, the idea based on no. 4 must be considered in the enquiry of the given clause in terms of § 307(2).⁵⁰⁴⁶ Where modifications or deviations are not customary, or where the performance is defined only by

⁵⁰³⁷ BGH *NJW* 1987, 2818 (2818 *et seq.*).

⁵⁰³⁸ OLG Stuttgart *NJW-RR* 1995, 116 (117).

⁵⁰³⁹ UBH/Schmidt § 308 no. 4 para 10a.

⁵⁰⁴⁰ UBH/Schmidt § 308 no. 4 para 10a.

⁵⁰⁴¹ BT-Drs. 7/3919 at 26, Palandt/*Grüneberg* § 308 para 25.

⁵⁰⁴² Stoffels *AGB-Recht* 329. The BGH sometimes also refers to a 'valid reason', e.g., in BGH *NJW* 2005, 3420 (3421).

⁵⁰⁴³ Stoffels *AGB-Recht* 330.

⁵⁰⁴⁴ *Geltungserhaltende Reduktion*.

⁵⁰⁴⁵ Stoffels *AGB-Recht* 330.

⁵⁰⁴⁶ MüKo/*Wurmnest* § 308 no. 4 para 13.

class⁵⁰⁴⁷ and is not of 'average kind and quality' in terms of § 360 HGB⁵⁰⁴⁸, the criterion of 'reasonableness' is also applicable to entrepreneurs.⁵⁰⁴⁹

A clause in a lease for an exhibition stand is invalid if it entitles the user to provide another stand than the one promised.⁵⁰⁵⁰ A clause by which the margin of an authorised dealer can be modified at will and without any other conditions is invalid too.⁵⁰⁵¹

2.3.5 Fictitious declarations (§ 308 no. 5)

2.3.5.1 Rationale of the provision

In terms of § 308 no. 5, a provision by which a declaration by the other party to the contract with the user, made when undertaking or omitting a specific act, is deemed to have been made or not made by the user unless a) the other party to the contract is granted a reasonable period of time to make an express declaration, and b) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time is ineffective.

Standard clauses, such as 'if the purchaser has taken the item into possession before it has accepted it, the item is deemed to have been accepted without defects on that date',⁵⁰⁵² or 'a rebooking within 40 days before departure is considered to be a withdrawal from the contract in conjunction with a new booking'⁵⁰⁵³ are fictitious declarations that might have an adverse effect for the other party which it possibly cannot assess when concluding the agreement.⁵⁰⁵⁴ For this reason, the law prohibits – with certain legal exceptions⁵⁰⁵⁵ – fictitious declarations and refers to the other party's declarations that it has actually made. One of the principles of private law is that silence is no declaration of intent. Thus, any deviation from this principle is problematic.⁵⁰⁵⁶ § 308 no. 5 is an emanation of this principle.

⁵⁰⁴⁷ *Gattungsschulden*.

⁵⁰⁴⁸ **§ 360 HGB:** 'If a thing defined only by class is owed, a thing of average kind and quality must be delivered.' My own translation.

⁵⁰⁴⁹ Stoffels *AGB-Recht* 330.

⁵⁰⁵⁰ OLG Cologne *NJW-RR* 1990, 1232 (1233).

⁵⁰⁵¹ BGH *NJW* 1994, 1060 (1063).

⁵⁰⁵² BGH *NJW* 1984, 725 (726).

⁵⁰⁵³ BGH *NJW* 1992, 3158.

⁵⁰⁵⁴ Stoffels *AGB-Recht* 277.

⁵⁰⁵⁵ Fictitious rejection: §§ 108(2), 177(2), 415(2), 451(1) BGB, fictitious consent: §§ 416(1), 455, 516(2) BGB, §§ 362(1), 377(2) HGB, fictitious agreement on payment: §§ 612, 632, 653, 689 BGB, fictitious contract renewal: §§ 545 and 625 BGB. To the extent that standard business clauses merely reflect the contents of these provisions in a declaratory manner, they are not submitted to content control (§ 307(3)).

⁵⁰⁵⁶ Palandt/*Grüneberg* § 308 para 28.

This provision does however not prohibit all fictitious declarations in order to facilitate the execution of mass contracts, particularly in the bank and insurance industries.⁵⁰⁵⁷

§ 308 no. 5 BGB as well as § 6(1) no. 2 of the Austrian KSchG served as a model for regulation 44(3)(v) of the Consumer Protection Act.⁵⁰⁵⁸ Apart from a different choice in the wording⁵⁰⁵⁹ and the grammatical structure,⁵⁰⁶⁰ its content is identical.

2.3.5.2 Application and content of the provision

a) No application for declarations concerning the conclusion of the contract

The prohibition only applies to fictitious declarations concerning the execution of the contract, but not concerning its conclusion.⁵⁰⁶¹ For the conclusion of the agreement, the legal provisions set out in §§ 145 *et seq.* apply, which cannot be restricted by standard terms.⁵⁰⁶² Furthermore, clauses concerning the renewal of an agreement that the parties agreed to when concluding the contract are not prohibited in terms of § 308 no. 5 either. The renewal is not based on a fictitious declaration, but on an agreement that in case of the other party's silence, the agreement is tacitly renewed.⁵⁰⁶³ The validity of such clauses must be assessed in terms of § 307.⁵⁰⁶⁴

The same applies to regulation 44(3)(v) of the Act which is only applicable to declarations concerning the execution of the contract. Section 51(1)(g) already outlaws terms if they falsely express an acknowledgement by the consumer that *before* the conclusion of the contract, no representations or warranties were made by the supplier in connection with the agreement, or the consumer has received goods or services or a document that is required by the Act to be delivered to the consumer. Furthermore, section 31(1)(b) of the Act sets out that a supplier must not 'offer to enter into or modify an agreement for the supply of any goods or services (...) on the basis that the goods or services are to be supplied, or the agreement or modification will automatically come into existence, unless the consumer declines such offer (...).' Any

⁵⁰⁵⁷ BT-Drs. 7/5422 at 7.

⁵⁰⁵⁸ See discussion on reg 44(3)(v) in Part I ch 3 para 3.4.5 a).

⁵⁰⁵⁹ E.g., 'statement or acknowledgement' or 'conduct' (CPA) vs 'declaration' (BGB/KSchG) or 'behaviour' (BGB)/'conduct' (KSchG).

⁵⁰⁶⁰ Active vs passive voice.

⁵⁰⁶¹ OLG Koblenz *NJW* 1989, 2951, Stöffels *AGB-Recht* 278.

⁵⁰⁶² Stöffels *AGB-Recht* 278.

⁵⁰⁶³ BGH *NJW* 2010, 2942 (2943).

⁵⁰⁶⁴ Stöffels *AGB-Recht* 278.

agreement or modification made in conflict with this provision is void.⁵⁰⁶⁵ Hence, item (v) is also not applicable to agreements that relate to amendments of the agreement itself.⁵⁰⁶⁶

b) Fictitious declaration

No. 5 only concerns fictitious declarations, i.e., clauses under which a certain declaration has been made or has not been made, and where the actual behaviour of the other party is irrelevant.

On the other hand, fictitious facts where certain facts or circumstances are deemed to exist or not to exist are assessed in terms of § 309 no. 12, or if the confirmation of fact is a particular form of a fictitious receipt, under § 308 no. 6.⁵⁰⁶⁷ If the declaration is of substantive significance, no. 5 applies.⁵⁰⁶⁸ Moreover, fictitious declarations are characterised by the fact that evidence to the contrary is not possible.⁵⁰⁶⁹

A clause in a real estate brokerage contract by which the client is deemed to not have known the object if he or she does not make a declaration to the contrary is a fictitious fact. Therefore, it must be assessed in terms of § 309 no. 12.⁵⁰⁷⁰ On the other hand, a clause by which the participation to a certain loyalty programme is based on the general terms and conditions which the clients receive with their loyalty card and which they accept by using the card for the first time is a fictitious declaration.⁵⁰⁷¹

It is noteworthy that no. 5 only concerns fictitious declarations of the other party. Declarations of the user are to be assessed in terms of the general clause of § 307.⁵⁰⁷²

c) Exceptions

The wording of § 308 no. 5 indicates two conditions that must be fulfilled cumulatively so that a fictitious declaration is valid. On the one hand, the other party must be granted a reasonable period of time to make an express declaration. On the other hand, the user must agree to especially draw the attention of the other party to the contract so that the latter can evaluate the intended significance of his behaviour and react accordingly⁵⁰⁷³. Besides, other requirements for the validity of fictitious declarations may be based on §§ 307 *et seq.*⁵⁰⁷⁴

⁵⁰⁶⁵ Section 31(2) and (3) CPA.

⁵⁰⁶⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 106.

⁵⁰⁶⁷ UBH/Schmidt § 308 no. 5 para 9, Palandt/Grüneberg § 308 para 28.

⁵⁰⁶⁸ Palandt/Grüneberg § 308 para 28.

⁵⁰⁶⁹ Stöffels *AGB-Recht* 279.

⁵⁰⁷⁰ UBH/Schmidt § 308 no. 5 para 9.

⁵⁰⁷¹ BGH *NJW* 2010, 864 (867).

⁵⁰⁷² WLP/Dammann § 308 no. 5 para 25.

⁵⁰⁷³ UBH/Schmidt § 308 no. 5 para 2.

⁵⁰⁷⁴ Stöffels *AGB-Recht* 279.

aa) Reasonable period of time

The user's standard terms must contain a provision pursuant to which the other party is granted a reasonable period of time to make an express declaration (lit. a). The reasonableness of this period of time depends on the circumstances of the given case and contracts of the same kind. In most cases, a period of time of one or two weeks is considered sufficient.⁵⁰⁷⁵ For more complex transactions, a longer period of time might be reasonable.⁵⁰⁷⁶ A clause that requires that the other party make such a declaration immediately when concluding the contract is invalid,⁵⁰⁷⁷ save if the transaction is of an urgent nature where it can be expected that the client acts swiftly, such as a securities transaction.⁵⁰⁷⁸ It is sufficient that the standard clause stipulates a 'reasonable period of time' without further specification. Then, the user must specify this period of time when entering into the agreement with its client though.⁵⁰⁷⁹

bb) Drawing the attention to the significance of the other party's behaviour

The second condition is that the clause itself must contain the user's obligation to draw the other party's attention to the significance of its behaviour (lit. b). Furthermore, at the beginning of the period of time, the client must be informed of the fictitious declaration. It must also be informed about the significance of its behaviour by pointing out the legal consequences and the possibility to reject. This information must be clear and unambiguous. In this regard, it is sufficient that the user cites the wording of § 308 no. 5 lit. b).⁵⁰⁸⁰

Hence, no. 1 paragraph 2 of the Standard business terms of banks⁵⁰⁸¹ is valid in terms of § 308 no. 5 lit. b): 'Any amendment to these standard business terms (...) shall be offered to the Customer in text form at least two months before the proposed time of their coming into effect. (...) The customer shall be deemed to have given his consent if he has not notified his rejection before the proposed date on which the amendments take effect. In its offer, the Bank shall specifically draw his attention to the fact that this approval has this effect.'⁵⁰⁸²

⁵⁰⁷⁵ WLP/Dammann § 308 no. 5 para 41 ('one week for normal transactions'), Palandt/Grüneberg § 308 para 29 ('minimum: one to two weeks').

⁵⁰⁷⁶ BGH NJW 1985, 617 (618).

⁵⁰⁷⁷ Palandt/Grüneberg § 308 para 29.

⁵⁰⁷⁸ UBH/Schmidt § 308 no. 5 para 11.

⁵⁰⁷⁹ Staudinger/Coester-Waltjen § 308 no. 5 para 13.

⁵⁰⁸⁰ UBH/Schmidt § 308 no. 5 para 12.

⁵⁰⁸¹ AGB-Banken, 2012 version.

⁵⁰⁸² Example from Stoffels *AGB-Recht* 280. My own translation.

cc) Legitimate interest of the user

The fulfilment of the two aforementioned cumulative conditions is not sufficient, however. For fictitious declarations, the user must also have a legitimate interest concerning such a clause.⁵⁰⁸³

This is the case if such fictitious declarations facilitate the execution of mass contracts, such as transactions with banks and insurance companies.⁵⁰⁸⁴ Also a clause in a hospital care contract according to which items that a patient has forgotten in the premises of the hospital and that were not picked up on the hospital's request, are transferred into the property of the hospital, are valid. This is because of the hospital's legitimate interest to facilitate the 'management' of such items, especially if the hospital provides care for a large number of patients.⁵⁰⁸⁵

Clauses that significantly jeopardise the balance of performance and counter-performance to the benefit of the user require special attention. Such modifications necessitate an amendment agreement that fulfils the requirements of §§ 145 *et seq.* It is not sufficient that the standard clause provides for a fictitious agreement of the other party even if its legitimate interests are considered.⁵⁰⁸⁶ Hence, for price modifications, the user cannot refer to § 308 no. 5.⁵⁰⁸⁷

dd) Compatibility of the fictitious declaration with §§ 307 *et seq.*

Lastly, the contents of the clause must be compatible with § 307. Hence, a provision which contains a fictitious renouncement of the warranties granted by §§ 434 *et seq.* is ineffective.⁵⁰⁸⁸

2.3.5.3 Relation to other provisions

Other provisions, such as the general clause, §§ 308 no. 6 and 309 no. 12 deal with similar problems. Unfortunately, the legislator did not succeed in systematically classifying confirmations of facts,⁵⁰⁸⁹ fictitious facts⁵⁰⁹⁰ and fictitious declarations.⁵⁰⁹¹ A demarcation might therefore be difficult.⁵⁰⁹² Confirmations of certain facts where certain facts or circumstances are deemed to exist or not to exist are assessed in terms of § 309 no. 12. If the confirmation of fact is a particular form of a fictitious receipt, the enquiry is done in terms of

⁵⁰⁸³ WLP/Dammann § 308 no. 5 para 67, UBH/Schmidt § 308 no. 5 para 9, Palandt/Grüneberg § 308 para 31.

⁵⁰⁸⁴ UBH/Schmidt § 308 no. 5 para 7.

⁵⁰⁸⁵ BGH NJW 1990, 761 (763).

⁵⁰⁸⁶ BGH NJW-RR 2008, 134 (136).

⁵⁰⁸⁷ Stöffels AGB-Recht 281.

⁵⁰⁸⁸ Stöffels AGB-Recht 281. See also Stübing NJW 1978, 1609.

⁵⁰⁸⁹ *Tatsachenbestätigungen.*

⁵⁰⁹⁰ *Tatsachenfiktionen.*

⁵⁰⁹¹ *Erklärungsfiktionen.*

⁵⁰⁹² Thamm/Pilger § 10 no. 6 AGBG para 1, Stöffels AGB-Recht 278.

§ 308 no. 6. If the declaration is of substantive significance, no. 5 applies.⁵⁰⁹³ Fictitious declarations are characterised by the fact that evidence to the contrary is not possible.⁵⁰⁹⁴

2.3.5.4 Legal consequences in case of violation

If one of the conditions mentioned above is not fulfilled in the given standard clause, the entire clause is invalid. Hence, a period of time stipulated in the standard terms that is too short is not altered into a longer period of time. Where the standard terms do not contain a specific period of time and the period of time granted later on is too short, the given period can be transformed into a reasonable one though.⁵⁰⁹⁵

Since the law aims to prevent any surprising confrontation with fictitious declarations, these have no effect if the clause itself does not contain the user's obligation to grant a reasonable period of time and to draw the other party's attention to the intended significance of its behaviour at the beginning of the period of time.⁵⁰⁹⁶ Otherwise, the other party's reliance that the fictional effect only occurs under the conditions set out in the clause would be compromised.⁵⁰⁹⁷

2.3.5.5 B2B contracts

According to § 310(1) 2nd sent., clauses dealing with fictitious declarations are to be assessed in terms of § 307. From business people, a higher degree of diligence and business experience can be expected so that the application of the strict and formal requirements of § 308 no. 5 is not justified. Especially the requirement to draw the other party's attention to the intended significance of its behaviour might be dispensable in B2B contracts.⁵⁰⁹⁸ Moreover, in B2B agreements, silence can be equivalent to an agreement to the given transaction if the other party has a duty based on the principle of good faith to reject the offer explicitly. Hence, § 308 no. 5 has no indicative effect on the general clause.⁵⁰⁹⁹

2.3.6 Fictitious receipt (§ 308 no. 6)

2.3.6.1 Rationale of § 308 no. 6

§ 308 no. 6 provides that in standard business terms, a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to

⁵⁰⁹³ Palandt/*Grüneberg* § 308 para 28.

⁵⁰⁹⁴ Stöffels *AGB-Recht* 279.

⁵⁰⁹⁵ UBH/*Schmidt* § 308 no. 5 para 14.

⁵⁰⁹⁶ UBH/*Schmidt* § 308 no. 5 para 10.

⁵⁰⁹⁷ Stöffels *AGB-Recht* 281.

⁵⁰⁹⁸ Staudinger/*Coester-Waltjen* § 308 no. 5 para 17, UBH/*Schmidt* § 308 no. 5 para 15.

⁵⁰⁹⁹ UBH/*Schmidt* § 308 no. 5 para 15, WLP/*Dammann* § 308 no. 5 para 70.

the contract is ineffective. Under § 130(1) 1st sent., a declaration of intent that is to be made to another becomes effective if made in his absence, at the point of time when this declaration reaches him. This provision is also applicable by analogy to 'acts similar to legal transactions'⁵¹⁰⁰ such as overdue notices⁵¹⁰¹ or notifications of defects⁵¹⁰² in terms of § 377 HGB. What is more, the reception of a declaration of intent is a condition for the fulfilment of information requirements. The burden of proof lies with the declaring person.⁵¹⁰³ In German law,, there is no *prima facie* proof that a registered letter has actually reached the person for which it was intended.⁵¹⁰⁴ Hence, it is not sufficient to present the transmission confirmation for the reception of an e-mail⁵¹⁰⁵ or fax.⁵¹⁰⁶

There are only two legal exceptions to this principle, set out in §§ 132 BGB and 13 VVG.⁵¹⁰⁷ § 132 BGB provides for two possibilities by which the sender can substitute the receipt by service. Under paragraph (1) of this provision, a declaration of intent is deemed to have been received if it is served through a bailiff as an intermediary. The service is effected under the provisions of the ZPO.⁵¹⁰⁸ § 132(2) provides that if the person declaring is unaware, through no negligence on his part, of the identity of the person to whom the declaration is to be made, or if the whereabouts of this person are unknown, service may be effected in accordance with the provisions of the ZPO relating to service by publication. In the former case, the local court (*Amtsgericht*) competent for the approval is the one in whose district the person declarant its residence, or in the absence of a residence within the country, its abode. In the latter case, the local court competent for the approval is the one in the district of which the person to whom service is required to be effected had its last residence, or, in the absence of a residence within the country, its last abode.

§ 13 VVG is relevant in cases where the policyholder changes its address or name. If the policyholder has not informed the insurer of a change of address, the dispatch of a letter sent recorded delivery to the policyholder's last known address shall suffice in respect of a

⁵¹⁰⁰ *Geschäftsähnliche Handlungen.*

⁵¹⁰¹ *Mahnungen.*

⁵¹⁰² *Mängelrügen.*

⁵¹⁰³ BGH NJW 1978, 886; 1987, 2235 (2236).

⁵¹⁰⁴ BGH NJW 1996, 2033 (2035).

⁵¹⁰⁵ This is only different if the confirmation of receipt and the read receipt can be presented. See Mankowski NJW 2004, 1901.

⁵¹⁰⁶ BGH NJW 1995, 665 (667) sees the transmission confirmation merely as an indication for the reception, but not as a *prima facie* proof.

⁵¹⁰⁷ *Versicherungsvertragsgesetz.*

⁵¹⁰⁸ ZPO = Zivilprozessordnung (Code of Civil Procedure).

declaration of intention to be made to the policyholder. The declaration shall be deemed to have been received three days after the letter was dispatched. The first and second sentences shall apply *mutatis mutandis* in respect of a change of the policyholder's name.⁵¹⁰⁹

Consequently, for these two legal exceptions, content control does not take place in terms of § 307(3) because standard clauses reflecting these provisions do not derogate from the law.⁵¹¹⁰

The South African legislator chose a different approach. In paragraph (w) of regulation 44(3) it is set out that a term providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer, is presumed to be unfair, '*unless such statement has been sent by prepaid registered post to the chosen address of the consumer*'.⁵¹¹¹ Hence, the discussions related to whether this item should be completed by also inserting other means of communication, such as e-mail, as Naudé suggests,⁵¹¹² or the deeming provision of section 23 ECTA,⁵¹¹³ is irrelevant for § 308 no. 6.⁵¹¹⁴

Standard business term users tend to get rid of this unfavourable evidence situation by inserting clauses by which the other party is deemed to have received a declaration of the user. Such clauses bear certain risks for consumers, although they might actually not have received the given declaration. Hence, the legislature inserted § 308 no. 6. In order to facilitate mass transactions of banks, only declarations of 'special importance' fall under this provision.

⁵¹⁰⁹ § 13(1) VVG.

⁵¹¹⁰ UBH/Schmidt § 308 no. 6 para 3.

⁵¹¹¹ Emphasis added. See Austrian **Konsumentenschutzgesetz** which provides in § 6(1) no. 3 that a declaration is deemed to have been received by the consumer, '*unless it is a matter of the validity of a declaration sent to the consumer's last known address in the event of the consumer not having notified the entrepreneur of a change of address*'. Emphasis added.

⁵¹¹² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 107.

⁵¹¹³ **Section 23 ECTA**: 'A data message (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee, (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.'

⁵¹¹⁴ See discussion on reg 44(3)(w) in Part I ch 3 para 3.4.5 b).

§ 308 no. 6 is a special provision to § 309 no. 12⁵¹¹⁵ that deals with provisions modifying the burden of proof.⁵¹¹⁶ Therefore, § 308 no. 6 is no autonomous restriction of freedom of contract but rather a limitation of § 309 no. 12 and a partial admission of fictitious receipts.⁵¹¹⁷

2.3.6.2 Content of the prohibition of § 308 no. 6

a) Fiction

§ 308 no. 6 applies where the actual receipt as a condition for the validity of a declaration is replaced by a fiction ('is deemed to have been received') or by a refutable or irrefutable presumption ('the receipt is irrefutably presumed').⁵¹¹⁸ The former AGB-Banken set out, for instance, that 'written notices of the bank are deemed to have been received by the customer if they have been sent to his or her last known address.'⁵¹¹⁹ On the other hand, clauses by which contractual partners confer each other power of attorney for the reception of declarations *vis-à-vis* the user are not considered fictitious receipts. Such powers of attorney can nonetheless be invalid under the general clause.⁵¹²⁰ Fictitious receipts must be distinguished from fictitious declarations.⁵¹²¹ The latter fall under § 308 no. 5.⁵¹²²

b) Declarations of special importance

The wording 'declaration that is of special importance' might lead to the conclusion that the provision covers only declarations with a certain degree of relevance. The contrary is true though because all declarations that have negative consequences for the other party fall under § 308 no. 6.⁵¹²³ Adverse legal consequences can accrue from declarations concerning the termination of or rescission from a contract, but also from overdue notices⁵¹²⁴ or the granting of a grace period.⁵¹²⁵

⁵¹¹⁵ § 309 no. 12: '(Burden of proof) [A] provision by which the user modifies the burden of proof to the disadvantage of the other party to the contract, in particular by a) imposing on the latter the burden of proof for circumstances lying in the sphere of responsibility of the user, or b) having the other party to the contract confirm certain facts [is invalid]; letter (b) does not apply to acknowledgements of receipt that are signed separately or provided with a separate qualified electronic signature.'

⁵¹¹⁶ Palandt/*Grüneberg* § 308 para 35, L/GvW/T/*Graf von Westphalen* § 10 no. 6 AGBG

⁵¹¹⁷ Palandt/*Grüneberg* § 308 para 35.

⁵¹¹⁸ WLP/*Dammann* § 308 no. 6 para 11, UBH/*Schmidt* § 308 no. 6 para 5.

⁵¹¹⁹ No. 1 (2) AGB-Banken in the version applicable until 1992. The new version does not contain a fictitious receipt clause.

⁵¹²⁰ BGH *NJW* 1989, 2383; 1997, 3437 (3439 *et seq.*).

⁵¹²¹ WLP/*Dammann* § 308 no. 6 para 16.

⁵¹²² See discussion on § 308 no. 5.

⁵¹²³ UBH/*Schmidt* § 308 no. 6 para 7, Palandt/*Grüneberg* § 308 para 37.

⁵¹²⁴ OLG Hamburg *VersR* 1981, 125.

⁵¹²⁵ Stoffels *AGB-Recht* 284.

The reason for this wide interpretation can be found in the legislative history of the norm. By the phrase 'of special importance', the legislator originally aimed to admit fictitious receipts for simple bank notices so that the provision actually only excludes few notices. These are to be assessed in terms of § 307, however. Although standard clauses by which 'declarations that are of no special importance are deemed to have been received if they have been sent to the customer', might be misleading for consumers, the courts decided that they are valid because they simply reflect the wording of the provision.⁵¹²⁶

2.3.6.3 Legal consequences in case of violation

Under § 308 no. 6 two constellations are conceivable: First, where a clause provides for a fictitious receipt for all declarations of the user, the entire clause is ineffective.⁵¹²⁷ Second, if the clause provides for several cases in which a declaration is deemed to have been received, only the ineffective parts of the clause are 'erased', whereas the others are valid.⁵¹²⁸ Where the fictitious receipt is invalid, the user must prove the reception of its declaration in terms of § 130.⁵¹²⁹

2.3.6.4 B2B contracts

Since §§ 308 no. 6 does not apply to business-to-business transactions under § 310(1) 2nd sent., the clause has to be assessed in terms of § 307.⁵¹³⁰ In order to assume a declaration of special importance, the adverse consequences must have some weight though.⁵¹³¹

2.3.7 Reversal of contracts (§ 308 no. 7)

2.3.7.1 Rationale of § 308 no. 7

In terms of § 308 no. 7, a provision by which the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract may demand a) unreasonably high remuneration for enjoyment or the use of a thing or a right or for performance rendered, or b) unreasonably high reimbursement of expenses is ineffective.

Clauses that stipulate unreasonably high remuneration for the use of a thing or a right, or unreasonably high reimbursement of expenses are often used to deter consumers from terminating an agreement.⁵¹³²

⁵¹²⁶ OLG Hamburg WM 1986, 383 (385). See also UBH/Schmidt § 308 no. 6 para 20.

⁵¹²⁷ Stöffels *AGB-Recht* 284.

⁵¹²⁸ UBH/Schmidt § 308 no. 6 para 8.

⁵¹²⁹ Stöffels *AGB-Recht* 285.

⁵¹³⁰ § 310(1) 1st sent.

⁵¹³¹ UBH/Schmidt § 308 no. 6 para 9.

⁵¹³² De Stadler *Consumer Law Unlocked* 125.

A similar provision is item (s) of regulation 44(3) of the Act.⁵¹³³ Regulation 44(3)(s) is to be read in conjunction with regulation 44(4)(d) which provides that item (s) does not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of the Act or any other law. Such a provision is section 20(6) pursuant to which the supplier may not charge the consumer if the goods are returned in the original unopened packaging. If the goods are in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for the use of the goods during the time they were in its possession, or any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer (section 20(6)(b)). In any other case, the consumer may charge a reasonable amount for the use of the goods or any consumption or depletion, and for necessary restoration costs to render the goods fit for re-stocking, unless the consumer had to destroy the packaging in order to determine whether the goods conformed to the description or sample provided, or were fit for the intended purpose (section 20(6)(c)).

Unlike § 308 no. 5 or regulation 44(3)(r), § 308 no. 7 and regulation 44(3)(s) respectively apply to cases where a contract is terminated for reasons other than breach and therefore have a wider scope of application than no. 5 or item (r).⁵¹³⁴

Contrary to § 309 no. 5 which prohibits agreements of a lump-sum claim by the user for *damages* or for compensation of a *decrease in value* under certain circumstances,⁵¹³⁵ § 308 no. 7 covers cases where the user demands a certain sum in the case of *termination of the contract*. The legislator prohibits unreasonably high remuneration or unreasonably high reimbursement of expenses so that the termination of the contract is not more attractive for the user than its execution. The other party shall not suffer adverse economic implications when cancelling⁵¹³⁶ the contract or rescind⁵¹³⁷ from it, which in fact would lead to a significant restriction of its freedom to terminate an open-ended agreement. What is more, the statutory provisions for a rescission of an agreement (§ 346) or its cancellation (§§ 628, 649) aim at a

⁵¹³³ See discussion on reg 44(3)(s) CPA in Part I ch 3 para 3.4.3 c).

⁵¹³⁴ See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 100.

⁵¹³⁵ See discussion on § 309 no. 5.

⁵¹³⁶ The official English translation of § 308 no. 7 translates '*Kündigung*' by 'giving notice'. In this chapter of this thesis, both terms are used indifferently.

⁵¹³⁷ The official English translation of § 308 no. 7 translates '*Rücktritt*' by 'revocation'. In South African and English law, revocation is only applicable to offers though. Hence, the term 'rescission' is preferable. See Law *Oxford Dictionary of Law* s.v. 'revocation' and Hutchison *et al Law of Contract* 54.

balancing of the parties' interests.⁵¹³⁸ This becomes clear when reading § 346(2)⁵¹³⁹ which provides that in case of a rescission of the contract only 'compensation for value'⁵¹⁴⁰ is due, i.e., the 'actual value'. In a lease, this is usually the rent that would have to be paid.⁵¹⁴¹ In case of a cancellation, the other party to the contract may only ask for 'a part of his remuneration corresponding to his services performed thus far', and § 649 provides that the contractor is entitled to demand the agreed remuneration. He must allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour though.⁵¹⁴² § 308 no. 7 aims to reflect the statutory model and to achieve a fair balancing of the parties' interests. Hence, this provision is an emanation of § 307(2) no. 1.⁵¹⁴³

It should be noted that the German heading of § 308 no. 7 ('*Abwicklung von Verträgen*') is ambiguous⁵¹⁴⁴ because it merely covers the reversal or early termination of an agreement. The official English translation takes this into account ('Reversal of contracts').⁵¹⁴⁵

2.3.7.2 Content of the provision

a) Forms included by the wording of no. 7

The provision covers cases where the user provides in its standard clauses for an unreasonably high remuneration or unreasonably high reimbursement of expenses in the case of a cancellation or rescission. The evaluative element of no. 7 is 'unreasonably'.⁵¹⁴⁶

No. 7 applies to an amount of money in the form of remuneration or reimbursement of expenses for the benefit of the user when a party (it does not matter which one) has cancelled the agreement or rescinded from it. 'Rescission' is the setting aside of a voidable contract *ex tunc*, which is thereby treated as if it had never existed.⁵¹⁴⁷ The agreement is transformed into a 'contractual obligation of restitution,' i.e., the primary obligations are revoked, and performances already rendered so far have to be restored. On the other hand, a cancellation

⁵¹³⁸ BT-Drs. 7/3919 at 26.

⁵¹³⁹ § 346(2): 'In lieu of restitution or return, the obligor must provide compensation for value, to the extent that 1. restitution or return is excluded by the nature of what has been obtained, 2. he has used up, disposed of, encumbered, processed or redesigned the object received, 3. the object received has deteriorated or has been destroyed; but deterioration that is caused by the object being used in accordance with its intended use is not taken into account. If consideration is specified in the contract, then this is to be used as a basis when the compensation for value is calculated; if compensation for value for the benefit of use of a loan is to be paid, it can be shown that the value of the benefit of use was lower.'

⁵¹⁴⁰ *Wertersatz*.

⁵¹⁴¹ BT-Drs. 7/3919 at 26.

⁵¹⁴² *Stoffels AGB-Recht* 390.

⁵¹⁴³ *WLP/Dammann* § 308 no. 7 para 2a.

⁵¹⁴⁴ In fact, '*Abwicklung*' also means 'execution', 'implementation' or 'liquidation'.

⁵¹⁴⁵ See *UBH/Schmidt* § 308 no. 7 para 1.

⁵¹⁴⁶ *Stoffels AGB-Recht* 390.

⁵¹⁴⁷ *Law Oxford Dictionary of Law* s.v. 'rescission', *Creifelds Rechtswörterbuch* s.v. 'Rücktritt vom Vertrag'.

terminates an agreement *ex nunc* without the obligation to restore performances already rendered. It is not relevant for no. 7 if the right to cancel the agreement is based on statutory or contractual provisions, or if it is an ordinary or extraordinary termination of the contract.⁵¹⁴⁸ The terminology used by the user is also irrelevant (annulment, revocation, withdrawal, cancellation etc.) since merely the type of termination that actually applies is important.⁵¹⁴⁹

b) Other types of termination of contracts

Although the wording of no. 7 only includes rescission or cancellation of the agreement, there is an undeniable need of protection of the other party in cases where the user terminates the contract by using another type of cancellation, and where such termination is more attractive to her than execution. Hence, an application of no. 7 by analogy to other forms of termination, such as voidability,⁵¹⁵⁰ the occurrence of a resolutive condition or a revocation of a mandate in terms of § 671, is generally accepted.⁵¹⁵¹ The termination of the contract by mutual agreement is not covered by no. 7, however.⁵¹⁵² Furthermore, no. 7 is only applicable if the existence of the contract is concerned; otherwise § 307 is applicable.⁵¹⁵³ If the standard terms of a bank provide that the client has to pay higher interest in case of an unauthorised overdraft, this does not concern the existence of the contract itself, and the general clause applies.⁵¹⁵⁴

c) Remuneration or reimbursement due to the termination of the contract

§ 308 no. 7 concerns the user's claim to remuneration or reimbursement due to a termination of the contract. If the user's standard terms do not provide for such remuneration or reimbursement for the benefit of the user, but for another's benefit, not no. 7 but § 307 is applicable. As discussed further above, the BGB contains provisions that regulate the amount of the given remuneration or reimbursement,⁵¹⁵⁵ according to which the contractor must allow set-off of the expenses she saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of her labour. What is more, the contractor may demand a part of the remuneration that corresponds to the work performed and reimbursement of those expenses not included in the remuneration if the work, before acceptance, is destroyed or deteriorates or becomes impracticable as the result of a defect in the materials supplied by the

⁵¹⁴⁸ Stoffels *AGB-Recht* 391.

⁵¹⁴⁹ UBH/Schmidt § 308 no. 7 para 6, WLP/Dammann § 308 no. 7 para 8.

⁵¹⁵⁰ §§ 119 *et seq.*

⁵¹⁵¹ Palandt/*Grüneberg* § 308 para 39, UBH/Schmidt § 308 no. 7 para 7.

⁵¹⁵² OLG Hamburg *NJW-RR* 1990, 909. Dammann is of the view that in these cases, § 308 no. 7 has to be applied by analogy (WLP/Dammann § 308 no. 7 para 11).

⁵¹⁵³ Staudinger/*Coester-Waltjen* § 308 no. 7 para 14.

⁵¹⁵⁴ BGH *NJW* 1992, 1751 (1752).

⁵¹⁵⁵ E.g., §§ 346 and 347 for a rescission, § 628 for a service contract, or § 649 2nd sent.

customer or as the result of an instruction given by the customer for the carrying out of the work, without a circumstance for which the contractor is responsible contributing to this (§ 645, read in conjunction with § 643). In principle, these statutory provisions cover all claims for remuneration or reimbursement in case of early termination of the agreement, except for lump-sum damages and contractual penalties.⁵¹⁵⁶

d) Unreasonable amount

No. 7 only concerns the amount of the remuneration or the reimbursement that the user requires, but not the reason for it. The latter has to be assessed in terms of the general clause.⁵¹⁵⁷ When assessing the reasonableness of the amount of the remuneration or the reimbursement, the statutory clauses which would apply if the given clause were inexistent serve as applicable standard.⁵¹⁵⁸ For the enquiry, the circumstances of the concrete case are irrelevant. Only the typical situation for the given type of contract in the case of early termination is considered.⁵¹⁵⁹

Remuneration for the transfer or use of a thing or a rendered performance is unreasonably high if it significantly exceeds the objective value of the received performance or use, or if a reasonable compensation for an advantage the user had is not taken into consideration.⁵¹⁶⁰

Hence, a standard clause in a leasing contract by which the lessee has to pay immediately after giving notice the outstanding instalments, whereby only 90 % of the proceeds of the re-use of the vehicle by the user are taken into account, is in effect an unreasonable high remuneration for the use of the car, namely for the time in which the lessee cannot use it anymore. Therefore, it violates no. 7.⁵¹⁶¹ Also invalid are clauses in marriage agency contracts by which the agent is entitled to keep its success-based remuneration paid in advance also in the case of early termination of the contract.⁵¹⁶²

The amount of the *reimbursement* of expenses is reasonable if it is justifiable and appropriate.⁵¹⁶³ Therefore, a standard clause of a travel agency by which the client has to pay 100 % of the flight if he or she rescinds from the contract after the registration deadline is invalid in terms of no. 7. I because it unilaterally favours the user's interests. It does not consider

⁵¹⁵⁶ See § 309 no. 5 and 6.

⁵¹⁵⁷ WLP/Dammann § 308 no. 7 para 4. Others want to apply this provision by analogy: Staudinger/Coester-Waltjen § 308 no. 7 para 7.

⁵¹⁵⁸ BGH NJW-RR 2005, 642 (643), UBH/Schmidt § 308 no. 1 para 1.

⁵¹⁵⁹ BGH NJW 1983, 1491 (1492).

⁵¹⁶⁰ Locher *Recht der AGB* 137.

⁵¹⁶¹ BGH NJW 1982, 1747 (1748).

⁵¹⁶² BGH NJW 1983, 2817 (2819).

⁵¹⁶³ WHL/Wolf § 10 no. 7 AGBG para 19, Stoffels *AGB-Recht* 393.

the standard of § 649 that applies to typical situations with regard to early termination of a contract of such type.⁵¹⁶⁴

§ 308 no. 7 is interpreted in that the other party must have the possibility – by analogy to § 309 no. 5 lit. b) – to prove that the actual amount was lower than the demanded sum.⁵¹⁶⁵ A standard clause by which the expenses saved and to be deducted from the architect's fee in case of the client's notice amount to '40 % for the performances that the contractor has not rendered yet' does not include this possibility and is therefore invalid.⁵¹⁶⁶

2.3.7.3 Relation to other provisions

It might be sometimes difficult to differentiate § 308 no. 7 from § 309 no. 5 which concerns lump-sum claims for damages.⁵¹⁶⁷ It is conceivable that a standard clause contains elements of a lump-sum claim as well as those of a reimbursement of expenses. Stoffels legitimately argues that such a differentiation is of mere academic interest because of the similar requirements for lump sums in both provisions. The possibility of the other party to prove that the amount was actually lower than the lump sum set out in the clause also speaks for his argument.⁵¹⁶⁸ The courts declare such clauses invalid in terms of both provisions and apply no differentiation.⁵¹⁶⁹

Also § 357⁵¹⁷⁰ concerns the reversal of contracts, namely the legal consequences of withdrawal from off-premises contracts and distance contracts (save contracts relating to financial

⁵¹⁶⁴ BGH NJW 1985, 633 *et seq.* Contracts of transportation of passengers or goods are considered contracts to produce a work (*Werkverträge*). See Palandt/*Sprau* before § 631 para 17d, with further references. In the given case, the travel agency in question only offered flights. If the case were to be decided today, and the travel agency would offer package travel contracts, it is submitted that the valuations contained in § 651i would have to be considered. § 651i: '(1) Prior to commencement of travel, the traveller may revoke the contract at any time. (2) If the traveller revoke the contract, then the travel organiser loses his claim to the agreed package price. He may, however, demand appropriate compensation. The amount of such compensation is determined by the price of the travel package minus the value of the expenses saved by the travel organiser and what he can gain by alternative deployment of the travel services. (3) In the contract, for each type of travel package, taking into account the customarily saved expenses and the customary potential savings from alternative deployment of the travel services, a percentage of the package price may be specified as compensation.'

⁵¹⁶⁵ Erman/*Roloff* § 308 para 60, UBH/*Schmidt* § 308 no. 7 para 4.

⁵¹⁶⁶ BGH NJW 1999, 418.

⁵¹⁶⁷ See discussion on § 309 no. 5.

⁵¹⁶⁸ Stoffels *AGB-Recht* 393 and 394.

⁵¹⁶⁹ E.g., BGH NJW 1997, 259 (260).

⁵¹⁷⁰ § 357: '(1) The performance received is to be restituted at the latest after fourteen days. (2) The trader must also retribute any payments the consumer may have made for the delivery. This does not apply inasmuch as the consumer has incurred additional costs because he opted for a type of delivery other than the least expensive type of standard delivery offered by the trader. (3) In making the repayment, the trader must use the same means of payment that the consumer used in making the payment. Sentence 1 does not apply if the parties expressly have agreed otherwise and the consumer does not incur any costs as a result. (4) In the case of a sale of consumer goods, the trader may refuse to make repayment until he has received the returned goods or the consumer has provided proof that he has dispatched the goods. This does not apply if the trader has offered to collect the goods. (5) The consumer is not obliged to arrange for the return shipment of the goods received if the trader has offered to collect the goods. (6) The consumer bears the direct costs of return shipment of the goods if the trader has informed the

services). § 4 FernUSG⁵¹⁷¹ is also a consumer protection provision and regulates that in a distance education contract, the client is entitled to rescind from the agreement pursuant to § 355 BGB, and that §§ 356 und 357 BGB apply by analogy.⁵¹⁷² Any infringement of these consumer protection provisions makes the clause void in terms of § 134⁵¹⁷³ so that the application of § 308 no. 7 is not necessary.⁵¹⁷⁴

2.3.7.4 Legal consequences in case of violation

If the clause is invalid, the court cannot reduce the remuneration or reimbursement of expenses to a permissible degree since there is no legal basis for this. Where the clause merely provides that the amount of the claim is that regulated by law, the judge has to calculate the precise amount.⁵¹⁷⁵ Where no statutory provisions exist, the court must balance the parties' interests by a gap-filling interpretation of the given standard clause.⁵¹⁷⁶

2.3.7.5 B2B contracts

In terms of § 310(1), § 308 no. 7 is not directly applicable, but its evaluations are considered under § 307.⁵¹⁷⁷ No. 7 is an emanation of § 307(2) no. 1 in that it concerns 'essential principles

consumer pursuant to Article 246a [§] 1(2) sentence 1 number 2 of the [EGBGB] of this obligation. Sentence 1 does not apply if the trader has stated that he is prepared to bear these costs. In the case of off-premises contracts, in the context of which the goods were delivered to the consumer's dwelling at the time the contract was concluded, the trader is obliged to collect the goods at his own costs if, by their nature, these goods cannot be returned by post. (7) The consumer shall be liable for any diminished value of the goods if 1. the diminished value results from the handling of the goods in any other manner than that necessary to establish the nature, characteristics, and functioning of the goods, and 2. the trader has informed the consumer pursuant Article 246a [§] 1 (2) sentence 1 number 1 of the [EGBGB] of his right of withdrawal. (8) Where the consumer withdraws from a contract for the provision of services or the supply of water, gas, or electricity, without their supply having been offered for sale in a limited volume or set quantity, or for the supply of distance heating, the consumer shall owe the trader compensation for the value of the performance provided until the time of the withdrawal in those cases in which the consumer has expressly demanded that the trader begin with the performance prior to expiry of the withdrawal period. The claim pursuant to sentence 1 exists only in those cases in which the trader has properly informed the consumer pursuant to Article 246a [§] 1 (2) sentence 1 number 1 and 3 of the [EGBGB]. For off-premises contracts, the claim pursuant to sentence 1 exists only in those cases in which the consumer has transmitted his request pursuant to sentence 1 on a durable medium. In calculating the compensation for value, the total price agreed upon is to be used as a basis. If the total price agreed upon is excessive, the compensation for value shall be calculated on the basis of the market value of the performance provided. (9) Where the consumer withdraws from a contract for the supply of digital content that is not contained in a tangible medium, he shall not compensate for value.'

⁵¹⁷¹ Gesetz zum Schutz der Teilnehmer am Fernunterricht (Fernunterrichtsschutzgesetz - FernUSG).

⁵¹⁷² Stöffels *AGB-Recht* 394.

⁵¹⁷³ § 134: 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'

⁵¹⁷⁴ Bamberger/Roth/Becker § 308 no. 7 para 4, MüKo/Wurmnest § 308 no. 7 para 3.

⁵¹⁷⁵ Stöffels *AGB-Recht* 394.

⁵¹⁷⁶ Staudinger/Coester-Waltjen § 308 no. 7 para 16, WLP/Dammann § 308 no. 7 paras 40-49.

⁵¹⁷⁷ BGH NJW 1994, 1060 (1067), UBH/Schmidt § 308 no. 7 para 24, Bamberger/Roth/Becker § 308 no. 7 para 40.

of the statutory provision from which it deviates'. Particularities may arise from the customs for the given branch or commercial practice.⁵¹⁷⁸

2.4 Conclusion

Since the German general clause is worded very widely, the courts have an extensive scope of evaluation in terms of § 307. To provide for more legal security and clarity, the legislator has introduced §§ 308 and 309, which can be qualified as grey- and blacklists. They offer guidelines for the application of the general clause since they contain reverse conclusions or conclusions by analogy.

The provisions of § 308 contain an evaluative element, expressed by indeterminate legal terms. Standard clauses that fall under § 308 usually include a risk of a disturbed balancing of the parties' interests. On the other hand, § 309 contains provisions that are outright prohibited as they are incompatible with essential principles of statutory provisions or undermine cardinal rights and obligations. § 309 is therefore a concretisation of § 307(2).

According to the ECJ, the provisions contained in the Annex of the Unfair Terms Directive serve as an information source for national authorities and individuals. The Member States must hence implement them in a fashion that ensures that the public obtains knowledge of them. In some instances, the protection offered by §§ 308 and 309 goes further than the Directive, and where the German provisions lack clauses contained in the Directive's Annex, the courts can fill this gap by employing the general clause.

§ 310(2) contains some exceptions for the application of §§ 308 and 309 (utility contracts). The price regulations adopted in this field are legal norms and not standard clauses. Hence, they are not subject to content control. *Vis-à-vis* special customers (industries), content control under § 307 is possible if the given contracts have explicitly been incorporated. Hence, special customers are not in a better position than standard-rate consumers. §§ 310(2) and 307 must be interpreted in conformity with the Directive, however.

§§ 308 no. 1, 2 to 8 and 309 do not apply to B2B contracts, or contracts with a legal person under public law or a special fund under public law. In these cases, the general clause applies. However, § 307(1) and (2) apply *vis-à-vis* these entities to the extent that this leads to the ineffectiveness of the contract provisions set out in §§ 308 no. 1, 2 to 8 and 309. The norms

⁵¹⁷⁸ UBH/Schmidt § 308 no. 7 para 24.

contained in § 309 may have an indicative effect on § 307 in some instances, or are a concretisation of the general clause. In some cases, the rationale of the provision set out in § 309 applies to the general clause without having an indicative effect, or the given provision has no effect at all on § 307. In any event, in B2B agreements, it can be expected that the commercial partners have a high degree of business experience and knowledge, which justifies a more lenient standard. Moreover, these agreements are characterised by promptness and straightforwardness, and different interpretational standards than for B2C contracts may apply.

If the court decides, after evaluation, that the conditions in the cases mentioned in § 308 are fulfilled, the clause is ineffective in its entirety. Then, the statutory provisions apply instead (§ 306(2)). A partial retention is excluded. In cases, where a clause can be split up into a valid and an invalid part, the effective part may be maintained, however.

Prohibited clauses without the possibility of evaluation:

§ 309 no. 1 prohibits price increases at short notice within four months of entering into the agreement. Contrary to regulation 44(3)(h) of the Act, the German provision does not apply to goods or services in connection with open-ended agreements. For these continuing obligations, the general clause is applicable though. Prohibited price increase standard clauses infringe the *pacta sunt servanda* principle and are an obstacle for price comparisons and competition. Price increases not only concern the actual, nominal price, but also ancillary performances and VAT. No. 1 also covers indexation clauses, 'tension clauses' and market price clauses, but not indirect price increases. This provision covers all transaction types, except those concerning immovable objects (land plots). § 651 a to y contain specific provisions for price increases of package travel contracts.

When entering into a contract, consumers must be able to identify the scope of possible price increases, which is why the BGH requires for so-called 'cost element clauses' that the standard clauses contain the various cost elements and their weighting. Otherwise, the consumer must be able to cancel the agreement. This has practical relevance for adjustment clauses of energy suppliers. What is more, price increase clauses of monopolistic suppliers are subject to equity control under § 315.

§ 309 no. 2 deals with the right to refuse performance. Under this provision, users are not allowed to exclude or restrict their client's right to refuse performance under § 320 or their right of retention in terms of § 273. Both, the right to refuse performance and the right of retention are based on the principle of 'fairness for the execution of contracts'. The legislator considered

the BGH's interpretation of 'the same *legal* relationship' as too far-reaching in terms of § 309 no. 2 and applies the right of retention only if it is based to 'the same *contractual* relationship'.

An *exclusion* of such a right is given where unacceptable or unrealisable conditions for the recognition of the other party's rights exist. A *restriction* can be assumed where the assertion is only possible under certain conditions, and the requirements set out in the clause are stricter than the law. Moreover, where the user links the assertion of the other party's rights to an acknowledgement of defects by the user, no. 2 applies. No. 2 does however not apply to cases where the customer has to pay in advance because the legislator did not wish to exclude agreements on the obligation to perform in advance *per se*. In these cases, § 307 applies.

§ 309 no. 3 outlaws prohibitions of set-off. The legislator did not outlaw clauses forbidding the set-off of claims *per se*, but only where this right is uncontested or has been finally and non-appealably established. In commercial practice, a prohibition of set-offs is expressly agreed in a standard clause, or it is impliedly contained in the parties' agreement. Implied prohibitions are net-cash clauses or clauses that require payment in advance. Claims that are ready for judgment are equal to those that have been finally and non-appealably established because their existence has been fully proved so that the user does not need protection against alleged counter-claims.

So-called 'group set-off clauses' by which the user is entitled to set off its claims not only against its customer but also against its group companies are disadvantageous for the other party. This applies especially where the clients are not designated individually, or the number of the concerned group companies is too vast. The newly inserted § 449(3) speaks in favour of a categorical invalidity of such clauses. Other examples where the user extends its possibility to set off its claims are open account agreements and clearing, which are often found in the banking sector. Both forms are considered compatible with the general clause.

In terms of **no. 4 of § 309**, standard terms users must not exempt themselves from the statutory requirements of giving the other party a warning notice or setting a period of time for the customer to perform or cure. This provision ensures a balanced relation between the parties. Customers must be warned about the consequences of their delay and granted the opportunity to perform. South African law does not have a similar provision, but the *mora debitoris* principles developed by the courts apply. No. 4 also applies where standard terms users use legal consequences that only occur on the basis of a warning notice or additional period of

time. It is therefore not necessary that a clause declare that a warning notice or the setting of an additional period of time for performance is superfluous.

§ 309 no. 5 aims to strike a balance between the other party's need for protection against excessive claims of the user and the user's need for simplified and economic enforcement. For the distinction between lump-sum claims and contractual penalties, functional-typological aspects have to be applied, such as the type of the given claim and the objective of the agreement. The BGH extends the provision's application to compensations based on the traveller's revocation of the travel package contract.

§ 309 no. 6 deals with 'asymmetric retention clauses', which are referred to in South Africa as 'one-sided forfeiture clauses'. These allow suppliers to retain payment in the case of breach, without giving the consumer the right to be compensated in the same amount if the supplier commits breach. Penalty clauses have a double function: to motivate the debtor to perform, and enable the creditor to be indemnified in a simple manner. Even though no. 6 is tailored to so-called 'dependent penalty agreements' which depend on the main obligation, it can also be applied by analogy to independent penalty clauses. It does however not apply to so-called 'prepayment penalties' for the repayment of a credit. The BGH qualifies these as a special form of a stipulation on the termination of the agreement, and § 307 applies in these cases.

The provision applies in cases of non-acceptance or late acceptance of the performance, payment default and termination of the contract. In cases where no. 6 does not apply, an enquiry in terms of § 307 is possible. Besides, strict-liability clauses are not compatible with the essential principles of the statutory provisions and thus invalid under the general clause.

§ 309 no. 7 concerns the traditional core of content control: the exclusion or restriction of liability for high-ranking and other damages. The provision includes contractual claims for damages and those based on the delivery of faulty goods, but also liability for breach at the moment of the conclusion of the contract (*culpa in contrahendo*) and for tortious acts.

No. 7 contains some restrictions for its application, namely for transport and tariff rules for regular public transport services on the road (i.e., not for air transport). The reason for this exclusion is the normative character of an applicable Order in which liability restrictions are already set out. The application to state-approved lotteries and gaming contracts is also excluded in order to avoid the danger of concerted manipulations by lottery agents and players. The exclusion or restriction of liability for the violation of highest-ranking legal rights (life,

health etc.) is not possible, even if committed by negligence or by a legal representative or a vicarious agent (lit. a).

Regulation 44(3)(a) of the Act contains a similar item. Read in conjunction with section 51(c)(i), item (a) of the Regulation only refers to exemption clauses excluding liability not based on gross negligence and which do not fall into the ambit of section 61.

Lit. b) of no. 7 contains limits for clauses that exclude or restrict liability for other damages. Liability for intentional breach is not mentioned in this provision because § 276(3) prohibits any release from liability for intention in advance.

It is not required that the standard clause explicitly mentions that liability is excluded; it is sufficient that the clause gives the impression that liability is excluded. Restrictions of liability concern the reduction of the client's claim for damages by excluding certain damages or restricting the amount of the damages. In addition, also restrictive modalities are covered since they are formal hindrances for the assertion of claims.

The restriction of the user's liability for negligent conduct is possible only for other damages. In terms of the general clause, also clauses excluding or restricting simple negligence can be ineffective, namely where the clause erodes essential rights or duties inherent in the nature of the agreement, or where cardinal obligations are concerned.

In terms of the Produkthaftungsgesetz, the producer's liability cannot be excluded. For the liberal professions and in transport law, special provisions concerning the exclusion or restriction of liability apply.

§ 309 no. 8 lit. a) is relevant for standard clauses that exclude or restrict the client's right to cancel its contract with the supplier if the latter does not deliver within the agreed time. This provision applies to all kinds of agreements, save for those referred to in no. 7 and the exceptions contained in § 310(4). The phrase 'free oneself from the contract' includes all legal rights under which an agreement may be terminated to the extent that they are based on a breach committed by the user. The provision prohibits any exclusions or restrictions of this right.

§ 309 no. 8 lit. b) contains six items and is only applicable to contracts relating to the supply of newly produced things and the performance of work. The scope of application of lit. b) is restricted to contracts between consumers and those concerning real estate because due to the modernisation of the law of obligations, consumer contracts are now excluded from its ambit.

The provision remains significant though for B2B agreements. The complete exclusion of any warranties of *used* things is not possible anymore.

Lit. b) aa) to ff) concern the other party's legal rights in the event of defects. On the other hand, as manufacturer warranties are not subject to content control because they are legally independent warranty agreements that do not derogate from the customer's legal rights.

§ 309 no. 8 lit. b) aa) expresses the principle that the customer must remain entitled to warranties, and that the user must remain the primary obligated party for any warranty. The provision aims to achieve that by a threefold construction. First, the entire or partial exclusion of claims is prohibited as the client must be allowed to a minimum standard of the warranties set out in §§ 434 and 634. Second, the limitation to the granting of claims against third parties is not allowed. Third, the user is prohibited from making the client's claims dependent upon prior court action taken against third parties. Clauses that establish merely the user's subsidiary liability are not forbidden *per se* though because such provisions do not require any court action against the third party.

According to the BGH, clauses that extend the control standard of § 307(2) no. 2 (limitation of essential rights or duties inherent in the nature of the contract) are prohibited. Hence, the field of application of no. 8 lit. b) aa) must not be limited to its wording.

§ 309 no. 8 lit. b) bb) deals with clauses limiting the other party's claims to cure, and excluding the other rights that it can assert if the bought or ordered item is defective. Such clauses are ineffective where they do not provide that in the event of failed cure, the client's other rights do not revive. The user can validly exclude the client's right to demand damages or reimbursement of futile expenditure though since no. 8 lit. b) bb) does not mention the revival of these rights. The provision makes an exception for contracts of building work because of the danger to destruct economic values and rights.

Lit. b) cc) of § 309 no. 8 outlaws standard clauses that exclude or limit the user's duty to bear the expenses necessary for cure. This prohibition is also applicable where the other rights of the other party are not restricted or excluded, and where the right to cure is only one right amongst others.

§ 309 no. 8 lit. b) dd) deals with provisions in standard terms that create an obstacle for clients for the enforcement of their right to cure because they must pay the stipulated price first and

cannot exert economic pressure on the supplier. The practical relevance of this item is somewhat limited as the thematically linked § 309 no. 2 applies more often in practice.

No. 8 lit. b) ee) prohibits clauses in which the user provides for a cut-off period for the other party to give notice of non-obvious defects that is shorter than the permissible period of time under item ff) of the same provision. For visible defects, a shorter than the permissible limitation period might be effective. In this case, the clause must be assessed in terms of § 307.

Item ff) of no. 8 lit. b) prohibits standard provisions providing that the limitation of claims against the user due to defects of the bought or ordered item is made easier, or in other cases providing for a limitation period of less than one year. Generally, the agreement on limitation periods is subject to the parties' freedom of contract. The provisions on the sale of consumer goods aim to preserve the consumer's rights in the event of defects concerning the limitation period and its beginning, however. A shortening of the limitation period from two years to one year is therefore only permitted for the sale of used goods. Hence, item ff) does not apply in these cases. The formulation 'making limitation easier' includes both the shortening of the limitation period and any measures that have the same result, e.g., an earlier beginning of the limitation period. Since shorter limitation periods are equal to a restriction of liability, the leading view argues that they also infringe § 309 no. 7 because such provisions also restrict personal rights.

§ 309 no. 9 concerns the duration of continuing obligations (open-ended agreements). No. 9 prohibits clauses providing for an initial duration of more than two years, tacit extensions of more than one year and notice periods of more than three months. The provision only concerns agreements on the regular supply of goods or the regular rendering of services or work performances by the user. Hence, continuing obligations are not targeted *per se*, and the prohibition does not concern significant contract types (lease, franchising agreements, leasing etc.). No. 9 is also applicable to mixed contracts where the provision covers the predominant element. It is however not applicable to temporary employment contracts. The provision is neither applicable to things sold as belonging together, or to insurance contracts. In this regard, no. 9 has merely a clarifying function. Where the legislator has provided for particular norms for the duration of the contract, like the WEG, no. 9 does not apply.

Even if the duration set out in a standard clause is valid under no. 9, the final enquiry is to be made by means of the general clause. This is because the legislature was of the view that open-ended agreements are too diverse so that a more generalising approach was necessary.

No. 10 of § 309 prohibits that the user's standard terms for certain contract types allow that a third party becomes the other party's contractual partner, save where the third party is identified beforehand, or the customer may free itself from the contract. The provision does not apply to assignments (transfer of single rights) or the use of subcontractors or vicarious agents since the other party's partner remains the same. This also applies where the user changes its legal personality.

§ 309 no. 11 aims to protect agents and is a specification of the prohibition of surprising clauses. Since such clauses are also invalid because they have not been properly incorporated into the contract or are surprising, the provision has rather a preventive function.

No. 12 of § 309 concerns clauses pertaining to the modification of the burden of proof and consists of two items (lit. a) and b)). The provision aims to protect the other party's position as otherwise its legal defence might be jeopardised. The prohibition applies to all principles of burden of proof, irrespective of whether they are applicable *ex lege* or have been developed by the courts. A teleological reduction of no. 12 in cases where the user 'only' modifies the burden of proof instead of waiving the client's claims for damages must be dismissed since the former is not a 'less' compared to the latter. **Lit. a)** merely reflects a general principle instead of having an autonomous significance. **Lit. b)** aims to prevent that clients confirm certain facts that are presented by the user as 'a mere formality'. As the legislator intended to prohibit clauses that aggravate the client's position, so-called 'completeness clauses' fall under this provision too. Already the user's attempt to degrade the customer's position in terms of proof is sufficient. Other cases are the reversal or a shift of the burden of proof or refutable assumptions.

§ 309 no. 13 concerns standard terms by which certain declarations require a more stringent form than written form, or which set out special requirements for their receipt. The prohibition covers all kinds of declarations pertaining to the conclusion, execution and termination of the agreement. More stringent forms than written form, i.e., the handwritten signature of the issuer, are notarial recording or official certification, for instance. Besides, restrictions to certain means of communication are included. Standard clauses that prescribe that the other party has to use the user's forms are invalid as the requirements for 'written form' are conclusively contained in §§ 126 and 127. No. 13 also prohibits special requirements for the reception of the other party's declaration. Requirements beyond the conditions set out in § 130 are invalid.

§ 309 no. 14 outlaws standard clauses that make ADR mandatory before the other party can assert its claims in court. ADR may have huge cost-implications that consumers often cannot

estimate. Despite its misleading title, the provision aims at permanent and temporary waivers of action. The primary function of no. 14 is not 'market cleansing' from prohibited clauses, but preventing the widespread of *mandatory* ADR clauses. It covers both arbitration and mediation. No. 14 applies to all types of claims of the client, and its normative objective covers all kinds of actions, i.e., court actions, preliminary proceedings and so forth. This prohibition is also applicable to consumer contracts, but since § 309 does not permit any evaluations, the 'other circumstances attending the entering into of the contract' are not taken into consideration.

§ 309 no. 15 prohibits clauses that restrict the consumer's rights in contracts to produce a work and in construction contracts concerning advance payments that are substantially higher than permitted by the applicable BGB norms, and the user's obligation to provide sufficient security.

Prohibited clauses with the possibility of evaluation:

§ 308 no. 1 1st sent. 1st var. targets provisions by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer. This provision presumes that the offer is made by the other party, e.g., by using an order form. No. 1 applies to all kinds of contracts. For suspensive conditions, no. 1 is applicable by analogy because the situation for the other party is the same in that it is bound to the contract whereas the user may meanwhile speculate on the client's costs. The user may have a legitimate interest for a longer period of time where it has to make calculations or undertake enquiries concerning the availability of the ordered goods, for example. A period of time is insufficiently specific where the customer is not able to calculate the acceptance period without any difficulties, where the clause contains indeterminate temporal terms, or where the calculation depends on circumstances in the user's sphere.

The **2nd var. of § 308 no. 1 1st sent.** concerns unreasonably long or insufficiently specific periods of time for rendering performance. The rationale of this provision is to avoid that the other party cannot serve notice of default to the user because the latter has reserved for itself a lax period of time for delivery. The prohibition covers 'real periods of time for performance' as well as 'quasi periods of time for performance' (grace and extension periods). An exception exists for consumer contracts where the user is allowed to withhold its performance until the other party's right to withdraw has expired.

The relatively newly inserted **§ 308 no. 1 lit. a) and b)** prohibit standard terms setting out periods of time that are considered unreasonably long (30 or 15 days, respectively) if the user is not a consumer. The legislative materials suggest that the prohibitions of lit. a) and b) are

particularly aimed at standard clauses that are used for contracts with entrepreneurs, legal persons under public law or special funds under public law.

In terms of § 308 no. 2, provisions that grant an unreasonably long or insufficiently specific additional period of time for the user's performance are invalid. In the enquiry, both parties' interests, the objective of the grace period and the particularities of the industry are considered. The additional period of time must not become a surrogate delivery deadline though because this would unreasonably disadvantage the customer who is expected to pay swiftly.

§ 308 no. 3 and its complementary provision of no. 8 prohibit clauses under which the user is entitled to free itself from its contractual obligations without objectively justified reason. This provision does not apply to continuing obligations, which must be assessed under § 307. The wording 'right to free [one]self from [one's] obligations' suggests that no. 3 and 8 apply to all kinds of terminations. The user must have a legitimate interest to disengage from the agreement. The two provisions have practical significance for supply and delivery clauses. Where the user's performance is unavailable, it must inform the other party without undue delay and reimburse it immediately (no. 8).

§ 308 no. 4 only concerns modifications of the user's performance and applies to continuing obligations too, unlike regulation 44(3)(i), read with regulation 44(4)(c)(iv). Since no. 4 covers both modifications and deviations, a differentiation is not necessary. Covered are the principal obligation and ancillary obligations and performances, the modalities of the performance as well as clauses by which the user may render part performance. Unlike the South African norm, no. 4 contains a reasonableness requirement. The clause must therefore contain serious grounds for the modification or deviation, and the conditions and implications for the customer must be reasonably taken into account. For the weighing of the parties' interests, a generalised-typified standard applies. Contrary to the wording of no. 4, the modification or deviation can only be reasonable if the conditions and the scope of the modification are sufficiently indicated in the clause.

§ 308 no. 5 deals with fictitious declaration clauses stipulating that a certain declaration has been made or has not been made, and where the actual behaviour of the other party is irrelevant. Such provisions must be distinguished from fictitious facts and fictitious receipts for which no. 5 does not apply. The demarcation might sometimes be challenging. Fictitious declarations are not prohibited *per se* and allowed where they facilitate the execution of mass contracts (e.g., banks). The prohibition only concerns the execution of agreements, not their conclusion. It

does not apply to renewals of contracts because these are not based on fictitious declarations, but on an agreement that the given agreement is tacitly renewed. To be valid, a standard clause providing for a fictitious declaration must contain three conditions of which two are mentioned in no. 5 lit. a) and b). The third (unwritten) condition is that the user must have a legitimate interest concerning such a clause, e.g., the execution of mass contracts.

In terms of § 308 no. 6, fictitious receipts concerning declarations of the user that are of special importance are invalid. The provision applies by analogy to acts similar to legal transactions (e.g., overdue notices). It covers actual fictions, but also refutable or irrefutable presumptions. In German law, there is no *prima facie* proof that a registered letter has actually reached the recipient. The same applies to transmission confirmations for e-mail or fax. The law makes two exceptions of this principle, namely in §§ 132 BGB and 13 VVG. For these exceptions, content control does not take place because they merely reflect legal provisions. The phrase 'declaration of special importance' must be interpreted widely and applies to all declarations having adverse consequences for the customer.

Despite the broad wording of the German heading of § 308 no. 7, this provision does not apply to all kinds of terminations of contracts, but foremost to cancellations and rescissions. As there is a need for protection of the customer also in other cases, no. 7 finds analogous application to other forms of termination, e.g., voidability. The rationale of the norm is to avoid that a termination of the contract is more attractive for the user than its execution. No. 7 aims to reflect the well-balanced statutory model and to achieve a fair balancing of the parties' interests. A *remuneration* is unreasonable if it significantly exceeds the objective value of the received performance, or if a reasonable compensation for an advantage the user had, is not taken into account. On the other hand, the amount to be *reimbursed* is reasonable if it is justifiable and appropriate. The courts do not distinguish between no. 7 and § 309 no. 5 which concerns lump-sum claims for damages because the requirements for a lump sum are comparable in both provisions. They therefore declare such clauses invalid in terms of both norms.

3. The general clause of § 307

3.1 Relevance and function of § 307(1) and (2)

The general clause of § 307 plays a prominent role within the enquiry of standard terms. Not only the prohibitions contained in §§ 308 and 309 are built on the general clause, but they are also the concretisation of the standard defined by it. Hence, if a clause is forbidden in terms of §§ 308 or 309, the scrutiny under § 307 becomes superfluous to the extent that the conditions of §§ 308 or 309 are met (*lex specialis derogat legi generali*).⁵¹⁷⁹ The general clause has a radiating effect on §§ 308 and 309.⁵¹⁸⁰ For these reasons, it can be described as the core element of content control.⁵¹⁸¹ What is more, § 307 plays a significant role for the courts for the control of B2C and B2B agreements. In terms of § 310(1) 2nd sent., for the content control of B2B contracts only the general clause but not the prohibitions contained in §§ 308 no. 1, 2 to 8 and 309 apply. What is more, § 307 is a catch-all clause⁵¹⁸² which enables the judge to assess standard clauses according to the specific contractual context where no more specific prohibitions are applicable.⁵¹⁸³ Even though §§ 308 and 309 contain the most critical prohibitions for standard terms, they only serve as examples and are not comprehensive. Since the German legislator aimed at comprehensive protection against unfair standard business terms, it 'completed' the protection granted by §§ 308 and 309 by a general clause.⁵¹⁸⁴ The general clause must thus be assessed in cases where the more specific prohibitions of §§ 308 and 309 do not apply.⁵¹⁸⁵

In practice, this means that one has to check first if the prohibitions contained in §§ 309 and 308 apply before assessing the general clause.⁵¹⁸⁶ Only in B2B contracts, the enquiry begins with § 307 because § 309 and certain items of § 308 are not applicable between business people. Nonetheless, the courts take into account the evaluations contained in §§ 308 and 307 in these

⁵¹⁷⁹ Schmidt *BGB-AT* 425.

⁵¹⁸⁰ Staudinger/*Coester* (2006) § 307 paras 10 and 83, Rüthers and Stadler *BGB-AT* 259.

⁵¹⁸¹ MüKo/*Kieninger BGB* before § 307 para 1.

⁵¹⁸² BT-Drs. 7/3919 at 22, BGH *NJW* 1980, 2518 (2519), Staudinger/*Coester* (2006) before §§ 307-309 para 20, Larenz and Wolf *BGB-AT* 791, Brox and Walker *BGB-AT* 114.

⁵¹⁸³ Larenz and Wolf *BGB-AT* 782. E.g., for a price-adjustment clause that is applicable only after 4 months after the conclusion of the contract, § 309 no. 1 finds no application, and the clause must be assessed in terms of § 307.

⁵¹⁸⁴ Stoffels *AGB-Recht* 182.

⁵¹⁸⁵ See also § 310(1) and (2). Brox and Walker *BGB-AT* 114.

⁵¹⁸⁶ Wertenbruch *BGB-AT* 138, Staudinger/*Coester* (2006) § 307 para 23, Neuner and Grigoleit *BGB-AT* 161. Since the conditions set out in § 309 are stricter than in § 308 (§ 308 contains evaluative elements), the assessment is done in the following (reverse) order: §§ 309 – 308 – 307. See Boecken *BGB-AT* 309.

cases too because they consider that a violation of §§ 308 or 309 in B2B contracts (if these provisions were applicable) is an indication for an infringement of § 307.⁵¹⁸⁷

In terms of § 307(3) 1st sent., '[paragraphs] (1) and (2) [of § 307], and [§§] 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed.' This includes derogations from material legal provisions and customary law.⁵¹⁸⁸ Positively formulated this means that content control only takes place for clauses that modify a legal situation that would be different if it were governed by statutory law. Negatively formulated, content control is not possible for clauses that do not modify existing statutory law.⁵¹⁸⁹ Therefore, clauses that merely reflect the contents of statutory provisions (declaratory clauses) are not subject to content control.⁵¹⁹⁰ Furthermore, clauses stipulating the specification of the performance and the price are not submitted to content control either.⁵¹⁹¹ 'Specification of the performance' refers to the type, the object, the amount or volume and the quality of the main performance, which is not determined by law.⁵¹⁹² For these cardinal obligations, no statutory provisions exist because they are an emanation of the principle of freedom of contract and therefore depend exclusively on the parties' will.⁵¹⁹³ In these cases, the transparency requirements of § 307(1) 2nd sent. must be met though.⁵¹⁹⁴ On the other hand, standard clauses by which cardinal obligations are restricted (e.g., limitation of the performance or exclusion of risk) are subject to content control.⁵¹⁹⁵ In a market economy, the price for goods or services is agreed between the parties and not determined by law. Thus, the legislator did not want to submit price control to the courts.⁵¹⁹⁶ Prices that are charged for a performance for which the supplier is obligated by law⁵¹⁹⁷ or which he or she charges in its own interest are subject to content control, though.⁵¹⁹⁸ Furthermore, ancillary price agreements, i.e., clauses concerning an object that can be determined by law through a gap-filling interpretation (e.g., the time of

⁵¹⁸⁷ BGH NJW 2007, 3421 (3422 *et seq.*), Schmidt *BGB-AT* 426.

⁵¹⁸⁸ Neuner and Grigoleit *BGB-AT* 161.

⁵¹⁸⁹ Neuner and Grigoleit *BGB-AT* 161.

⁵¹⁹⁰ Boecken *BGB-AT* 309.

⁵¹⁹¹ Larenz and Wolf *BGB-AT* 783.

⁵¹⁹² Larenz and Wolf *BGB-AT* 783.

⁵¹⁹³ Leenen *BGB-AT* 351.

⁵¹⁹⁴ For the transparency requirement of § 307(1) 2nd sent., see further below.

⁵¹⁹⁵ Larenz and Wolf *BGB-AT* 783.

⁵¹⁹⁶ BT-Drs. 7/3919 at 22, Larenz and Wolf *BGB-AT* 784.

⁵¹⁹⁷ BGH NJW 2000, 651; 2001, 1419 (notification of the client that a debit order has not been honoured; banks have a duty to notify their clients of these facts under § 666).

⁵¹⁹⁸ BGH NJW 2001, 1419; 2002, 2386 (deactivation fee for a telephone line).

performance, § 271; the place of payment, § 270; or payment conditions), are open to scrutiny in terms of § 307.⁵¹⁹⁹

3.2 Unreasonable disadvantage

3.2.1 Applicable assessment standard

In terms of § 307(1), 'provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user.' The unreasonableness of the disadvantage leads to a two-step enquiry⁵²⁰⁰ which will be discussed in the following.

In this context, it is reminded that contrary to the German general clause and recognised international standards, section 48 of the Act is very verbose and structured in an unnecessarily complicated way.⁵²⁰¹

a) Disadvantage

The first step consists in the determination of whether the other party, usually the consumer, has suffered a disadvantage. This requires a legal comparison between the clause in question and statutory provisions.⁵²⁰² A comparison with statutory provisions is obvious because content control is always a legal control.⁵²⁰³ In practice, this means that the standard clause in question has to be compared with the position in which the other party would be without this clause.⁵²⁰⁴ If the result of this comparison is that the clause puts the other party in a worse position than it would be without it, there is a disadvantage to the detriment of the consumer. The determination of the disadvantage is only descriptive at this stage, i.e., without any evaluation.⁵²⁰⁵

b) Unreasonableness

The second step consists of the determination of the unreasonableness of the disadvantage and therefore contains a value judgment because this step is indissolvably linked with the principle of good faith.⁵²⁰⁶ The unreasonable disadvantage is the more specific aspect which refers to the

⁵¹⁹⁹ Larenz and Wolf *BGB-AT* 785, Neuner and Grigoleit *BGB-AT* 161.

⁵²⁰⁰ Staudinger/*Coester* (2006) § 307 para 90 *et seq.*, Fastrich *Inhaltskontrolle* 280 *et seq.*, PWW/*Berger* § 307 para 7.

⁵²⁰¹ See discussion on s 48 CPA in Part I ch 3 para 4.

⁵²⁰² Wolf and Neuner *BGB-AT* 567, Stoffels *Schuldverhältnisse* 426.

⁵²⁰³ Stoffels *AGB-Recht* 182.

⁵²⁰⁴ Staudinger/*Coester* (2006) § 307 para 90, BGH *NJW* 1994, 1069 (1070).

⁵²⁰⁵ Staudinger/*Coester* (2006) § 307 para 90.

⁵²⁰⁶ Staudinger/*Coester* (2006) § 307 para 90 and 95. According to von Hoyningen-Huene *Inhaltskontrolle* para 173, the element of 'reasonableness' itself does not contain any value-judgment since only the principle of good faith delivers the standard of what is reasonable or not. In practice, this distinction should not lead to different results, however.

more general principle of good faith.⁵²⁰⁷ An unreasonable disadvantage in terms of § 307, or unfairness under article 3(1) of the Unfair Terms Directive, exists if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.⁵²⁰⁸ This link expresses the legislator's objective to accept only contractual clauses that ensure a fair balancing of the parties' interests.⁵²⁰⁹ The courts have expressed this clearly by stating that a disadvantage must be assumed where the user is merely concerned with its own interests in an abusive manner, without considering the other parties' interests, and thus does not undertake any steps to balance both parties' interests.⁵²¹⁰

Therefore, this second step only consists of a weighing of interests. This is done by identifying the typical interests of the parties in the given type of contractual relationship. Here, the economic objective of the contract has to be considered as well as third parties' interests, if any.⁵²¹¹ The BGH refuses a systematic and general consideration of third-party interests, however.⁵²¹² This identification is merely descriptive.⁵²¹³ The fact that certain clauses are widespread or even customary does not exclude their unreasonableness.⁵²¹⁴

Afterwards, the weighing of the typical interests of the contractual relationship in question takes place. In general, the bar for justifying an impairment of the other party's interests is *a fortiori* higher the more intense this interference is.⁵²¹⁵ For example, the user can only impair the consumer's privacy, which is protected by the Constitution, if it can put forward significant interests. Hence, a (revocable) clause by which the consumer agrees to sales calls is an uncontrollable disturbance of his or her privacy, and the supplier's interests to promote its products and its profit-seeking cannot justify the existence of such a clause.⁵²¹⁶

When weighing the parties' interests, one must always keep in mind the statutory provisions from which the contract deviates. The more a clause deviates from the statutory provisions, the higher are the requirements for justifying such a deviation.⁵²¹⁷ A slight disadvantage is not insignificant *per se* but can be neutralised by other interests of the user (e.g., rationalisation).⁵²¹⁸

⁵²⁰⁷ Larenz and Wolf *BGB-AT* 787.

⁵²⁰⁸ This is clearly set out in art 3(1) of the Unfair Terms Directive.

⁵²⁰⁹ BGH *NJW* 1997, 193 (195).

⁵²¹⁰ BGH *NJW* 2008, 1064 (1065), BAG *NZA* 2006, 324 (326), Schmidt *BGB-AT* 431, Bork *BGB-AT* 698.

⁵²¹¹ BGH *NJW* 1999, 3558 (3559); *NJW-RR* 2006, 1258 (1259), Schmidt *BGB-AT* 432.

⁵²¹² BGH *NJW* 1982, 178 (180), Palandt/*Grüneberg* § 307 para 12.

⁵²¹³ Stöffels *AGB-Recht* 183.

⁵²¹⁴ BGHZ 114, 15, BGHZ 106, 267, PWW/*Berger* § 307 para 7.

⁵²¹⁵ Stöffels *AGB-Recht* 183.

⁵²¹⁶ BGH *NJW* 1999, 1864 *et seq*; 1999, 2279 (2282); 2000, 2677 (2678).

⁵²¹⁷ Erman/*Roloff* *BGB* § 307 para 26.

⁵²¹⁸ Stöffels *AGB-Recht* 184.

It is therefore important not to assume an unreasonable disadvantage too quickly when being confronted with atypical contractual clauses, despite a certain degree of divergence between the contents of the clause and the statutory provision. It has to be considered that possibly the parties agreed upon alternatives to the statutory provision and that the balancing of their interests could be achieved by other means.⁵²¹⁹

The BGH decided that a clause in a lease for an apartment, according to which the tenant had to paint the interior walls in white when moving out constitutes an unreasonable disadvantage for the tenant. This clause would prevent price-conscious tenants from painting their walls in other discreet colours while staying in the apartment.⁵²²⁰ On the other hand, in another case, the BGH decided that a clause in a standard lease by which the tenant was not allowed to paint or varnish wooden parts (skirting, ceiling) in other colours than in those stipulated in the clause does not unreasonably disadvantage the tenant.⁵²²¹ Furthermore, the LG Frankfurt held that a clause prescribing a rigid schedule for the renovation of an apartment by the tenant, without considering the actual condition of the apartment, violates § 307(1).⁵²²² Clauses by which a tenant has to participate proportionally to a renovation that was not due yet after he or she moved out, constitutes an unreasonable disadvantage too because it is possible that the tenant barely used the apartment or took utmost care so that a renovation was not necessary.⁵²²³

So-called 'price-adjustment clauses' are not disadvantageous *per se*. These clauses, which are primarily used in open-ended agreements, such as pay-TV subscriptions or for the provision of gas or electricity, ascertain that the supplier is allowed to adjust its price if its own costs rise. They have the advantage that the supplier must not undertake a long-term calculation but can adapt its prices to a changing environment. Furthermore, they protect the customer from being invoiced with a higher price from the beginning because the supplier wants to protect itself from shrinking margins in the future. Price-adjustment clauses infringe § 307(1) though if they do not limit price increases to the actual increase that the supplier has to bear and therefore allow for an actual increase of its margin as this creates a contractual imbalance between the parties' rights and obligations.⁵²²⁴

⁵²¹⁹ Stoffels *AGB-Recht* 184.

⁵²²⁰ 'White paint clause' decision: BGH *NJW* 2011, 514.

⁵²²¹ BGH *NJW* 2009, 62 *et seq.*

⁵²²² LG Frankfurt/M.. *NJW-RR* 2004, 160.

⁵²²³ LG Hamburg *NJW* 2005, 2462 *et seq.*

⁵²²⁴ BGH *NJW* 2008, 360 (361); 2009, 578; 2009, 2667.

Since the South African general clause is structured in a more complex manner, it is not apparent whether for content control the balance of the parties' interest has to be considered here as well. It is submitted that for any fairness enquiry, this has to be the case. Fairness can only be ascertained where the interests of the parties are evenly balanced. This becomes clearer in section 48(2)(b) of the Act pursuant to which the terms of the agreement are so adverse to the consumer as to be inequitable. It seems that the adverseness in section 48(2)(b) is comparable to the 'disadvantage' in § 307(1) 1st sent. For the fairness enquiry, one has to assess whether the clause is equitable. Evaluative elements, such as good faith as well as the balance of the parties' interests have to be considered.⁵²²⁵

As submitted in the South African part of this thesis, the list contained in section 52(2) of the Act is not exhaustive.⁵²²⁶ Thus, other factors, e.g., those which serve as the best international model, and which can be found in the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission in 2005⁵²²⁷ should also be considered by the courts. The Bill also contained the balance of the parties' interests as a fairness factor (item (c)).⁵²²⁸

3.2.2 Moment of evaluation

In individual proceedings, the time of conclusion of the contract is the relevant moment for the assessment.⁵²²⁹ For consumer contracts this is expressly stated in article 4(1) of the Unfair Terms Directive ('at the time of conclusion of the contract') as well as in § 310(3) no. 3 BGB.⁵²³⁰ This does not only apply to factual circumstances, but also to evaluative elements. Therefore, regulatory changes can neither make a clause valid if it was invalid at the time of the conclusion of the contract or *vice versa*.⁵²³¹ The courts do not apply this principle *in strictu sensu* and argue that the change of the standard of evaluation had already taken place at the moment when the

⁵²²⁵ See discussion on s 48(2)(b) in Part I ch 3 para 4.1.2 b).

⁵²²⁶ Some authorities, like Naudé or Sharrock, are also of this opinion. See Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 11, Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 135.

⁵²²⁷ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 13, Naudé 2006 *Stell LR* 373 and 374.

⁵²²⁸ Section 14(4) of the Unfair Contract Terms Bill published in Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

⁵²²⁹ BGH *NJW* 2000, 1110 (1113), Medicus *NJW* 1995, 2579 *et seq*, Staudinger/*Coester* (2006) § 307 para 100, Schmidt *BGB-AT* 431.

⁵²³⁰ **Article 4(1) of the Directive:** '(...) the unfairness of a contractual term shall be assessed (...) at the time of conclusion of the contract (...).' **§ 310(3):** 'In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos: (...) 3. In judging an unreasonable disadvantage under [§] 307(1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.' Emphasis added.

⁵²³¹ Stöffels *AGB-Recht* 184.

parties entered into the contract.⁵²³² This view is problematic in terms of legal certainty though. The demarcation between a change of the standard of evaluation before or after a regulatory change is too difficult to undertake. Hence, the legislative situation, expressed by the laws in force, should be the only applicable standard.

In contrast, in institutional actions (general use challenges) where no concrete contract has been entered into, the moment of the last oral proceedings is relevant.⁵²³³

According to section 52(2)(c) of the Act, the court also must consider circumstances that existed when the agreement was made, irrespective of whether the Act was in force at that time. The fairness enquiry is thus shifted temporally forward. In practice, this could be relevant for agreements for the continuous supply of goods or services but should have less and less relevance. Here too, this applies only to factual circumstances but not to regulatory changes.⁵²³⁴

3.2.3 Abstract-universal approach

To answer the question of whether a clause raises concern, an abstract-general and typified approach is applied, which does not take into account the concrete circumstances of the individual case.⁵²³⁵ Hence, the user's interests are weighed against the interests of a typical, average consumer. In this context, the type and object of the contract, its objective as well as the particularities of this type of transaction are taken into consideration.⁵²³⁶ The evaluation concerns the question of whether the given type of transaction creates an unreasonable disadvantage to the other party considering the typical interests of the parties.⁵²³⁷

For example, in a gym contract entered into for a year which provides that the client has to pay a monthly fee even if he or she does not use the gym, it is irrelevant if the gym owner would cancel the contract and reimburse a particular client who was unable to attend the gym due to a long illness. The actual application of the clause in an individual case is thus not relevant for the control of the clause.⁵²³⁸

Where standard terms are used for different groups of customers, the typical interests for these different groups must be taken into consideration so that the results might be different for each

⁵²³² BGH *NJW* 1995, 2553.

⁵²³³ UBH/*Fuchs* § 307 para 119.

⁵²³⁴ See discussion on s 52(2)(c) in Part I ch 3 para 2.2.

⁵²³⁵ BGH *NJW* 2000, 2106 (2107); 2002, 1713 /1715), UBH/*Fuchs* § 307 para 110 *et seq*, PWW/*Berger* § 307 para 9, Schmidt *BGB-AT* 430, Neuner and Grigoleit *BGB-AT* 164.

⁵²³⁶ BGH *NJW* 1987, 2575 (2576); 1990, 1601 (1602).

⁵²³⁷ BGH *NJW* 1987, 487; 1990, 1601 (1602), Stoffels *AGB-Recht* 184.

⁵²³⁸ BGH *NJW* 1997, 193 (194).

group.⁵²³⁹ A clause that is unproblematic in B2B contracts might hence raise concern in a consumer contract.⁵²⁴⁰

Contrary to German legislation, the Act applies a particular-personalised approach where the particular consumer's situation is assessed. This becomes clear when reading the factors listed in section 52(2). These are geared towards procedural fairness, such as the nature of the parties, their relationship to each other and their respective education (item (b)), the parties' conduct (item (d)), or the consumer's knowledge of unfair terms (item (h)).⁵²⁴¹

3.2.4 Fairness control and consumer contracts

a) Autonomous interpretation of art. 3(1) of the Unfair Terms Directive?

Under article 3(1) of the Unfair Terms Directive, '[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' Article 4 concretises which elements have to be considered for the fairness enquiry. The question has been raised whether the standard for such an imbalance in the parties contractual rights and obligations is the same in article 3(1) and § 307.⁵²⁴² If this were not the case, a clause would have to be assessed both against the background of article 3 of the Directive and § 307 BGB.⁵²⁴³

Since the German general clause is a widely formulated catch-all clause, most authors agree that a (theoretical) divergence between both provisions can be resolved by applying the methods of interpretation.⁵²⁴⁴ Some authors are of the view that the European Court of Justice has a prerogative in terms of article 267 TFEU (ex-article 234 TEC)⁵²⁴⁵ and that article 3(1) of the Directive has to be interpreted autonomously by the ECJ. They argue that the standards of

⁵²³⁹ BGH *NJW* 1990, 1601 (1602); 2000, 658 (660).

⁵²⁴⁰ Staudinger/*Coester* (2006) § 307 para 112, Palandt/*Grüneberg* § 307 para 8.

⁵²⁴¹ See discussion on s 52 in Part I ch 3 para 2.

⁵²⁴² UBH/*Fuchs* § 307 para 397, Ulmer *EuZW* 1993, 345 and Frey *ZIP* 1993, 575 are of the opinion that the level of protection of § 9 AGBG (now § 307 BGB) is not lesser than the one of art 3 of the Directive.

⁵²⁴³ Stöffels *AGB-Recht* 185.

⁵²⁴⁴ Staudinger/*Coester* (2006) § 307 para 80.

⁵²⁴⁵ **Article 267 TFEU:** 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

the national statutory laws are irrelevant and that it is necessary to formulate a uniform European standard, which could only be undertaken by the ECJ.⁵²⁴⁶

On the other hand, the contrary – and correct view – argues that such a standard can only be formulated by the national courts, including the national legal principles and case law because European law does not have a sufficiently concrete standard.⁵²⁴⁷ What is more, article 1(2) of the Directive and recital 13 underscore the role of the statutory or regulatory provisions of the Member States.⁵²⁴⁸ Finally, the ECJ has decided that the standard for content control is limited to the national legal order in question in which the contractual provision has effect.⁵²⁴⁹

b) Hybrid solution pursuant to § 310(3) no. 3

The aforementioned abstract-universal approach is modified for consumer contracts in terms of § 310(3) no. 3 because 'in judging an unreasonable disadvantage (...), *the other circumstances attending the entering into of the contract* must also be taken into account'.⁵²⁵⁰ This modification is due to the transposition of article 4 of the Unfair Terms Directive into German law.

§§ 305 *et seq.* do not define the formulation 'the other circumstances attending the entering into of the contract'. Recital 16 of the EU Directive gives some guidance though and makes clear that the bargaining positions of the parties, whether the consumer had an inducement to agree to the term, or whether the goods or services were sold or supplied to the special order of the consumer have to be considered. Fuchs maintains that one can distinguish between three categories of circumstances attending the entering into the contract, namely 1) the personal qualities of the contractual party (level of personal business experience), 2) the particularities of the concrete situation when concluding the contract (e.g., pressure, taking the other party by surprise, explanations), and 3) particular atypical interests of the consumer (the intended use of the good known by the supplier).⁵²⁵¹

The modification of the abstract-general standard by taking into account also the earlier mentioned 'other circumstances' requires a two-step enquiry: In a first step, the usual abstract-universal approach is applied. At this stage, the concrete circumstances of the conclusion of

⁵²⁴⁶ Nassall *JZ* 1995, 692 *et seq.* Also the ECJ decision *Océano Grupo Editorial SA v Roció Murciano Quintero* concerning the Unfair Terms Directive (*NJW* 2000, 2571 *et seq.*) pointed in that direction.

⁵²⁴⁷ H. Roth *JZ* 1999, 535 *et seq.*, Heinrichs *NJW* 1996, 2196, Staudinger/*Schlosser* (2006) before §§ 305 *et seq.* para 9 *et seq.*, WHL/*Horn* § 24a AGBG para 59.

⁵²⁴⁸ Stoffels *AGB-Recht* 185.

⁵²⁴⁹ ECJ *NJW* 2004, 1647.

⁵²⁵⁰ Grigoleit and Neuner *BGB-AT* 164. Emphasis added.

⁵²⁵¹ UBH/*Fuchs* § 307 para 406 *et seq.* See also BAG *NZA* 2006, 324 (328).

the contract are not considered. This approach is justified because § 310(3) no. 3 ('also') does not require that the abstract-general approach be completely replaced. In addition, article 4(1) of the Directive does not exclusively require a particular-personalised enquiry, and recital 16 speaks of 'general criteria'.⁵²⁵²

The second step consists in the consideration of the concrete-individual circumstances of the conclusion of the contract. This step can influence the result in both directions, i.e., in favour of the customer or to its disadvantage.⁵²⁵³ Therefore, a clause that is not unreasonably disadvantageous for the consumer *per se* can be found unreasonably disadvantageous if the supplier conceals the disadvantages of the clause to the consumer. On the other hand, a clause with an unreasonably disadvantageous content in the sense of § 307 can pass the test if the consumer was familiar with this kind of clauses and the supplier informed him or her thereof. This solution might be unfavourable to the consumer but is consequent and in keeping with the Directive which requires that *all other circumstances* be considered.⁵²⁵⁴ Furthermore, it reflects the reality of the responsible consumer and promotes equal treatment between the parties.⁵²⁵⁵

The consumer's knowledge of unfair terms is also a factor listed in section 52(2)(h) of the Consumer Protection Act.⁵²⁵⁶

§ 310(3) no. 3 does not apply to institutional actions since they do not refer to a specific entering into a contract.⁵²⁵⁷ After such a decision, the parties must be able to refer to particular circumstances that existed during the conclusion of a particular contract, however, in order to reach a different decision in individual proceedings. Hence, § 11 UKlaG⁵²⁵⁸ must be interpreted restrictively in these cases.⁵²⁵⁹

⁵²⁵² Stoffels *AGB-Recht* 188.

⁵²⁵³ BAG NZA 2008, 170 (172), UBH/*Fuchs* § 307 para 410, MüKo/*Basedow* § 310 para 75.

⁵²⁵⁴ MüKo/*Basedow* § 310 para 75, UBH/*Fuchs* § 307 para 410, OLG Frankfurt *NJW-RR* 2001, 780.

⁵²⁵⁵ Stoffels *AGB-Recht* 188.

⁵²⁵⁶ See discussion on s 52(2)(h) in Part I ch 3 para 2.2.

⁵²⁵⁷ BGH *NJW* 1999, 2180 (2182); 2001, 2971 (2973), Palandt/*Grüneberg* § 310 para 20, Michalski *DB* 1999, 680.

⁵²⁵⁸ § 11 UKlaG: 'Effects of the judgment - If the user against whom judgment has been given fails to comply with an injunction based on § 1, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. However, this party cannot invoke the effect of the injunction if the user against whom judgment has been given could contest the judgment under § 10.'

⁵²⁵⁹ Stoffels *AGB-Recht* 189.

3.2.5 Aspects in respect of the fairness enquiry

With respect to the long-time experience in the field of standard business terms, some principles for the application and evaluation have evolved. They give some guidance for the enquiry and will be discussed in the following.

a) Scrutiny of individual clauses

Content control always refers to a specific contractual clause and never to the entire contractual agreement.⁵²⁶⁰ This emanates from the wording of § 307(1) ('provisions in standard business terms') and the title of the Unfair Terms Directive ('Unfair terms in consumer contracts'). Another approach would not make sense since only the enquiry of individual clauses makes a differentiated result possible with regard to an unreasonable disadvantage for a party. This does not mean though that the other provisions of the agreement are not to be taken into account. A provision can only be evaluated by taking the remainder of the contract as well as individually agreed clauses into consideration.⁵²⁶¹ This has two consequences, referred to as the 'accumulative effect'⁵²⁶² and 'compensational effect'⁵²⁶³.

aa) Accumulative effect

The disadvantageous effect of a clause that itself is still acceptable can be intensified by another clause so that the interplay between the two clauses creates an unreasonable disadvantage.⁵²⁶⁴ In general, this leads to the ineffectiveness of both clauses,⁵²⁶⁵ irrespective of whether one clause was a standard clause and the other individually agreed.⁵²⁶⁶ If a standard clause is ineffective, and another clause that is intertwined with it is valid, the whole provision covered by both clauses might be ineffective.⁵²⁶⁷ For example, in a lease where the tenant has to undertake minor repairs on a regular basis (clause 1) and renovate the entire flat when moving out (clause 2), irrespective of the moment when he or she undertook the last repairs, the combination of both clauses constitutes an unreasonable disadvantage for the tenant. They are

⁵²⁶⁰ Von Hoyningen-Huene § 9 AGBG para 171. Staudinger/*Coester* (2006) § 307 para 89.

⁵²⁶¹ BGH *NJW* 1989, 582; 1993, 532, Palandt/*Grüneberg* § 307 para 13, Staudinger/*Coester* (2006) § 307 para 124, PWW/*Berger* § 307 para 9.

⁵²⁶² *Summierungseffekt* or *Verstärkereffekt*.

⁵²⁶³ *Kompensationswirkung*.

⁵²⁶⁴ BGH *NJW* 2006, 2116 (2117); 2007, 997 (999), UBH/*Fuchs* § 307 para 155, PWW/*Berger* § 307 para 10, von Hoyningen-Huene § 9 AGBG para 177.

⁵²⁶⁵ BGH *NJW* 2007, 997 (999), Palandt/*Grüneberg* § 307 para 13.

⁵²⁶⁶ BGH *NJW* 2006, 2116 (2117).

⁵²⁶⁷ BGH *NJW* 2003, 2234; 2003, 3192.

both ineffective.⁵²⁶⁸ It would have been different if the final renovation was only due if the last renovation during the tenancy was overdue.⁵²⁶⁹

bb) Compensational effect

Contrary to the accumulative effect, the compensational effect refers to cases where a clause presenting a disadvantage for the consumer might be compensated by other, advantageous provisions so that the interaction between them does not constitute an unreasonable disadvantage. The consideration of such an advantageous clause is nonetheless only permitted if there is a material connection between the two provisions, and the advantageous clause has sufficient weight for adequate compensation.⁵²⁷⁰

Therefore, the obligation of a magazine retailer set out in a standard business terms contract to carry the whole range of magazines of his wholesaler is an unreasonable disadvantage for the retailer. A clause by which the retailer has the right to give back the magazines not sold within a certain period compensates this disadvantage, however.⁵²⁷¹ Another example is the practice of employers to present a form to be signed by their employees by which the latter declare that they are excluded from asserting any claims against the employer after the end of their employment contract. These clauses are unreasonably disadvantageous for employees, save where a similar declaration of the employer compensates them, or if the employer accepts to pay a severance package to the former employee.⁵²⁷²

German courts are particularly generous with the application of the compensational effect with regard to contractual instruments that have been negotiated collectively, such as the Construction Tendering and Contract Regulations (VOB)⁵²⁷³ or the General German Carrier Conditions (ADSp).⁵²⁷⁴ The courts argue that these instruments came into being with the collaboration of all concerned economic actors and have been widely recognised for more than 60 years. The ADSp, for instance, are a 'general contractual order' and have become a 'readily useable legal order'. This does not exclude them from content control but leads to the result that the normative objective of the entire regulation and the economic circumstances of the case must be considered. The individual ADSp norms can therefore not be assessed in isolation

⁵²⁶⁸ BGH *NJW* 2003, 2234; 2003, 3192.

⁵²⁶⁹ Schmidt *BGB-AT* 433.

⁵²⁷⁰ BGH *NJW* 2003, 888 (890 *et seq.*), Staudinger/*Coester* (2006) § 307 para 125, PWW/*Berger* § 307 para 10. Von Hoyningen-Huene § 9 AGBG para 173 does not require such a connection.

⁵²⁷¹ BGH *NJW* 1982, 644 (645).

⁵²⁷² LAG Schleswig-Holstein *BB* 2004, 608, LAG Düsseldorf *DB* 2005, 1463, 1465.

⁵²⁷³ BGH *NJW* 1999, 942 (943). VOB = Vergabe- und Vertragsordnung für Bauleistungen.

⁵²⁷⁴ Affirmative: Palandt/*Grüneberg* § 307 para 15. ADSp = Allgemeine Deutsche Spediteursbedingungen.

with regard to the statutory norms of the *ius dispositivum*. Instead, the interests of both parties in the context of the ADSp have to be evaluated.⁵²⁷⁵ Note should be taken that this is only valid if the entire collectively negotiated regulation is being agreed upon, and not only individual clauses or certain parts of it.⁵²⁷⁶

In contrast, under section 48(2) *in pr.* of the Act, the fairness enquiry does not only cover individual clauses but also transactions or agreements as a whole.⁵²⁷⁷

The idea of the compensational effect has also been expressed in *Barkhuizen v Napier*: '[T]he idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damage for breach, should be matched by corresponding benefits to the other party.'⁵²⁷⁸

More generally, also in terms of the Act, contract terms must not be seen in isolation. The circumstances and the context of the agreement must be considered too.⁵²⁷⁹ The contract 'as a whole' must thus be taken into account because a provision that confers a benefit on the consumer might be commensurate with the detriment caused by a clause alleged to be unfair.⁵²⁸⁰

b) Rationalisation effect

In principle, a high degree of rationalisation by standard business terms speak for their fairness because rationalisation is one of the main reasons for their existence.⁵²⁸¹ If they involve disadvantages for the other party, one has to assess whether the consumer can be expected to accept the consequences.⁵²⁸² Therefore, a direct debit order contained in the standard terms of a broadband provider is not presenting an unreasonable disadvantage.⁵²⁸³ For mobile phone contracts and the varying amounts to be paid each month this is however only valid if the

⁵²⁷⁵ BGH *NJW-RR* 1997, 1253 (1255).

⁵²⁷⁶ BGH *NJW* 2003, 1321 (1322). With regard to the VOB/B, the BGH is now of the view that each modification is to be interpreted in that the regulation as a whole is not being agreed upon, irrespective of how intense the modification is (BGH *NJW* 2004, 1597).

⁵²⁷⁷ **Section 48(2):** '(...) a transaction or agreement, or a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if (...)'.
⁵²⁷⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [165], where Sachs J cites Collins *Law of Contract* 253.

⁵²⁷⁹ See s 52(2)(c) and (e). See also art 4 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 and art 83(2) of the Proposal for a Regulation of the European Parliament and of the Council on the Common European Sales Law COM (2011) 635 final of 11 October 2011 and art 32(2) of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final, submitted on 8 October 2008.

⁵²⁸⁰ Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 136.

⁵²⁸¹ Schmidt *BGB-AT* 409.

⁵²⁸² BGH *NJW* 1996, 988 (989), UBH/*Fuchs* § 307 para 121.

⁵²⁸³ BGH *NJW* 1996, 988, Häuser *JZ* 1997, 957 *et seq.*

provisions ensure that the customer has sufficient time between the reception of the invoice and the debit of the given amount in order to check the invoice and credit his or her bank account (minimum five working days).⁵²⁸⁴

c) Risk control

For the fairness review of a clause which passes a certain risk onto a party, it is relevant to enquire in whose sphere the risk is passed onto, and if the realisation of the risk can be avoided better and cheaper by the consumer or the supplier.⁵²⁸⁵ This criterion is confirmed by the so-called economic analysis of the law which aims to allocate the risk of a breach or default of the contract to the 'cheapest cost avoider'.⁵²⁸⁶ Hence, a clause in the standard terms of a supplier of domestic fuel by which the user declines any obligation to check the customer's tank and excludes its liability for damages due to the overflowing of the tank is unreasonable. The customer cannot be expected to check his tanks since he has not the necessary expertise and means. What is more, the monitoring of the filling of the tank is incumbent to the fuel provider.⁵²⁸⁷ The same applies to the operator of a car wash facility who is obliged to check, control and monitor its installation regularly, and is in a position to choose its staff carefully. On the other hand, the client is not able to do this. This is why a clause that passes on the risk for damages on his or her car due to a defective car wash site is ineffective.⁵²⁸⁸

d) Insurability

Another factor for the fairness enquiry is the insurability of the risk. Hence, it is important to know whether the risks involved can be insured better by the user or the other party.⁵²⁸⁹ In this regard, the economic analysis of the law refers to the 'cheapest insurer'.⁵²⁹⁰ Not only the possibility to insure the risk is relevant in this context, but also the premiums to be paid as well as the coverage offered. In addition, the claims settlement must be acceptable for the party in question and be a widespread practice.⁵²⁹¹ Where it is common practice that the consumer insures the risk belonging to a certain business sector, the supplier can rely on this, and the exclusion of the risk is not an unreasonable disadvantage for the consumer.⁵²⁹²

⁵²⁸⁴ BGH *NJW* 2003, 1237.

⁵²⁸⁵ BGH *NJW* 2005, 422 (424), von Hoyningen-Huene § 9 AGBG para 190 *et seq.*

⁵²⁸⁶ Schäfer and Ott *Ökonomische Analyse* 227 *et seq.*, Stoffels *AGB-Recht* 192.

⁵²⁸⁷ BGH *NJW* 1971, 1036.

⁵²⁸⁸ BGH *NJW* 2005, 422, Leenen *BGB-AT* 354.

⁵²⁸⁹ BGH *NJW* 1991, 1886 (1888); 2002, 673 (675), UBH/*Fuchs* § 307 para 156 *et seq.*, von Hoyningen-Huene § 9 AGBG para 216 *et seq.*

⁵²⁹⁰ Schäfer and Ott *Ökonomische Analyse* 407 *et seq.*

⁵²⁹¹ BGH *NJW* 1992, 1761 (1762), UBH/*Fuchs* § 307 para 159.

⁵²⁹² BGH *NJW* 1992, 1761 (1762).

Therefore, a clause by which the operator of a car wash facility excludes damages to the exterior or the paintwork of its customers' vehicles raises concerns. The supplier can easily insure those risks without increasing its prices dramatically, whereas these risks are not even included in the customer's comprehensive insurance policy.⁵²⁹³

On the other hand, a shift of the supplier's liability onto the consumer is not suspicious where usually the clients insure the risk(s) in question.⁵²⁹⁴ Hence, a standard provision by which the liability of a shipyard for damages arising during repairs is not problematic because they are common practice in this sector, and the customer is already fully insured against these risks by means of its mandatory insurance policy. If the shipyard had to insure these risks as well, the customer would not only have to bear its own insurance premiums but also an increase in the shipyard's prices in order to cover their premiums.⁵²⁹⁵

According to section 52(2)(f) of the Act, the court must consider whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier.⁵²⁹⁶

In any event, the assessment of the legitimate interest of the supplier begs the question of whether a term represents a proportionate response to the supplier's interest, such as a risk faced by it, and other possible ways by which it could have protected its interest as well as market practice.⁵²⁹⁷ Where the supplier limits its liability, one has to consider whether it was reasonable to expect it to insure itself against the liability and whether the consumer could be expected to insure him- or herself. As regards the consumer, the question of whether the supplier had advised the consumer timeously to take insurance, or whether the consumer should otherwise have realised that it needed insurance, are important factors for this enquiry.⁵²⁹⁸

⁵²⁹³ BGH NJW 2005, 422. UBH/*Fuchs* § 307 para 159 argue that those damages are insurable for the customer; they come to the same result, though.

⁵²⁹⁴ BGH NJW 2002, 673 (675).

⁵²⁹⁵ BGH NJW 1988, 1785 (1787).

⁵²⁹⁶ Two factors of the **SA Law Commission's list** implicitly refer to the legitimate interest criterion: '(m) whether a term is unduly difficult to fulfil, or imposes obligations or liabilities on a party which are *not reasonably necessary* to protect the other party' and '(n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is *not reasonably necessary* to protect his or her interests'. Emphasis added.

⁵²⁹⁷ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 28.

⁵²⁹⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 30.

e) Irrelevance of the 'price argument'

The so-called 'price argument'⁵²⁹⁹ in terms of which an unfair clause might become fair by compensating it with a lower price, is generally irrelevant.⁵³⁰⁰ The reasons put forward are that any legal disadvantage could somehow be justified economically and that the client is unlikely to receive fair compensation for this disadvantage. Furthermore, the advantage in terms of the price is not measurable with regard to the price that would be fair in the absence of the term.⁵³⁰¹ In addition, courts are not in the position to assess the 'normal' price which they would have to correlate with the 'reduced' price.⁵³⁰²

The BGH⁵³⁰³ had to decide a case in which a doctor bought furniture for his waiting room to a very low price. The salesperson justified the low price by the fact that the standard terms of the supplier completely excluded its liability and that this cost-saving would be transferred to the clients. According to the court, such a clause is invalid under § 307(1).⁵³⁰⁴ It argued that the supplier has to calculate its prices within the limits of the principle of good faith, and even though the customer might benefit from a lower price, this would not justify a deviation from the seller's obligations. An exception is made where the consumer has a real choice between different versions of a contract entailing different prices, for example, with or without the seller's liability.⁵³⁰⁵

Furthermore, the BGH puts some weight on the price argument and the exclusion of the supplier's liability in the electricity supply sector.⁵³⁰⁶ Such an exception of the irrelevance of the price argument can only be justified though if the exclusion of the supplier's risk merely concerns a manageable risk, the client is able to evaluate the extent to the risk that he or she must insure, and if the conclusion of an insurance policy is more economical than a price increase of its supplier, which would be onerous for all customers.⁵³⁰⁷ Fuchs doubts that this argumentation applies to all other mass contracts.⁵³⁰⁸ An assessment on a case-to-case basis is thus probably the most reasonable approach.

⁵²⁹⁹ *Preisargument*.

⁵³⁰⁰ BGH *NJW-RR* 2008, 818 (820), UBH/*Fuchs* § 307 para 145, von Hoyningen-Huene § 9 AGBG para 179.

⁵³⁰¹ UBH/*Fuchs* § 307 para 144 and 145.

⁵³⁰² Stoffels *AGB-Recht* 194.

⁵³⁰³ BGH *NJW* 1957, 17 (19).

⁵³⁰⁴ § 309 no. 8 lit. b) aa) is not applicable because of § 310(1) 1st sent.

⁵³⁰⁵ UBH/*Fuchs* § 307 para 148, Palandt/*Grüneberg* § 307 para 18.

⁵³⁰⁶ BGH *NJW* 1998, 1640 (1644).

⁵³⁰⁷ Staudinger/*Coester* § 307 para 137 *in fine*.

⁵³⁰⁸ UBH/*Fuchs* § 307 para 146.

The 'price argument' seems not to apply to the Act though as section 48(1)(a)(i) seems to introduce a price control mechanism. As already discussed in Part I, it is unlikely that the South African legislature intended to introduce a price control mechanism in section 48.⁵³⁰⁹

In terms of section 52(2)(a) of the Act, the court must consider the fair value of the goods or services in question. The 'fair' value relates to the price of a good or a service and thus is a substantive fairness consideration. As already discussed elsewhere, courts should be careful to interfere with pricing issues as they do often not have the technical skills to assess the 'fair' price.⁵³¹⁰ Therefore, South African courts should only interfere where the price is manifestly unjust or there is an excessive advantage for the supplier.⁵³¹¹

The same applies to the suggested (and non-listed) factor in section 52(2) of the Act that greater costs for the supplier, if certain terms were to be omitted, should be taken into account in the fairness enquiry.⁵³¹² A term might be fair if it represents a fair balancing between the consumer's and the supplier's interests. A slight increase in costs due to the omission of the term would probably not make it fair. If the supplier can insure itself against the risk in question without materially increasing the price paid by the consumer, the term will probably be unfair.⁵³¹³ In this regard, it is referred to the discussion above on risk control and insurability.

f) Constitutional aspects

When applying the general clause, also constitutional aspects must be considered because of the radiating effect of fundamental rights on other rights and obligations.

In contracts with a personal aspect (e.g., dating agency agreements), the constitutional rights of articles 1 (human dignity) and 2 GG⁵³¹⁴ (freedom of personal development) therefore have to be considered in the fairness enquiry as regards the duration of such a contract.⁵³¹⁵ Moreover, in employment contracts, the constitutional right of professional freedom (article 12 GG) must be considered. A prohibition of any secondary employment is thus an unreasonable disadvantage under § 307(1).⁵³¹⁶ Other problematic provisions in this field are repayment

⁵³⁰⁹ See discussion on s 48(1)(a)(i) in Part I ch 3 para 4.1.1 a).

⁵³¹⁰ Sharrock 2010 *SA Merc LJ* 309, Sharrock *Judicial control* 131.

⁵³¹¹ Naudé 'Introduction to Sections 48-52 and regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁵³¹² Sharrock 2010 *SA Merc LJ* 314, Sharrock *Judicial control* 136.

⁵³¹³ See discussion of this factor in Part I ch 3 para 4.1.4 b) ee).

⁵³¹⁴ GG = *Grundgesetz*, the German Constitution.

⁵³¹⁵ Staudinger/*Coester* § 307 para 18.

⁵³¹⁶ OLG Naumburg *NZA-RR* 2007, 521.

clauses for training costs borne by the employer,⁵³¹⁷ gratifications⁵³¹⁸ and non-competition clauses.⁵³¹⁹

3.3 The provision of § 307(2)

§ 307(2) offers guidance as to when a clause is unreasonably disadvantageous and concretises paragraph (1) of the same provision. Consequently, paragraph (2) must be assessed before paragraph (1). The courts often do not distinguish between the two paragraphs and are content with merely stating that a clause is invalid in terms of § 307.⁵³²⁰ If a clause does obviously not fall under § 307(2), one can assess § 307(1) directly of course.⁵³²¹

3.3.1 § 307(2) no. 1 and 2 as self-contained specific provisions of content control

§ 307(2) provides that '[a]n unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision' fulfils the conditions set out in no. 1 or 2 of § 307(2). The meaning of the phrase 'in case of doubt' is discussed controversially. The Government Bill for the AGBG⁵³²² states that the legislator intends not to assume unreasonableness *eo ipso* but that the user has the possibility to explain why a clause should exceptionally be valid.

Some authors argue that § 307(2) is a provision governing the burden of proof.⁵³²³ According to this view, the user bears the onus of proof if he or she wants to assert that there is no unreasonable disadvantage for the other party. This opinion is contrary to the essence of proof, which can only concern facts, and not legal evaluations or the weighing of interests. The same applies to the viewpoint that paragraph (2) is a 'refutable assumption of ineffectiveness',⁵³²⁴ since this term also refers to facts.⁵³²⁵

The prevailing opinion classifies paragraph (2) as legal rule examples for paragraph (1) of § 307.⁵³²⁶ Therefore, 'in case of doubt' is to be read as 'in general'. This means that an unreasonable disadvantage exists if the conditions of paragraph (2) are fulfilled, except where there are indications in the concrete case that this rule does not lead to fair results.

⁵³¹⁷ BAG NZA 2008, 1004.

⁵³¹⁸ BAG NZA 2008, 40 (43).

⁵³¹⁹ BVerfG AP no. 65.

⁵³²⁰ For example, BGH NJW 1984, 871 (872); NJW-RR 1998, 629. This practice is rightly criticised by some authors: von Hoyningen-Huene § 9 AGBG para 132, Staudinger/Coester (2006) § 307 para 83.

⁵³²¹ Neuner and Grigoleit BGB-AT 163.

⁵³²² BT-Drs. 7/3919 at 23.

⁵³²³ L/GvW/T/Löwe § 9 AGBG para 20, WHL/Wolf § 9 AGBG para 58.

⁵³²⁴ Widerlegbare Unwirksamkeitsvermutung. Erman/Roloff BGB § 307 para 1.

⁵³²⁵ Von Hoyningen-Huene § 9 AGBG para 238.

⁵³²⁶ Von Hoyningen-Huene § 9 AGBG para 238, Larenz and Wolf BGB-AT 790.

The drawback of this opinion is that it is hardly imaginable that a clause creating an unreasonable disadvantage under paragraph (2) can still become valid in terms of paragraph (1). This would mean that paragraph (1) has a broader scope of evaluation than paragraph (2), and that the evaluation made in terms of paragraph (2) is only temporary, awaiting a final judgment by referring to paragraph (1).⁵³²⁷ With regard to the fact that the control under §§ 307 *et seq.* requires a supra-individual and generalising approach which does not consider the concrete circumstances, but only the typical characteristics of an agreement, the question begs to be asked why paragraph (2), which contains many open concepts ('compatible', 'essential rights', 'attainment of the purpose of the contract is jeopardised', 'nature of the contract') should not be able to integrate the given transactions and allow a final enquiry. Therefore, a correction of the evaluation obtained with regard to paragraph (2) by assessing the clause against the background of paragraph (1) is excluded from a methodological point of view. Paragraph (2) should thus be regarded as a self-contained provision of content control which determines unequivocally whether there is an unreasonable disadvantage.⁵³²⁸ Hence, the phrase 'in case of doubt' is superfluous.⁵³²⁹

Because of the formulation '[w]ithout limiting the generality of subsection 1' at the beginning of subsection (2) of section 48 of the Act, the ambit of section 48(1) is supposed to reach beyond the instances of unfairness set out in section 48(2)(a) and (b).⁵³³⁰

In contrast to § 307(2), the objective of section 48(2) of the Act is to make sure that section 48(1) is not interpreted restrictively, i.e. in a manner where only the instances of unfairness listed in section 48(2) are considered, but that also the deceptive standard embodied in section 48(2)(c), read with section 41, as well as the procedural standard of section 48(2)(d)(ii) are included.⁵³³¹ Hence, subsection (2) of section 48 is not *lex specialis* to subsection (1), but the two provisions complete each other. It is suggested that subsection (2) has a radiating effect on subsection (1), and is not a self-contained provision of content control.⁵³³²

This 'radiating effect' is limited, though, and subsection (2) is not helpful in concretising unfairness in terms of subsection (1). Section 48(2) gives examples for when a clause is unfair. This is the case if it is excessively one-sided, or so adverse to the consumer as to be inequitable,

⁵³²⁷ Stoffels *AGB-Recht* 197, von Hoyningen-Huene § 9 AGBG para 239.

⁵³²⁸ Staudinger/*Coester* (2006) § 307 para 226.

⁵³²⁹ Schmidt-Salzer *AGB* para F 46 ('superfluous or ineffective'), Staudinger/*Schlosser* (1980) § 9 AGBG para 19 ('virtually without any relevance').

⁵³³⁰ Van Eeden and Barnard *Consumer Protection Law* 249.

⁵³³¹ Van Eeden and Barnard *Consumer Protection Law* 250.

⁵³³² See discussion on the basic unfairness standard of s 48(2) in Part I ch 3 para 4.1.2.

or if the consumer relied upon a false, misleading or deceptive representation or a statement of opinion to the detriment of the consumer, or the transaction or agreement was subject to a term or condition, or a notice to a consumer according to section 49(1), and it is unfair, unreasonable, unjust or unconscionable,⁵³³³ or the consumer has not been informed by its fact, nature and effect in a manner that satisfied section 49. Unfortunately, only the first paragraph, relating to one-sidedness, is helpful in defining the concept of ‘unfair, unreasonable or unjust’, whereas paragraph (b) only uses the synonym ‘inequitable’ and therefore creates a certain circularity.⁵³³⁴ Therefore, it is submitted that the interlacing of these two subsections is limited.

3.3.2 Relationship between § 307(2) no. 1 and 2

Generally, 307(2) no. 1 takes precedence over no. 2.⁵³³⁵ In this regard, the character of content control as a form of legal control is underlined. The prohibition of jeopardising the attainment of the purpose of the contract (no. 2) is relevant where the judge cannot relate to a relevant statutory provision and has to determine the nature of the given contract.⁵³³⁶ The original scope of application of no. 2 is the limitation of cardinal obligations.⁵³³⁷ Cardinal obligations are those that have outstanding importance and weight within the contract.⁵³³⁸ Only in this respect, no. 2 can be qualified as *lex specialis* to no. 1.⁵³³⁹ In practice, a precise demarcation between no. 1 and 2 is not necessary and/or not possible, which is admitted by the prevailing view,⁵³⁴⁰ because a deviation from essential principles of a statutory provision can also be a limitation of essential rights or duties inherent in the nature of the contract, and *vice versa*.⁵³⁴¹

3.3.3 Incompatibility with the statutory concept, § 307(2) no. 1

With the insertion of § 307(2) no. 1, the legislator built on Ludwig Raiser's work and the preceding case law⁵³⁴² concerning the guiding function of the *ius dispositivum*, serving as a concretisation of the content control standard.⁵³⁴³

⁵³³³ 'Unconscionable' is defined in s 1, when used with reference to any conduct, as '(a) having a character contemplated in section 40, or (b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.' By inserting the concept of unconscionableness the legislator introduces questions related to ethics and unfortunately complicates the basic unfairness assessment unnecessarily.

⁵³³⁴ In the same sense: Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

⁵³³⁵ Staudinger/Schlosser (1980) § 9 AGBG para 28. Tending to the same result: von Hoyningen-Huene § 9 AGBG para 282, UBH/Fuchs § 307 para 198.

⁵³³⁶ Stoffels *AGB-Recht* 197.

⁵³³⁷ BT-Drs 7/3919 at 23.

⁵³³⁸ Wolf and Neuner *BGB-AT* 565.

⁵³³⁹ Stoffels *AGB-Recht* 197.

⁵³⁴⁰ UBH/Fuchs § 307 para 197, with further references.

⁵³⁴¹ Neuner and Grigoleit *BGB-AT* 164.

⁵³⁴² Raiser *Recht der AGB* 293 *et seq.* See also the chapter 'Historical overview' in Part II ch 1.

⁵³⁴³ Larenz and Wolf *BGB-AT* 787, Boecken *BGB-AT* 312.

a) 'Essential principles' of the statutory provision

According to the courts, the limitation to 'essential principles' of the statutory provision means that only norms which express the requirement of justice and are not merely based on considerations of expediency must be considered.⁵³⁴⁴ Since this distinction is difficult to draw and often impossible, this view must be rejected. Provisions that seem to be merely technical, e.g., rules on limitation periods, also often contain considerations of justice.⁵³⁴⁵

Another view postulates that this phrase means that only those norms are to be considered that serve the need for protection of the party or are a manifestation of the legal order of the applicable laws,⁵³⁴⁶ or constitute a field of the statutory law that is highly sensitive to questions of justice.⁵³⁴⁷ This view is also problematic as it suffers from the same problems as the judiciary's opinion.⁵³⁴⁸ The element 'essential principles' excludes legal provisions that do not offer a sufficient 'content of justice' before the proper evaluation of interests and draws a sharp line between 'essential principles' and 'non-compatibility', which is an artificial approach.⁵³⁴⁹

A third approach combining the two elements (essential principles/non-compatibility) in a single assessment leads to better results.⁵³⁵⁰ The element of the 'essential principles' could be understood in that particular attention to the 'content of justice' of the statutory norm that has been replaced by a contractual term must be paid. A strong argument for this view is the statement of the Law Commission⁵³⁵¹ that underscores that the formulation (which unfortunately is not expressed in the official BGB translation)⁵³⁵² 'essential fundamental *ideas* of the statutory provision', instead of 'essential principles', makes it clear that the 'content of justice' of the legal norm should serve as a *guideline*.⁵³⁵³ This means that the legislator did not intend to introduce an exclusionary criterion but one that is to be considered when weighing the interests, having regard to existing differentiations.⁵³⁵⁴ What is more, this view takes into account that certain provisions of the *ius dispositivum* have a significant protective function for

⁵³⁴⁴ BGH NJW 2001, 3480 (3481 *et seq*); NJW-RR 2004, 1206 (1207), BAG NZA 2007, 853 (854).

⁵³⁴⁵ Stoffels AGB-Recht 198, Wolf and Neuner BGB-AT 566.

⁵³⁴⁶ UBH/Brandner (2001) § 9 AGBG para 133, Soergel/Stein (1987) § 9 AGBG para 35.

⁵³⁴⁷ Staudinger/Coester (2006) § 307 para 247, WHL/Wolf § 9 AGBG para 70.

⁵³⁴⁸ UBH/Fuchs § 307 para 222.

⁵³⁴⁹ Stoffels AGB-Recht 198.

⁵³⁵⁰ UBH/Fuchs § 307 para 223.

⁵³⁵¹ BT-Drs. 7/5422 at 6.

⁵³⁵² The official translation of the Ministry of Justice translates '*wesentliche Grundgedanken*' with 'essential principles'.

⁵³⁵³ Richtschnur.

⁵³⁵⁴ Stoffels AGB-Recht 199.

certain contract types but a negligibly weak one for others.⁵³⁵⁵ For these reasons, the element of 'essential principles' (or better translated as 'essential fundamental ideas') must not be understood as an autonomous element but rather as one indicating the significance of the 'content of justice' and the protective character of the replaced statutory provision for the weighing of interests taking place within the following non-compatibility assessment.⁵³⁵⁶

b) 'Statutory provision'

The term 'statutory provision' from which a clause deviates is interpreted widely both by the courts and legal literature. Not only the norms contained in the BGB but also all unwritten legal principles, the principles developed by the courts, as well as the rights and obligations resulting from the nature of the given agreement or the gap-filling interpretation in terms of §§ 157 and 242 fall under this term.⁵³⁵⁷ Others plead for a more restrictive interpretation of the term 'statutory provision' in the context of § 307,⁵³⁵⁸ which has an impact of the content control of contract types that are not codified because the normative standard for these agreements are not laid down in written laws.⁵³⁵⁹

The different types of 'statutory provisions' will be discussed in the following.

aa) Provisions fulfilling formal and substantive requirements

In terms of article 2 EGBGB,⁵³⁶⁰ a 'statute' of the BGB includes any legal rule, i.e., substantive provisions.⁵³⁶¹ These are generally valid legal norms which are based on the community's will, irrespective of the form in which they are applied.⁵³⁶² Therefore, also customary law is considered being equal to written laws.⁵³⁶³

⁵³⁵⁵ Staudinger/Schlosser (1980) § 9 AGBG para 24, UBH/Brandner (2001) § 9 AGBG para 132, referring to BGH NJW 1989, 1479 where the BGH promotes a differentiating view with regard to § 627 (termination without notice for service contracts), since this provision includes various types of services.

⁵³⁵⁶ Stoffels *AGB-Recht* 199, Larenz and Wolf *BGB-AT* 788.

⁵³⁵⁷ BGH NJW 1993, 721 (722); 1998, 1640 (1642), WHL/Wolf § 9 AGBG para 66, UBH/Brandner (2001) § 9 AGBG para 140.

⁵³⁵⁸ Von Hoyningen-Huene § 9 AGBG para 245 *et seq.*, Zöllner *RdA* 1989, 159 *et seq.*

⁵³⁵⁹ Stoffels *AGB-Recht* 199.

⁵³⁶⁰ **Article 2 EGBGB:** "Statute" under the Civil Code and under this Act means any legal rule.'

⁵³⁶¹ Staudinger/Merten (2006) Art 2 EGBGB para 4.

⁵³⁶² Staudinger/Merten (2006) Art 2 EGBGB para 2, Soergel/Hartmann Art 2 EGBGB para 2.

⁵³⁶³ Staudinger/Coester (2006) § 307 paras 88 and 231, von Hoyningen-Huene § 9 AGBG at 83 *et seq.*, Palandt/Grüneberg § 307 para 29. See also Staudinger/Merten (2006) Art 2 EGBGB para 93.

Only norms of the *ius dispositivum* are statutory provisions⁵³⁶⁴ as a violation of mandatory provisions (*ius cogens*) would be void in terms of § 134.⁵³⁶⁵ A further enquiry under § 307(2) no. 1 of such a void norm is not necessary.⁵³⁶⁶

It is arguable however if the provisions of §§ 305 *et seq.* themselves can serve as a guidance for content control under § 307(2) no. 1.⁵³⁶⁷ This has to be rejected because of the mandatory character of these provisions. The prohibitions contained in §§ 308 and 308 are not 'statutory provisions' in the sense of § 307(2) no. 1 either because they take precedence over § 307.⁵³⁶⁸ If they are not applicable, e.g., in B2B contracts, the ideas contained in these provisions might be considered in the enquiry under § 307(1).⁵³⁶⁹

bb) Unwritten legal principles and case law

The function of content control, i.e., the protection against the realisation of freedom of contract to the benefit of only one party,⁵³⁷⁰ could not properly be fulfilled if 'statutory provision' would exclusively include provisions of the *ius dispositivum*. What kind of provisions are included beyond positively formulated statutory provisions is discussed controversially.

The prevailing view is based on the materials for the AGBG⁵³⁷¹ and considers all kinds of normative provisions of the written and unwritten law as well as legal principles as 'statutory provisions' in the sense of § 307(2) no. 1. Some authors also include case law.⁵³⁷² This view is hardly compatible with the definition of 'statute' of article 2 EGBGB because general legal principles are only included in the term 'statute' if they are reliably developed from positive law by means of analogy and can be regarded as legal rules.⁵³⁷³ Judicial rulings are excluded from the meaning of 'statute' though because they have no mandatory general effect for an undetermined number of persons.⁵³⁷⁴

⁵³⁶⁴ Palandt/*Grüneberg* § 307 para 29, Staudinger/*Coester* (2006) § 307 para 232. Differentiating: Fastrich *Inhaltskontrolle* 284 *et seq.*

⁵³⁶⁵ § 134: 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'

⁵³⁶⁶ Stoffels *AGB-Recht* 199.

⁵³⁶⁷ *Pro*: BGH *NJW* 1983, 1853 (1854), WHL/*Wolf* § 9 AGBG para 68. *Contra*: von Hoyningen-Huene § 9 AGBG para 256 *et seq.*, Staudinger/*Coester* (2006) § 307 para 107 *et seq.*, UBH/*Fuchs* § 307 para 210.

⁵³⁶⁸ Stoffels *AGB-Recht* 201.

⁵³⁶⁹ Von Hoyningen-Huene § 9 AGBG para 257a, Staudinger/*Coester* (2006) § 307 para 242.

⁵³⁷⁰ PWW/*Berger* § 307 para 6.

⁵³⁷¹ Erster Teilbericht der Arbeitsgruppe beim Bundesminister der Justiz at 55; Begründung zum Regierungsentwurf BT-Drs. 7/3919 at 23.

⁵³⁷² BGH *NJW* 1998, 1640 (1642), Staudinger/*Coester* (2006) § 307 para 236 *et seq.*

⁵³⁷³ Staudinger/*Merten* (2006) Art 2 EGBGB para 112.

⁵³⁷⁴ Staudinger/*Merten* (2006) Art 2 EGBGB para 40.

The question begs to be asked whether the meaning of 'statutory provision' of § 307(2) no. 1 is congruent with the term 'statute' in article 2 EGBGB.⁵³⁷⁵ With regard to the fact that §§ 305 *et seq.* seek protection against contractual terms that often have no 'model' in statutory provisions, an identical meaning of 'statutory provision' and 'statute' is not necessarily meant. On the other hand, the meaning of 'statutory provision' should not be too extensive as otherwise, § 307(2) no. 2 would be of lesser importance, whereas no. 1 would gain undue significance.⁵³⁷⁶ Hence, general legal principles should be regarded as 'statutory provisions' only – like in article 2 EGBGB – if they deviate from positive law by means of a methodologically reliable procedure. This is not the case, e.g., for principles that the courts base on the principle of good faith.⁵³⁷⁷

Not only article 2 EGBGB ('legal rule'),⁵³⁷⁸ but also § 307(2) no. 1 ('provision')⁵³⁷⁹ requires a rule-like structure that is composed of one or several conditions as well as a legal consequence.⁵³⁸⁰ This is generally not the case for general legal principles. Even if general legal principles show the direction, they are no rules that can be subsumed under a given case.⁵³⁸¹ Therefore, the principle of proportionality,⁵³⁸² the *pacta sunt servanda* principle,⁵³⁸³ or the principle of contractual justice⁵³⁸⁴ are no legal rules. On the other hand, principles that have attained such a degree of concretisation that they are no longer distinguishable from legal provisions can be regarded as 'statutory provisions' in terms of § 307(2) no. 1.⁵³⁸⁵ These are, for example, the principle that liability requires fault,⁵³⁸⁶ the principle according to which the aggrieved party, instead of performance, can require to be in a position it would have if the contract had been duly performed, but a better position,⁵³⁸⁷ or the principle of equivalence, according to which each party has to perform its contractual obligations.⁵³⁸⁸

⁵³⁷⁵ Staudinger/*Coester* (2006) § 307 para 233 answers this question negatively.

⁵³⁷⁶ Zöllner *RdA* 1989, 160.

⁵³⁷⁷ BGH *NJW* 1983, 1671 (1672).

⁵³⁷⁸ 'Rechtsnorm'.

⁵³⁷⁹ 'Regelung'.

⁵³⁸⁰ Stoffels *AGB-Recht* 201.

⁵³⁸¹ Stoffels *AGB-Recht* 201.

⁵³⁸² UBH/*Fuchs* § 307 para 214.

⁵³⁸³ BGH *NJW* 1984, 1182 (1183) and BAG *NZA* 2005, 465 (467) reach a contrary conclusion though.

⁵³⁸⁴ UBH/*Fuchs* § 307 para 214.

⁵³⁸⁵ These principles are referred to as '*rechtssatzförmige Prinzipien*'. Larenz and Canaris *Methodenlehre* 479.

⁵³⁸⁶ '*Haftungsrechtlicher Verschuldensgrundsatz*'. This principle is derived from the civil law and contained in many provisions, such as §§ 280 and 823.

⁵³⁸⁷ Therefore, a clause in a standard leasing contract by which in the case of a premature termination of the agreement only 90 % of the proceeds obtained from the used vehicle are considered – instead of 100 % like in the case of a termination after the contract had ended – is void. See BGH *NJW* 2002, 2713 (2714 *et seq.*).

⁵³⁸⁸ With regard to this principle, a standard clause limiting the validity of telephone cards without reimbursement or crediting of the remaining amount when purchasing a new card has been considered void. See BGH *NJW* 2001, 2635 (2637 *et seq.*). For such a clause in prepaid mobile phones, see Stoffels *AGB-Recht* 203. See also von Hoyningen-Huene § 9 AGBG para 251, UBH/*Fuchs* § 307 para 214 *et seq.*

cc) Specific fundamental principles of generally accepted contract types

According to a common opinion, the scope of application of § 307(2) no. 1 also includes the 'specific fundamental principles of generally accepted contract types', even if these are not statutorily regulated.⁵³⁸⁹ The supporters of this view argue that the low regulatory density is no reason to weaken content control.⁵³⁹⁰ Stoffels legitimately maintains that this view is not convincing because it assumes that the protective level of § 307(2) no. 2, which is applicable if no statutory provision exists, is insufficient. Since the conditions of no. 2 are far-reaching and quite flexible, it is hardly conceivable though that untypical and generally accepted contract types do not fall under this provision.⁵³⁹¹ The scope of application of no. 1 should thus not include cases reaching beyond the wording of this provision ('statutory provision').⁵³⁹²

c) Meaning of 'deviation' and 'non-compatibility'

In the following, the meaning of the characteristics of non-compatibility of a contractual provision with the statutory provision as well as the meaning of 'deviation' from this statutory provision will be discussed. The legislator's choice of the terms 'deviates' and 'not compatible' requires a two-fold assessment.⁵³⁹³

aa) Determination of a disadvantageous divergence of the legal situation

A deviation from the statutory provision is given if a clause contains elements that modify the contents of the statutory provision that would apply in the absence of the clause in a disadvantageous manner.⁵³⁹⁴ Therefore, the legal situation which would exist with the statutory provision and the situation with the standard clause have to be compared.⁵³⁹⁵ The divergence can take the form of a replacement of the *ius dispositivum* by the clause, the modification of the statutory provision otherwise applicable, or an omission changing the sense of the statutory provision.⁵³⁹⁶ Furthermore, there is a deviation where the standard clause normally would be part of another type of contract,⁵³⁹⁷ e.g., a clause that makes the rules of the law of sales applicable in an arrangement that could be qualified as a service contract. It is important to note that the modification of the substantive contents has to be disadvantageous for the customer

⁵³⁸⁹ WHL/Wolf § 9 AGBG para 67.

⁵³⁹⁰ UBH/Brandner (2001) § 9 AGBG para 140. See also Weick NJW 1978, 11 *et seq.*, Schapp DB 1978, 621 *et seq.*

⁵³⁹¹ Stoffels AGB-Recht 204.

⁵³⁹² Fastrich *Inhaltskontrolle* 286, von Hoyningen-Huene § 9 AGBG para 246 *et seq.*

⁵³⁹³ Staudinger/Coester (2006) § 307 para 243 *et seq.*

⁵³⁹⁴ Staudinger/Schlosser (1980) § 9 AGBG para 20.

⁵³⁹⁵ Staudinger/Coester (2006) § 307 para 243, von Hoyningen-Huene § 9 AGBG para 263.

⁵³⁹⁶ Von Hoyningne-Huene § 9 AGBG para 263.

⁵³⁹⁷ 'Umtypisierung'. Staudinger/Coester (2006) § 307 para 245.

because § 307 is aimed at clauses that are 'disadvantageous' to the other party. Thus, advantageous clauses do not violate § 307.⁵³⁹⁸

The assessment of the 'guiding model' (*Leitbild*) that the statutory provision provides is not always obvious. German rental law (§§ 535 *et seq.*), for instance, provides that '[t]he lessor must surrender the leased property to the lessee in a condition suitable for use in conformity with the contract and maintain it in this condition for the lease period.'⁵³⁹⁹ In practice, lessors pass this obligation onto their lessees by means of a standard clause in the lease agreement. Thus, the question begs to be asked if one only can assume a lease agreement in terms of §§ 535 *et seq.* in cases where the lessor surrenders the property and maintains it, and that lease agreements in which he or she only surrenders the apartment without being obliged to maintain it constitute a different kind of contract that is only similar to lease regulated in the BGB.⁵⁴⁰⁰ The BGH held that for such provisions in standard lease agreements, an individual agreement between the parties is not necessary but that in this regard, the checking of a box is sufficient. The law of standard business terms does not aim to interfere with the calculation of leases. Hence, a stipulation that deviates from the statutory provision (here the passing of cosmetic repairs⁵⁴⁰¹ onto the lessee) can be agreed on in standard terms.⁵⁴⁰² The statutory provisions governing the lease (§§ 535 *et seq.*) thus still serve as a guiding model for such leases.⁵⁴⁰³

For contracts that are not regulated by statute, or those that significantly deviate from statutory provisions, it is uncertain how a reference for the determination of a deviation can be determined. Most authorities are of the view that one has to fit the given agreement into the existing contract types by means of a 'general similarity comparison' so that the applicable provision of the somehow similar contract type serves as the 'statutory provision' in the sense of § 307(2) no. 1.⁵⁴⁰⁴ If the result seems inappropriate, the 'in case of doubt' wording of § 307(2) helps to refute the result. This solution seems to raise some concerns because the 'in case of

⁵³⁹⁸ Staudinger/*Schlosser* (1980) § 9 AGBG para 20. See also BT-Drs. 7/5422 at 6.

⁵³⁹⁹ § 535(1) 2nd sent.

⁵⁴⁰⁰ Pawlowski *BGB-AT* 227. Such clauses are common practice in standard lease agreements. Often, the lessee simply has to check a certain box. According to the BGH, such clauses are customary practice and can thus not be considered unfair (BGHZ 92, 363 (368) = BGH *NJW* 1985, 480 (481)). Leenen is of the view that this argument is not convincing since this customary practice came only into being after the BGH's decisions. See Leenen *BGB-AT* 353.

⁵⁴⁰¹ 'Cosmetic repairs' are: the decoration with wallpaper, the painting of walls, ceilings and floors, as well as radiators, interior doors and windows or exterior doors (interior side). See § 28(4) 3rd sent. Verordnung über wohnungswirtschaftliche Berechnungen nach dem Zweiten Wohnungsbaugesetz at http://bundesrecht.juris.de/bundesrecht/bvo_2/gesamt.pdf.

⁵⁴⁰² BGHZ 92, 363 *et seq.*

⁵⁴⁰³ Pawlowski *BGB-AT* 227.

⁵⁴⁰⁴ Stoffels *AGB-Recht* 205.

doubt' formulation seems to have no proper meaning at all.⁵⁴⁰⁵ More importantly, this view overlooks that it is not necessary to cast clauses of an (unregulated) agreement artificially into an obviously inappropriate type of contract.⁵⁴⁰⁶ Such an approach is neither sufficient nor a requisite for content control under § 307. Instead, it is more appropriate to analyse the content of the given contract clause and to look out for a statutory provision (of any contract type) that regulates the 'subject' or 'theme' of this clause.⁵⁴⁰⁷ This view is more coherent with the fact that content control has primarily individual clauses in mind and not entire agreements.⁵⁴⁰⁸

At this stage, it is not important whether the statutory provision can be applied directly or merely by analogy. This is to be clarified only at the end of the enquiry in terms of § 307(2) no. 1.⁵⁴⁰⁹ If there is no statutory provision that can serve as a reference, a deviation does not exist⁵⁴¹⁰ and the content control has to be done by applying § 307(2) no. 2.⁵⁴¹¹

bb) The assessment of non-compatibility as the final evaluative step

Once a deviation between a contract clause and the statutory provision from which it deviates has been confirmed, the final step consists of the evaluation of whether this deviation is compatible with the essential principles of the statutory provision. Non-compatibility with the statutory provision requires that the balance be shifted in a not negligible way to the detriment of the consumer.⁵⁴¹² In this step, the rights and obligations set out in the statutory provisions are considered, and the contractual clause is evaluated in the light of the statutory provision.⁵⁴¹³

A factor in this scrutiny is the 'degree of justice'⁵⁴¹⁴ contained in the statutory provision.⁵⁴¹⁵ Special attention must be given to the user's interest to deviate from the statutory provision.⁵⁴¹⁶ Such a deviation might be justified by the underlying circumstances of the conclusion of the contract and a different distribution of the risks and obligations involved.⁵⁴¹⁷ In this regard, the degree of justification varies depending on the statutory provision and the concrete case. Therefore, one can expect a higher degree of justification for any deviation of the statutory

⁵⁴⁰⁵ See discussion above.

⁵⁴⁰⁶ Staudinger/*Coester* (2006) § 307 para 246.

⁵⁴⁰⁷ Stoffels *AGB-Recht* 205.

⁵⁴⁰⁸ See the wording of § 307(1) 1st sent. ('[p]rovisions') and art 3 ('contractual term') of the Unfair Terms Directive.

⁵⁴⁰⁹ Staudinger/*Coester* (2006) § 307 para 246.

⁵⁴¹⁰ Staudinger/*Coester* (2006) § 307 para 244.

⁵⁴¹¹ Stoffels *AGB-Recht* 205.

⁵⁴¹² Wolf and Neuner *BGB-AT* 566.

⁵⁴¹³ Staudinger/*Coester* (2006) § 307 para 254, von Hoyningen-Huene § 9 AGBG para 268.

⁵⁴¹⁴ '*Gerechtigkeitsgehalt*'.

⁵⁴¹⁵ Stoffels *AGB-Recht* 206.

⁵⁴¹⁶ Staudinger/*Coester* (2006) § 307 para 253.

⁵⁴¹⁷ WHL/*Wolf* § 9 AGBG para 80.

warranties for newly bought items in comparison to used items, for instance.⁵⁴¹⁸ What is more, a deviation might be compatible with the statutory provision if the user modifies the distribution of risks and obligations differently.⁵⁴¹⁹ Alternative solutions must be possible because the statutory provisions are not cast in stone. If in the result, the customer's interests are respected by means of a different contractual solution, this should not be regarded as non-compatible with the statutory provision.⁵⁴²⁰ This is exemplified by the fact that long before the Act to Modernise the Law of Obligations⁵⁴²¹ came into effect, it was generally accepted that the standard terms user could first offer a rectification of the defect before the consumer could require a reimbursement or a reduction of the purchase price. This was regarded as an adequate compensation, provided that the consumer's right to ask for a reduction or a reimbursement was 'revived' if the rectification failed.⁵⁴²²

A suggested, non-listed factor in section 52(2) of the Act is the extent to which the term differs from what would have been in the case of its absence.⁵⁴²³ The South African Law Commission formulated this criterion in its list as follows: '(w) whether, to the prejudice of the party against whom the term is proffered, the party proffering the term is otherwise placed in a position substantially better than that in which the party proffering the term would have been under the regulatory law, had it not been for the term in question; (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled'. Hence, the formulation in § 307(2) no. 1 BGB is much more comprehensive.

The South African Law Commission's formulations require that a given term be compared with the residual rules, i.e. the provisions implied by law into the contract. The common law is considered residual rules as well.⁵⁴²⁴ In German law, principles that have attained such a degree of concretisation that they are no longer distinguishable from legal provisions can be regarded as 'statutory provisions' in terms of § 307(2) no. 1.⁵⁴²⁵ In this regard, the German law is more restrictive than the South African provisions.

⁵⁴¹⁸ Stöffels *AGB-Recht* 206. In this regard, see §§ 309 no. 8 lit. b) aa) and 434 *et seq* BGB.

⁵⁴¹⁹ Von Hoyningen-Huene § 9 AGBG para 268, Staudinger/*Coester* (2006) § 307 para 257 *et seq*.

⁵⁴²⁰ Stöffels *AGB-Recht* 206.

⁵⁴²¹ Schuldrechtsmodernisierungsgesetz.

⁵⁴²² Staudinger/*Coester* (1980) § 9 AGBG para 24, WHL/*Wolf* § 9 AGBG para 78. See also § 309 no. 8 lit. b) bb).

⁵⁴²³ This is the formulation of s 14(4)(g) of the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

⁵⁴²⁴ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 45.

⁵⁴²⁵ These principles are referred to as '*rechtssatzförmige Prinzipien*'. Larenz and Canaris *Methodenlehre* 479.

d) Examples from case law for non-compatible provisions

In the following, some examples of clauses that are not compatible with the essential principles of the statutory provisions from which they deviate will be presented.

- a) Under § 286(3), the obligor of a claim for payment is in default at the latest if he does not perform within thirty days after the due date and receipt of an invoice or equivalent statement of payment. Most authorities are of the view that this provision is a guiding principle in law. Hence, clauses that provide for a different agreement to the consumer's disadvantage constitute an unreasonable disadvantage in terms of § 307.⁵⁴²⁶
- b) A provision in the standard terms of a bank according to which the value date for a credited amount is only one business day after the actual date at which the payment has been made violates the *ius dispositivum* in terms of which the value date has to correspond with the actual date of crediting.⁵⁴²⁷ Otherwise, the client might be put in a position in which he or she has to pay interests for a debit that actually does not exist.⁵⁴²⁸
- c) Banks are not allowed to require the payment of fees for services which they are legally obliged to perform. Thus, a special fee for payments a client makes at the bank counter cannot be required.⁵⁴²⁹ The same applies to fees for the verification of sufficient funds in the account in the context of standing orders, transfers, cheques or debit orders since this kind of verifications is in the bank's interests.⁵⁴³⁰
- d) A clause in a brokerage contract under which the broker can claim a fee irrespective of whether he or she entered successfully into a contract, is ineffective because it is not compatible with § 652(1).⁵⁴³¹
- e) In terms of § 649 1st sent.,⁵⁴³² a customer may terminate a contract to produce a work at any time since he or she has an interest that the work be executed. If this cannot be assured, a continuation of the contract would be unreasonable. This applies above all to long-term

⁵⁴²⁶ Stöffels *AGB-Recht* 207. See also BT-Drs 14/2752 at 11.

⁵⁴²⁷ *Argumentum e* §§ 667, 271(1). § 667: 'The mandatary is obliged to return to the mandator everything he receives to perform the mandate and what he obtains from carrying out the transaction.' § 271(1): 'Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately.'

⁵⁴²⁸ BGH *NJW* 1989, 582; 1997, 2042.

⁵⁴²⁹ BGH *NJW* 1994, 318 (319).

⁵⁴³⁰ BGH *NJW* 1998, 309 (310); 2005, 1645.

⁵⁴³¹ § 652(1): 'A person who promises a brokerage fee for evidence of the opportunity to enter into a contract or for negotiating a contract is obliged to pay the fee only if the contract comes into existence as a result of the evidence or as a result of the negotiation of the broker. If the contract is entered into subject to a condition precedent, the brokerage fee may only be demanded if the condition is fulfilled.'

⁵⁴³² § 649 1st sent.: 'The customer may terminate the contract at any time up to completion of the work. If the customer terminates the contract, then the contractor is entitled to demand the agreed remuneration (...).'

contracts in the building sector.⁵⁴³³ The contractor can require the agreed amount less not incurred expenditures, though.⁵⁴³⁴ If this claim is excluded, the parties' interests are unbalanced and § 649 is violated.⁵⁴³⁵

- f) The standard terms of a supplier of a kitchen that it has to install in the client's house contain a clause according to which the customer 'has to pay the purchase price in full at delivery without deduction'. This clause is not compatible with § 641 and is therefore ineffective because '[t]he remuneration must be paid upon acceptance of the work'.⁵⁴³⁶

3.3.4 Limitation of fundamental rights and duties that jeopardises the contractual purpose

According to § 307(2) no. 2, an unreasonable disadvantage is assumed to exist if a provision limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised. Because of the vagueness of this provision, the prohibition of undermining the contractual purpose will be concretised dogmatically in the following.⁵⁴³⁷

a) The prohibition of undermining the contractual purpose as an emanation of the prohibition of contradictory conduct

§ 307(2) no. 2 is mainly relevant for atypical, non-codified contracts that cannot refer to a pre-cast guiding model, such as leasing or franchising agreements.⁵⁴³⁸ Nonetheless, a comparative standard is necessary in order to be able to assess the contractual purpose. The analysis of the contractual content and the economic objectives of the agreement are crucial in this regard.⁵⁴³⁹

Legal literature⁵⁴⁴⁰ and some BGH decisions draw a line between the prohibition of undermining the contractual purpose and the prohibition of contradictory conduct (*venire contra factum proprium*). According to the BGH, § 307(2) no. 2 is based on the principle that standard clauses must not restrict the contractual parties' position that must be granted with regard to the content and objective of the agreement.⁵⁴⁴¹ Hence, if the supplier assumes the

⁵⁴³³ BGH NJW 1999, 3261 (3262), OLG Düsseldorf NJW-RR 2000, 166 (167).

⁵⁴³⁴ § 649 2nd sent.: '(...) however, he must allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five percent of the remuneration accounted for by the part of the work not yet provided.'

⁵⁴³⁵ BGH NJW 2007, 3423 (3424).

⁵⁴³⁶ BGH NJW 2013, 1431, 1432, Brox and Walker *Schuldrecht* AT 49.

⁵⁴³⁷ Staudinger/*Schlosser* (1980) § 9 AGBG para 27 speaks of an 'unfortunate formulation'.

⁵⁴³⁸ Larenz and Wolf *BGB-AT* 789, Neuner and Grigoleit *BGB-AT* 164.

⁵⁴³⁹ Stoffels *Schuldverhältnisse* 427.

⁵⁴⁴⁰ Lieb *DB* 1988, 953, Staudinger/*Coester* (2006) § 307 para 272.

⁵⁴⁴¹ BGH NJW-RR 1986, 271 (272).

accounting in terms of the contract, for instance, it cannot provide in its standard terms that it does not assume any responsibility for irregular accounting.⁵⁴⁴²

The prohibition of contradictory conduct is a subcategory of the unlawful exercise of a right,⁵⁴⁴³ according to which a rights holder cannot claim its right if it would violate the trust of the other party that it had built. Dogmatically, most authorities see the institute of the unlawful exercise of a right as a manifestation of the principle of legitimate expectations,⁵⁴⁴⁴ which itself is expressed in the principle of good faith (§ 242) and § 307.⁵⁴⁴⁵ What is more, the prohibition of contradictory conduct is also based on the *venire contra factum proprium* prohibition because the fundamental idea is the same: Users of standard terms offer their products or services on the market and put forward their main advantages *vis-à-vis* their clients. When concluding a contract, the client has certain expectations concerning the performance of the product and his or her legal position, based on the information that the supplier has given in its commercials and during the sales talks. Clients do usually not verify such information and trust that the supplier is honest regarding the minimal rights the customer is granted. If the standard terms restrict the customer's legal position or the promised performance, they violate the *venire contra factum proprium* maxim because of the contradiction between the contractual terms and the information given beforehand.⁵⁴⁴⁶

Thus, it can be said that the legislator did not enter new territory by inserting § 307(2) no. 2 but based this provision on the prohibition of contradictory conduct, which itself is an emanation of the principle of legitimate expectations (good faith).⁵⁴⁴⁷

b) Conditions of § 307(2) no. 2

Now that the dogmatic grounding of the prohibition of contradictory conduct has been presented, the discussion of the conditions of § 307(2) no. 2 can be undertaken with less difficulty.

aa) Essential rights and duties inherent in the nature of the contract

The prohibition of contradictory conduct and the underlying principle of legitimate expectations direct the attention to the expectation of the rights holder, and conversely to the

⁵⁴⁴² BGH NJW 1985, 914 (916).

⁵⁴⁴³ MüKo/Roth § 242 para 255.

⁵⁴⁴⁴ 'Vertrauensgrundsatz'. Staudinger/Looschelders/Olzen (2006) § 242 para 288, Palandt/Heinrichs § 242 para 56.

⁵⁴⁴⁵ The same applies to the principle of good faith in terms of art 3(1) of the EU Unfair Terms Directive which also is based on the principle of legitimate expectations. See Stoffels *AGB-Recht* 216.

⁵⁴⁴⁶ Stoffels *AGB-Recht* 216.

⁵⁴⁴⁷ Stoffels *AGB-Recht* 216.

obligations of its counterpart.⁵⁴⁴⁸ The purpose of § 307(2) no. 2 is to ascertain that standard terms user does not infringe the 'nature of the contract' by using standard terms that are contrary to the sense of the agreement.⁵⁴⁴⁹ The 'nature of the contract' is defined by the cardinal obligations contained therein as well as accessory obligations that are significant for the consumer.⁵⁴⁵⁰ If a business owner instructs an IT firm to write for her a tailor-made software programme for the management of her orders, and the IT company excludes any liability for programming errors in its standard terms, this clause violates § 307(2) no. 2 because a functioning software programme for the order management was the object of the contract, i.e., a cardinal obligation, and an exclusion of programming errors would lead to the result that the IT firm would bear no risk for bad performance.⁵⁴⁵¹

The courts apply a test according to which they ask if the obligations are indispensable for the duly fulfilment of the contract and if the party of the contract (consumer) relies – and may rely – on their execution.⁵⁴⁵²

The two characteristics of § 307(2) no. 2, i.e., the 'essential rights and duties' and the 'nature of the contract', cannot be separated as they are inseparably linked. Indeed, the starting point for the enquiry is the agreement between the parties, but the control standard must detach from it and also integrate extra-contractual and normative evaluations.⁵⁴⁵³ Hence, one has to find an external control standard which does not necessarily consist in a specific contract type but in the development of problem-related partial solutions. It is suggested that this is a similar approach to the determination of divergence of the legal situation in terms of no. 1 where a statutory provision of any contract type is compared to the 'subject' of the given contract. This is what the legislature wanted to express by '*nature of the contract*'.⁵⁴⁵⁴ The contrary view,⁵⁴⁵⁵

⁵⁴⁴⁸ Soergel/*Stein* (1987) § 9 AGBG para 43, Staudinger/*Coester* (2006) § 307 para 272, von Hoyningen-Huene § 9 AGBG para 291.

⁵⁴⁴⁹ Wolf and Neuner *BGB-AT* 566, Rüthers and Stadler *BGB-AT* 259.

⁵⁴⁵⁰ BGH *NJW* 2005, 1774 (ineffectiveness of a standard clause according to which the client who booked a coach trip is not entitled to transportation if he or she lost the ticket, although the company maintains nominative lists of their customers). Neuner and Grigoleit *BGB-AT* 163.

⁵⁴⁵¹ Example from Schmidt *BGB-AT* 431.

⁵⁴⁵² BGH *NJW-RR* 1986, 271 (272); 1993, 560 (561), von Hoyningen-Huene § 9 AGBG para 286. This concept can also be found in **art 25 CISG**: 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.'

⁵⁴⁵³ Staudinger/*Coester* (2006) § 307 para 268.

⁵⁴⁵⁴ Fastrich *Inhaltskontrolle* 287, Staudinger/*Coester* (2006) § 307 para 268, Stoffels *AGB-Recht* 218. Emphasis added.

⁵⁴⁵⁵ Von Hoyningen-Huene § 9 AGBG para 283, Soergel/*Stein* (1987) § 9 AGBG para 42, Palandt/*Grüneberg* § 307 para 34.

according to which a proper contractual order for the given contract type is to be developed must therefore be refuted.

In a first step, the customer's expectations, based on the agreed principal obligations, have to be analysed. Furthermore, secondary obligations can also be part of the client's expectations because § 307(2) no. 2 does not limit the enquiry to cardinal obligations.⁵⁴⁵⁶ Other interests that might be affected are the client's expectation as regards its physical integrity, and that its property will not be affected.⁵⁴⁵⁷

(i) Expectations of the average consumer

When assessing the typical expectations of a consumer, an abstract and objective standard is applied and the concrete situation or the personal circumstances of the other party are disregarded. Hence, the typical expectations of an average consumer for the given transaction serve as a reference for this assessment.⁵⁴⁵⁸ An exception is made for individually agreed clauses, even if they are not part of a consumer contract.⁵⁴⁵⁹ Otherwise, the contract would be seen and analysed in a fashion that distorts the actual agreement between the parties.⁵⁴⁶⁰ Other differentiations are also possible, such as the type of client (commercial client or consumer).⁵⁴⁶¹ In the case of tailor-made contracts, a more lenient application of the abstract approach is inevitable. These cases will mostly be qualified as singular contracts and not as standard term agreements though.⁵⁴⁶²

(ii) The agreed set of obligations as a starting point

In cases where the statutory law does not provide for a reference, the standard of content control must be developed in consideration of the set of obligations agreed, against the backdrop of freedom of contract. Hence, the nature of the contract is foremost determined by the provisions agreed by the parties.⁵⁴⁶³ These are determinative for the consumer's expectations insofar as he or she will adapt his or her expectations accordingly and develop certain ideas about the content of the agreement. On the other hand, the standard terms user who regularly uses terms that were drafted under its influence has a particular responsibility for the effects its terms might

⁵⁴⁵⁶ Stoffels *AGB-Recht* 219.

⁵⁴⁵⁷ Staudinger/*Coester* (2006) § 307 para 272, WHL/*Wolf* § 9 AGBG para 84, BGH *NJW* 1985, 3016 (3018).

⁵⁴⁵⁸ Soergel/*Stein* (1987) § 9 AGBG para 42, WHL/*Wolf* § 9 AGBG para 83, BGH *NJW* 1986, 2428 (2429) ('relevance of the perspective of an average bank customer').

⁵⁴⁵⁹ UBH/*Fuchs* § 307 para 246.

⁵⁴⁶⁰ Stoffels *AGB-Recht* 219.

⁵⁴⁶¹ UBH/*Fuchs* § 307 para 247.

⁵⁴⁶² Stoffels *AGB-Recht* 220.

⁵⁴⁶³ Soergel/*Stein* (1987) § 9 AGBG para 42.

have in legal relationships. The trust the customer puts in the supplier, based on the contractual arrangement, is hence attributable to the supplier.⁵⁴⁶⁴

The enquiry of the concrete contractual content can only be the first step, however. If content control were executed only by taking a standard that is orientated towards the clauses of the agreement, as postulated by Lieb,⁵⁴⁶⁵ only obvious violations against the internal contractual logic could be determined, and the standard for content control of non-codified contracts would be lower in comparison to those having a normative model. The consequence would be a significantly lower protection against unreasonably disadvantageous terms.⁵⁴⁶⁶ Content control is legal control⁵⁴⁶⁷ and cannot take place without the consideration of external references. Therefore, a positive comparison in the form of a 'righteous order' is necessary.⁵⁴⁶⁸ In practice, this means that not the individual expectations of a customer are evaluated, but what an objective observer in the situation of the consumer could typically expect.⁵⁴⁶⁹

The standard of content control in terms of § 307(2) no. 2 requires that various sources be considered, namely the agreed price, the expectations typically based on this price as well as the principles and evaluations of the legal order. The considerations that follow within the content control must therefore be detached from the concrete agreement and the particular clause, but without losing it completely out of sight.⁵⁴⁷⁰

(iii) External factors influencing the other parties' expectations and expectations of justice based on statutory provisions

The expectations of the consumer are normally influenced by many external factors that cannot be differentiated. The typical client understands the presented contract as a certain contract type that is commonly agreed upon in the given type of legal transaction.⁵⁴⁷¹ The average consumer's idea of the relevant contents of a contract is therefore typically shaped both by

⁵⁴⁶⁴ Stoffels *AGB-Recht* 220.

⁵⁴⁶⁵ Lieb *DB* 1988, 953 *et seq.* Lieb postulates a limitation of content control with the 'internal coherence' serving as a reference.

⁵⁴⁶⁶ Stoffels *AGB-Recht* 220, Fastrich *Inhaltskontrolle* 282, Staudinger/*Coester* (2006) § 307 para 268.

⁵⁴⁶⁷ Stoffels *Schuldverhältnisse* 416 and 417.

⁵⁴⁶⁸ Staudinger/*Coester* (2006) § 307 para 268, Roussos *JZ* 1988, 1003.

⁵⁴⁶⁹ Stoffels *AGB-Recht* 221.

⁵⁴⁷⁰ Stoffels *AGB-Recht* 221.

⁵⁴⁷¹ This becomes clear in the first partial report of the working group of the Ministry of Justice which complemented 'in the nature of the contract' by the formulation 'or the guiding model (*Leitbild*) that [the consumer] had with regard to generally accepted standards (*Verkehrsanschauung*)'. See Erster Teilbericht at 26 (§ 6) and CDU/CSU draft (BT-Drs. 7/3200 at 3).

empirically verifiable circumstances and by expectations of justice based on statutory provisions.⁵⁴⁷²

What an average consumer can typically expect of such a contract can be evaluated by means of commonly used clauses and provisions of new contract types that have become part of the public mind. This also applies to customary and commercial practices. Due to their constant use and practice, they create the expectation that they are 'just' or 'righteous'.⁵⁴⁷³

Case law contributes to the expectations of an average consumer too.⁵⁴⁷⁴ The content and the limitations of non-codified agreements, such as the leasing contract, were developed by the courts, in conjunction with the work of legal literature. Over the years, consumers developed a certain idea concerning the content of these agreements.⁵⁴⁷⁵

Legitimate interests in terms of § 307(2) no. 2 are not only limited to psychological aspects but must also contain objective and normative factors.⁵⁴⁷⁶ Already the abstract-universal approach of content control generally ensures that the assessment is not personalised/individualised with regard to a particular customer. Effective protection against ineffective clauses can only be achieved though where also the principles of the legal order are taken into account for the enquiry of the consumer's legitimate expectations. The clients' expectations must therefore be checked against the valuations of the objective law and adjusted accordingly.⁵⁴⁷⁷ Although mere common practice does not establish legal recognition of a clause,⁵⁴⁷⁸ the danger could otherwise exist that clauses created by the legal professions⁵⁴⁷⁹ and establishing lower standards for clients could be regarded as legitimate expectations. Hence, the clients' expectations must be adjusted to the minimal normative standards.⁵⁴⁸⁰

Normative factors not only have a corrective function but can also serve for the concretisation of his or her expectations. This is primarily the case for contract forms that have not been fully

⁵⁴⁷² Stoffels *AGB-Recht* 221.

⁵⁴⁷³ Contrary to § 242, customary practice is not expressly referred to in § 307, but the standard of good faith understood with the element of legitimate expectations and the formulation contained in § 310(1) 2nd sent. ('reasonable account must be taken of the practices and customs that apply in business dealings'), the consideration of customary practice is obvious. See von Honingen-Huene § 9 AGBG para 212 *et seq.*, WHL/Wolf § 9 AGBG para 131, BGH NJW 1985, 480 (481).

⁵⁴⁷⁴ Staudinger/Coester (2006) § 307 para 270, Soergel/Stein (1987) § 9 AGBG para 42.

⁵⁴⁷⁵ Stoffels *AGB-Recht* 222.

⁵⁴⁷⁶ Fikentscher *Schuldrecht* para 163, Stoffels *AGB-Recht* 222.

⁵⁴⁷⁷ Stoffels *AGB-Recht* 222.

⁵⁴⁷⁸ BGH NJW 1987, 1931 (1935); 1991, 2414 (2416), UBH/Fuchs § 307 para 251, Staudinger/Coester (2006) § 307 para 266, Fastrich *Inhaltskontrolle* 288.

⁵⁴⁷⁹ In German law, the term '*Kautelarjurisprudenz*' is used in this regard. See Creifelds *Rechtswörterbuch* s.v. '*Kautelarjurisprudenz*'.

⁵⁴⁸⁰ Fastrich *Inhaltskontrolle* 289, Erman/Roloff § 307 para 32,

developed yet, where no established concept exists, and where the courts have not yet reached any decisions so far. It is unclear though how the relevant normative valuations can be found for this 'unfolding of expectations of justice for the specific type of contract'.⁵⁴⁸¹ On the basis of a detailed analysis of the economic objective of the agreement and the typical interests of the parties, various normative aspects can be relevant.⁵⁴⁸² This means that also the user's interests come into play. Thus, only those rights and obligations should be recognised that serve the parties' interests and are a reasonable encumbrance for a party.⁵⁴⁸³ Factors to be considered can be risk control,⁵⁴⁸⁴ insurability,⁵⁴⁸⁵ rationalisation⁵⁴⁸⁶ and the type of the given contract⁵⁴⁸⁷ (e.g., long-term agreement or contract with personalised elements). Furthermore, it is relevant if one deals with a bi- or a multilateral contract (e.g., franchising or credit card agreement). If more than two parties are involved, the interests of all parties have to be considered so that the functioning of the agreement is ensured.⁵⁴⁸⁸

bb) Limitation of essential rights and duties by standard terms: Disappointed expectations

As discussed further above, the client's legitimate expectations are disappointed if the orally agreed promises or those contained in the supplier's commercials are not reflected in the supplier's standard terms, i.e. when the provision 'limits essential rights or duties inherent of the nature of the contract'.⁵⁴⁸⁹ Therefore, a comparison between the legal situation with and without the given clause (i.e., between the actual and the hypothetical situation) must be undertaken.⁵⁴⁹⁰ The latter is described in § 307(2) no. 2 by the formulation 'essential rights or duties inherent in the nature of the contract'. These rights or duties are limited if the standard clause grants lesser rights or duties than one could legitimately expect.⁵⁴⁹¹ A contractual obligation is also limited if its violation has no consequences.⁵⁴⁹²

⁵⁴⁸¹ 'Entfaltung vertragstypenspezifischer Gerechtigkeitserwartungen'. See Staudinger/Schlosser (1980) § 9 AGBG para 28, Staudinger/Coester (2006) § 307 para 271, von Hoyningen-Huene § 9 AGBG para 285.

⁵⁴⁸² Stoffels *AGB-Recht* 223.

⁵⁴⁸³ WHL/Wolf § 9 AGBG para 85.

⁵⁴⁸⁴ BGH *NJW* 1997, 1700 (1702); 2002, 673 (675), UBH/Fuchs § 307 para 156 *et seq.*, von Hoyningen-Huene § 9 AGBG para 216 *et seq.*, Sieg *BB* 1993, 149.

⁵⁴⁸⁵ BGH *NJW* 2002, 673 (675).

⁵⁴⁸⁶ BGH *NJW* 1996, 988 (989), UBH/Fuchs § 307 para 121.

⁵⁴⁸⁷ Von Hoyningen-Huene § 9 AGBG para 285, Staudinger/Coester (2006) § 307 para 271.

⁵⁴⁸⁸ UBH/Fuchs § 307 para 253, WHL/Wolf § 9 AGBG para 110.

⁵⁴⁸⁹ Stoffels *AGB-Recht* 226.

⁵⁴⁹⁰ Staudinger/Coester (2006) § 307 para 277, von Hoyningen-Huene § 9 AGBG para 290.

⁵⁴⁹¹ Von Hoyningen-Huene § 9 AGBG para 291.

⁵⁴⁹² BGH *NJW* 2002, 673 (675).

cc) Jeopardising the purpose of the contract

Under § 307(2) no. 2, the limitation of essential rights or duties inherent in the nature of the contract must also jeopardise the purpose of the contract. The courts and legal literature are mostly of the opinion that this step must be examined separately.⁵⁴⁹³ Consequently, two aspects have to be considered: First, the intensity of the interference is crucial because negligible impairments are not sufficient. The threshold must not be too high though as otherwise, § 307(2) no. 2 cannot unfold its meaning.⁵⁴⁹⁴ Second, the determination of the jeopardising of the purpose of the *contract* necessitates the control of the *entire* agreement. In this regard, one must consider that the contractual purpose can also be achieved by compensatory clauses.⁵⁴⁹⁵

c) Examples from case law

The prohibitions contemplated in § 307(2) also come into play where clauses exclude or restrict the user's liability. These will be discussed under § 309 no. 7.⁵⁴⁹⁶ Other cases where a provision limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised were decided by the courts as follows:

- a) Clauses that extend the surety's liability so that also interests, commissions and costs are included, and by which the maximum amount stipulated in the suretyship is exceeded are ineffective. Such clauses create an incalculable risk for the surety and are not compatible with the rationale and objective ('nature of the contract') of a maximal liability suretyship.⁵⁴⁹⁷
- b) A standard clause by which a bank reserves the right to credit a transferred amount to another account of the recipient violates § 307(2) no. 2. Such clauses have the potential that the transfer has no redemptive effect for the remitter so that he might be forced to pay twice. Furthermore, they are not compatible with the remitter's legitimate interest according to which the bank has to execute the remitter's order exactly.⁵⁴⁹⁸

⁵⁴⁹³ UBH/*Fuchs* § 307 para 261, Staudinger/*Coester* (2006) § 307 para 278, von Hoyningen-Huene § 9 AGBG para 293 *et seq.*, BGH *NJW* 1993, 335 (336); 1998, 671 (673). Some authors are of a different view: Staudinger/*Schlösser* (1980) § 9 AGBG para 27, Becker *Auslegung des § 9 Abs. 2 AGBG* 182 *et seq.*

⁵⁴⁹⁴ Von Hoyningen-Huene § 9 AGBG para 295, Stoffels *AGB-Recht* 227.

⁵⁴⁹⁵ Staudinger/*Coester* (2006) § 307 para 280.

⁵⁴⁹⁶ See discussion of this item in this chapter.

⁵⁴⁹⁷ BGH *NJW* 2002, 3167 (3168 *et seq.*).

⁵⁴⁹⁸ BGH *NJW* 1986, 2428 (2429).

- c) The exclusion of ex-§ 6 VVG⁵⁴⁹⁹ (now § 28 VVG) by an insurance company with the effect of being released even for slight negligence of the insured person or a breach of obligations having no consequences are considered ineffective under § 307(2) no. 2.⁵⁵⁰⁰
- d) A developer contract for the purchase of real estate is usually concluded with the expectation that the developer coordinates the necessary actions and steps. A clause by which the purchaser him- or herself is obliged to take extra-judicial measures for the enforcement of claims against the artisans goes against the rationale of such an agreement and violates § 307(2) no. 2.⁵⁵⁰¹
- e) The exclusion of the replacement of a lost ticket for a bus trip in the standard business terms of a coach travel company undermines the main mutual obligations of the contractual parties. Such a clause practically invalidates the client's right to be transported after the loss of his or her ticket without being justified by the company's interests.⁵⁵⁰²
- f) A contract of safe custody (e.g., for a cloakroom in a theatre) which excludes in its standard terms the staff's or theatre's liability for 'careful safekeeping' for clothes that had been deposited against payment contradicts the cardinal obligations of the keeper and makes the agreement senseless. The same applies to guarding contracts for parked vehicles in parking lots for which the customer has to pay a ticket.⁵⁵⁰³ Similarly, a car wash operator cannot exclude its liability for ordinary negligence because it is its contractual duty to protect its clients' cars from damage.⁵⁵⁰⁴

3.4 Remaining scope of application of § 307(1) 1st sent.

After having discussed the scope of application of § 307(2), the question begs to be asked if for § 307(1) an autonomous scope of application remains. Schlosser⁵⁵⁰⁵ negated this question because all cases that had been decided so far could be solved by applying paragraph (2) of § 307. However, the prevailing opinion today is that paragraph (2) has a proper scope of application.⁵⁵⁰⁶ In practice, several contractual arrangements have evolved that are not captured by § 307(2) or §§ 308 and 309,⁵⁵⁰⁷ such as legally regulated contractual arrangements and the

⁵⁴⁹⁹ VVG = Versicherungsvertragsgesetz (Insurance Contract Act).

⁵⁵⁰⁰ BGH NJW 1985, 559 *et seq.*

⁵⁵⁰¹ BGH NJW 2002, 2470 (2471).

⁵⁵⁰² BGH NJW 2005, 1774.

⁵⁵⁰³ Rüthers and Stadler *BGB-AT* 260.

⁵⁵⁰⁴ BGH NJW 2005, 422, Leenen *BGB-AT* 354, Faust *BGB-AT* 112.

⁵⁵⁰⁵ Staudinger/Schlosser (1980) § 9 AGBG para 14.

⁵⁵⁰⁶ UBH/Fuchs § 307 para 94, Staudinger/Coester (2006) § 307 para 83 *et seq.*, von Hoyningen-Huene § 9 AGBG para 122 *et seq.*, Becker *Auslegung des § 9 Abs. 2 AGBG* 197 *et seq.*, BGH NJW 1981, 117 (118); 2000, 2103 (2105).

⁵⁵⁰⁷ Staudinger/Coester (2006) § 307 para 83.

evaluation of the interaction of various onerous contractual clauses. Furthermore, paragraph (1) applies to clauses that cannot be assessed against the background of a legal provision in terms of § 307(2) no. 1 because the contract type has no codified model, or a similar regulation is not applicable due to the atypical character of the contract and paragraph (2) no. 2 does not apply either.⁵⁵⁰⁸

For the autonomous scope of application of § 307(1) 1st sent., pre-formulated standard clauses for the extension of gym membership agreements serve as an example. The BGH could not identify any codified model for these contracts that could be applied as a standard. Particularly §§ 620 *et seq.* (termination of services relationship), if they were applicable for gym membership contracts, cannot serve as a guiding model because the cancellation periods set out there only apply if the duration of the service agreement is not determined. For the application of § 307(2) no. 2, there were no indications. The BGH decided that clauses for the extension or duration of a gym membership contract might indeed bind the member to the agreement for a long time, but in doing so, they do not limit his or her essential contractual rights or duties.⁵⁵⁰⁹

3.5 Application of the general clause in B2B contracts

Since § 310(1) 1st sent. only excludes § 305(2) and (3), as well as §§ 308 no. 1, 2 to 8 and 309 from content control in B2B contracts, §§ 307(1) 1st sent., 307(2) and the transparency control pursuant to § 307(1) 2nd sent. apply to contracts between businesses. The rationale of the application of the general clause in B2B contracts is that §§ 305 *et seq.* are not aimed at merely offering consumers protection but at ascertaining the principle of good faith in contractual relationships based on standard business terms.⁵⁵¹⁰

3.5.1 Standard of reasonableness

For content control in B2B contracts, the same standard as for B2C agreements is applicable.⁵⁵¹¹ Also in contractual relationships between entrepreneurs, a generalised-abstract standard is applied, regardless of the individual need for protection of a party.⁵⁵¹² Because of customs of trade and the experience business people have in commercial affairs, B2B relationships require a more flexible approach in comparison to consumer contracts though,

⁵⁵⁰⁸ Stoffels *AGB-Recht* 229.

⁵⁵⁰⁹ BGH *NJW* 1997, 739. The same applies to BGH *NJW* 2000, 1110 (1112) for a service station agreement.

⁵⁵¹⁰ Stoffels *AGB-Recht* 229. Before the AGBG came into force, this was not clear and debated. See Erster Teilbericht der Arbeitsgruppe beim BMJ 1974 at 30, Referentenentwurf *DB* 1974, supplement no. 18 at 4 and 23.

⁵⁵¹¹ Erman/*Roloff* § 307 para 35, Soergel/*Stein* (1987) § 9 AGBG para 47. See also BGH *NJW* 1976, 2345 (2346), a decision before the AGBG came into force.

⁵⁵¹² UBH/*Fuchs* § 307 para 372, Palandt/*Grüneberg* § 307 para 39.

even if one has to distinguish between different business sizes and types (e.g., wholesale trader or retailer).⁵⁵¹³ This is expressed in § 310(1) 2nd sent. 2nd half-sentence, according to which 'reasonable account must be taken of the practices and customs that apply in business dealings'.⁵⁵¹⁴ Hence, a long-term B2B practice in terms of which in certain circumstances liability is excluded might be considered reasonable under § 307. Also clauses that are considered unreasonable in B2C contracts might be judged as reasonable in B2B contracts as otherwise, the particular interests and needs of the participating businesses, such as a speedy and smooth business processing, might be obstructed.⁵⁵¹⁵ The same applies to a unilateral distribution of risk in B2B contracts that is often counter-balanced with other advantages that are stipulated in other existing contracts between the firms in question. In B2C contracts, where the parties only conclude one single agreement, such counter-balancing between various contracts is not possible.⁵⁵¹⁶

The BGH considers the previously mentioned situations as exceptions⁵⁵¹⁷ because it maintains that one should not apply two different standards for B2C and B2B contracts.⁵⁵¹⁸ In recent literature,⁵⁵¹⁹ the court's view has been heavily criticised because it questions the importance of freedom of contract in B2B agreements. In order to avoid any difficulties, German businesses thus tend to choose foreign law, e.g., Swiss law.⁵⁵²⁰ Stoffels correctly points out that the point of departure must be § 310(1). This provision is not aimed to lower the threshold of protection for businesses⁵⁵²¹ because neither the fact that entrepreneurs are more seasoned in commercial affairs nor the exclusion of §§ 308 and 309 in terms of § 310(1) 1st sent. allows considering that only significant or obviously unreasonable disadvantages lead to the ineffectiveness of a clause.⁵⁵²² On the other hand, the courts should differentiate more between the regulatory requirements of different business sectors, without applying blindly requirements which are motivated by consumer protection to B2B agreements.⁵⁵²³

According to section 5(2)(b), the Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual value, at the time of the transaction,

⁵⁵¹³ Palandt/*Grüneberg* § 307 para 39.

⁵⁵¹⁴ See BT-Drs. 7/3919 at 14. Rob *BGB-AT* 389.

⁵⁵¹⁵ Stoffels *AGB-Recht* 230.

⁵⁵¹⁶ See argumentation of Regierungsentwurf BT-Drs. 7/3919 at 43.

⁵⁵¹⁷ BGH *NJW-RR* 1997, 1253 (1255); *NJW* 2007, 3774 (3775).

⁵⁵¹⁸ Stoffels *AGB-Recht* 230.

⁵⁵¹⁹ Berger/Kleine *BB* 2007, 2137, Lischek/Mahnken *ZIP* 2006, 158, Staudinger/*Schlosser* (2006) § 310 para 12.

⁵⁵²⁰ Stoffels *AGB-Recht* 233.

⁵⁵²¹ UBH/*Fuchs* § 307 para 373.

⁵⁵²² Von Hoyningen-Huene § 9 AGBG para 302, UBH/*Fuchs* § 307 para 373 note 1393.

⁵⁵²³ Stoffels *AGB-Recht* 233.

equals or exceeds the threshold value in terms of section 6 of the same Act. Therefore, the Act does not apply to all B2B agreements in South Africa.⁵⁵²⁴

3.5.2 The radiating effect of §§ 308 and 309 on B2B contracts

By virtue of § 310(1) 1st sent., the prohibitions contained in §§ 308 no. 1, 2 to 8 and 309 do not apply to B2B contracts. Since these prohibitions are a specific manifestation of the evaluative standard laid down in the general clause, based on the principle of good faith, it is not excluded though that clauses that are problematic in terms of §§ 308 or 309 could be ineffective under § 307. This is explicitly expressed in § 310(1) 2nd sent., according to which '[§] 307(1) and (2) as well as [§] 308 no. 1, 2 to 8 nevertheless apply to these cases in sentence 1 to the extent that this leads to the ineffectiveness of the contract provisions set out in [§§] 308 and 309'.⁵⁵²⁵

In order to draw conclusions from the prohibitions and evaluative standards contained in §§ 308 and 309 for B2B, one has to distinguish between the different types of prohibitions.⁵⁵²⁶ § 308 contains prohibitions based on a significant disadvantage for a contractual party. The result depends here on an evaluation ('prohibited clauses with the possibility of evaluation') which takes into account the contract type, the parties and their typical needs. These considerations can be integrated without problems into B2B relationships so that the evaluations contained in § 308 are not problematic for this kind of contracts.⁵⁵²⁷

On the other hand, § 309 contains more restricted formulations, which make their application for B2B contracts more difficult. Nevertheless, the BGH⁵⁵²⁸ and a part of the current literature⁵⁵²⁹ assert that § 309 has an indicative effect so that clauses that would be ineffective in B2C contracts would probably also be void in B2B agreements. This view raises concerns because it distorts the differences between B2C and B2B contracts.⁵⁵³⁰ Therefore, it would be better to comprehend the prohibitions of § 309 as criteria for encompassing content control.⁵⁵³¹

In practice, standard terms drafters should always enquire if their B2B clauses also withstand the test of §§ 308 and 309. If not, they should consider alternative formulations in order to be on the safe side.⁵⁵³²

⁵⁵²⁴ See discussion on the scope of application of the CPA in Part I ch 2.

⁵⁵²⁵ Stoffels *AGB-Recht* 233.

⁵⁵²⁶ Stoffels *AGB-Recht* 233.

⁵⁵²⁷ UBH/*Fuchs* § 307 para 383, Palandt/*Grüneberg* § 307 para 40.

⁵⁵²⁸ BGH *NJW* 1984, 1750 (1751); 2007, 3774 (3775).

⁵⁵²⁹ Palandt/*Grüneberg* § 307 para 40, BGH *NJW* 2007, 3774.

⁵⁵³⁰ UBH/*Fuchs* § 307 para 382, WHL/*Wolf* § 9 AGBG para 121.

⁵⁵³¹ UBH/*Fuchs* § 307 para 382.

⁵⁵³² Stoffels *AGB-Recht* 234.

Since the greylist contained in regulation 44(3) of the Act does not apply to B2B contracts in terms of regulation 44(1), the factors contained in this list do not have a radiating effect on the general clause. The Act does not contain a similar clause to § 310(1) 2nd sent. In such cases, section 48 applies, and the consumer has the onus of proof.⁵⁵³³ The reason for this is probably that businesses are more seasoned in commercial affairs. On the other hand, the blacklist of section 51 of the Act applies to B2B contracts, provided that section 5(2)(a) does not apply.⁵⁵³⁴

3.6 The transparency requirement of § 307(1) 2nd sent.

3.6.1 Fundamental aspects

a) Normative basis of the transparency requirement

In terms of § 307(1) 2nd sent., '[a]n unreasonable disadvantage may also arise from the provision not being clear and comprehensible.' This provision has been inserted in the wake of the modernisation of the law of obligations⁵⁵³⁵ but its content had been a principle applied by the courts for quite a long time before that.⁵⁵³⁶ The EU Unfair Terms Directive confirmed this German case law.⁵⁵³⁷ With regard to the various manifestations of the transparency requirement in the AGBG and the case law based on the former general clause of § 9 AGBG, the German legislator first considered it not being necessary to cast the transparency requirement into a legislative provision.⁵⁵³⁸ This standpoint was however debated by some authors,⁵⁵³⁹ and finally not supportable anymore after an ECJ ruling of 2001.⁵⁵⁴⁰ In summary, the court held that for the transposition of the Unfair Terms Directive, the Member States could not rely on national case law, but for the sake of legal certainty and clarity they had to transpose the Directive into legislative norms and administrative provisions. In the following, the German legislator inserted the transparency requirement into the general clause and made clear in § 307(3) 2nd sent. that this requirement also applies to areas where content control is not applied. Consequently, the transparency requirement is also applicable to clauses that are not submitted to content control.⁵⁵⁴¹ Hence, also provisions concerning the price and the specification of the performance (e.g., catalogues, prospects, building specifications), which are *essentialia*

⁵⁵³³ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁵⁵³⁴ See discussion on the scope of application of the CPA in Part I ch 2.

⁵⁵³⁵ Gesetz zur Modernisierung des Schuldrechts of 26 November 2001 (BGBl. I at 3138).

⁵⁵³⁶ BGH *NJW* 1989, 222 (calculation of interests for mortgage loans) and BGH *NJW* 1989, 582 (value date in giro contracts), then settled case law.

⁵⁵³⁷ **Article 4(2):** '(...) in so far as these terms are in plain intelligible language') and art 5 1st sent. of the Unfair Terms Directive: '(...) these terms must always be drafted in plain, intelligible language').

⁵⁵³⁸ See argumentation of the Government Draft BT-Drs. 13/2713 at 6.

⁵⁵³⁹ See Stoffels *AGB-Recht* 235, with further references.

⁵⁵⁴⁰ ECJ *NJW* 2001, 2244, decision of 10 May 2001.

⁵⁵⁴¹ Faust *BGB-AT* 112, Bork *BGB-AT* 699.

negotii, must be clear and comprehensible.⁵⁵⁴² Because of freedom of contract, the statutory law does not contain provisions determining the object of the contract or the performance to provide.⁵⁵⁴³

The transparency requirement is also reflected in various other provisions. According to § 305(2) no. 2, standard terms are only incorporated into a contract if the client had the opportunity to take notice of their contents. Under § 305c, surprising clauses do not become part of the agreement. Furthermore, any doubts in the interpretation of standard terms are resolved against the user (§ 305c(2)). These mechanisms take place before the transparency control in terms of § 307(1) 2nd sent. and therefore concern transparency during the conclusion of a contract, and not transparency during the execution.⁵⁵⁴⁴ As these provisions merely cover specific aspects of the transparency requirement, § 307 is not superfluous.⁵⁵⁴⁵ In institutional actions, for instance, only §§ 307 to 309 apply.⁵⁵⁴⁶

§§ 308 and 309 contain aspects of the transparency requirement as well. According to § 308 no. 1 and 2, 'insufficiently specific periods of time' and an 'insufficiently specific additional period of time' are prohibited. § 309 no. 12 2nd sent. sets out that provisions that modify the burden of proof to the disadvantage of the consumer, in particular by having the other party to the contract confirm certain facts, are prohibited, save where an acknowledgement of receipt is signed separately. The prohibition of § 308 no. 4 must also be interpreted in the light of the transparency requirement ('can reasonably be expected').⁵⁵⁴⁷

Note should be taken that transparency control also takes place in terms of § 310(1) 2nd sent. for B2B contracts as well as for pre-formulated, i.e., not individually agreed contract clauses in consumer contracts (§ 310(3) no. 2).⁵⁵⁴⁸

The purpose of the transparency requirement is to make sure that the client is able to reach an informed decision.⁵⁵⁴⁹ If customers are not able to see their rights and obligations to a full extent due to unclear provisions, they suffer two disadvantages: Firstly, they cannot fully comprehend the content of the clause(s) when entering into the contract and thus cannot defend themselves against their incorporation. Secondly, they do not know their rights and obligations

⁵⁵⁴² Wertenbruch *BGB-AT* 150, Stoffels *AGB-Recht* 235, Schmidt *BGB-AT* 426, Larenz and Wolf *BGB-AT* 790.

⁵⁵⁴³ Schmidt *BGB-AT* 426.

⁵⁵⁴⁴ 'Abschlusstransparenz' and 'Abwicklungstransparenz'. See Wolf and Neuner *BGB-AT* 568.

⁵⁵⁴⁵ MüKo/Kieninger § 307 para 52, Larenz and Wolf *BGB-AT* 790.

⁵⁵⁴⁶ § 1 UKlaG.

⁵⁵⁴⁷ Stoffels *AGB-Recht* 236.

⁵⁵⁴⁸ Larenz and Wolf *BGB-AT* 790.

⁵⁵⁴⁹ Larenz and Wolf *BGB-AT* 785.

during the execution of the agreement so that they are not able to adapt to the legal situation and respond accordingly.⁵⁵⁵⁰

Clauses that withstand content control under § 307 might therefore be invalid nonetheless because they do not meet the required transparency.⁵⁵⁵¹

In the Act, the transparency requirement is expressed in various provisions, such as section 52(2)(g), read in conjunction with section 22 (plain and understandable language), section 48(2)(c), read with section 41 (false, misleading or deceptive representations), or section 48(2)(d)(ii), read with section 49 (terms must be drawn to the consumer's attention).

b) Unreasonable disadvantage due to insufficient clarity

One may ask the question of whether mere formal incompliance with the transparency requirement is sufficient to declare a clause ineffective, or if the client also has to suffer a disadvantage from the unclear clause.⁵⁵⁵² Fuchs and Stoffels legitimately argue that incompliance with the transparency requirement leads to ineffectiveness of a provision if the intransparency leads to an unreasonable disadvantage.⁵⁵⁵³ Brox and Walker argue that intransparency does not automatically lead to ineffectiveness, which is also expressed in the wording of § 307(1) 2nd sent. ('may also arise').⁵⁵⁵⁴ The determination of such an unreasonable disadvantage is dispensable though if there is an irrefutable presumption that such a disadvantage exists.⁵⁵⁵⁵ The objective for the existence of the transparency requirement is to increase the perception and comparability of contract clauses.⁵⁵⁵⁶ Only informed customers are able to reach informed decisions and to choose another supplier, if necessary. A lack of information, or even targeted disinformation, disturbs the market and necessitates transparency control, also in the field of prices and performances. Since the enquiry of the existence of an unreasonable disadvantage is performed in an abstract way, without having a particular consumer in mind, there is an irrefutable presumption of an unreasonable disadvantage in cases where an abstract danger of the loss of market opportunities exists.⁵⁵⁵⁷ This is even more so where intransparency results in the concealment of the real legal position as the customer might

⁵⁵⁵⁰ Wolf and Neuner *BGB-AT* 568, Larenz and Wolf *BGB-AT* 790.

⁵⁵⁵¹ Faust *BGB-AT* 113.

⁵⁵⁵² Staudinger/*Coester* (2006) § 307 para 174 *et seq.*, UBH/*Fuchs* § 307 para 326 *et seq.*

⁵⁵⁵³ UBH/*Fuchs* § 307 para 330, Stoffels *AGB-Recht* 236.

⁵⁵⁵⁴ Brox and Walker *Schuldrecht AT* 51.

⁵⁵⁵⁵ Stoffels *AGB-Recht* 236. According to Fuchs (UBH § 307 para 331), this view goes too far, and Coester (Staudinger (2006) § 307 para 174) is of the view that this irrefutable presumption exists 'as a general rule'.

⁵⁵⁵⁶ Köndgen *NJW* 1989, 946 *et seq.* and 952.

⁵⁵⁵⁷ Staudinger/*Coester* (2006) § 307 para 175 *et seq.*, OLG Celle *NJW-RR* 1995, 1133.

be deterred to claim his or her rights.⁵⁵⁵⁸ The actual realisation of this danger is not necessary because in terms of § 307(1) 2nd sent., an unreasonable disadvantage is already given if the provision is unclear. Hence, it can be argued that intransparency leads to ineffectiveness of a standard clause where the determination of a disadvantage due to intransparency is not necessary. This view is covered by the wording of § 307(1) 2nd sent. and by the governmental argumentation according to which intransparent clauses are to be considered ineffective *per se* without a material unreasonable disadvantage.⁵⁵⁵⁹ In Stoffel's view, this formulation is misleading though since the unreasonableness of a disadvantage is necessarily a consequence of the clause's intransparency.⁵⁵⁶⁰

3.6.2 Standard of evaluation

In order to assess whether the user's standard terms are clear and comprehensible, an abstract-general approach is applied. Nonetheless, an unclear provision can be compensated by information given individually to the client before entering into the contract.⁵⁵⁶¹ For consumer contracts, the circumstances attending the entering into of the contract must be taken into consideration in any event (§310(3) no. 3).⁵⁵⁶²

In this context, it is irrelevant how a specialist for standard terms (e.g., a lawyer) might comprehend the clause, but what understanding an average client has when concluding the agreement.⁵⁵⁶³ For an insurance contract, for example, this would be an average insurance taker who can be expected to read the insurance clauses carefully, evaluate their meaning and consider the obvious context in which the individual clauses are embedded.⁵⁵⁶⁴ Between business people, the requirements are more lenient because of their experience and customs of trade.⁵⁵⁶⁵

⁵⁵⁵⁸ Staudinger/*Coester* (2006) § 307 para 178.

⁵⁵⁵⁹ BT-Drs. 14/6040 at 154.

⁵⁵⁶⁰ Stoffels *AGB-Recht* 237.

⁵⁵⁶¹ UBH/*Fuchs* § 307 para 346 *et seq.*, Staudinger/*Coester* (2006) § 307 para 202 *et seq.*

⁵⁵⁶² Erman/*Roloff* § 307 para 21.

⁵⁵⁶³ BGH *NJW* 1999, 2279 (2280), BAG *NZA* 2005, 1111 (1113), WHL/*Wolf* § 9 AGBG para 148, PWW/*Berger* § 307 para 13.

⁵⁵⁶⁴ BGH *NJW-RR* 2005, 903 (903).

⁵⁵⁶⁵ BGH *NJW* 1999, 942 (944); 2007, 2176 (2177).

3.6.3 Application and manifestations of the transparency requirement

By analysing the relevant case law, certain recurring patterns become apparent. These allow a more precise determination of the transparency requirements for practical use. These patterns are not limitative and might overlap though.⁵⁵⁶⁶

a) Requirement of clarity and transparency

An emanation of the transparency requirement is that the standard terms user has to present the other party's rights and duties in a clear and comprehensible manner.⁵⁵⁶⁷ This concerns especially economic disadvantages and financial charges.⁵⁵⁶⁸ The less a customer can expect a particular provision, the higher is the requirement to formulate the given provision clearly and comprehensibly. Transparency does not only apply to particular clauses, but also to a framework of provisions which make it difficult to detect negative consequences because of the interaction between certain clauses.

Therefore, a clause in a life insurance policy concerning the repurchase is ineffective if it does not inform the consumer of the adverse consequences of a cancellation of the contract or the exemption to pay the premium in terms of the repurchase value.⁵⁵⁶⁹ What is more, the agreement of an hourly fee for a lawyer infringes the transparency requirement if the provisions do not contain an estimation of the total amount the client is expected to pay until the termination of the mandate.⁵⁵⁷⁰ Another example is a clause in a leasing agreement in terms of which the calculation of the residual value of the vehicle is calculated, among other factors, by applying the 'annuity value formula' (*'Rentenbarwertformel'*). According to the BGH, even business people cannot be expected to understand the meaning of such a highly technical term.⁵⁵⁷¹ The BGH decided in another case that a standard clause of an online mail-order shop by which it reserved the right to ship an 'equivalent item' if the ordered product was not available infringes the transparency requirement because the customer could not assess what was meant by an 'equivalent item'.⁵⁵⁷² Severability clauses by which the parties agree that a statutory provision should replace a contract clause if the former is void are also ineffective because such clauses are not transparent. The customer is not able to know what the statutory

⁵⁵⁶⁶ See also UBH/*Fuchs* § 307 para 355 *et seq* where these patterns are classified in a similar fashion.

⁵⁵⁶⁷ *'Verständlichkeitsgebot'*. See PWW/*Berger* § 307 para 14, with further references.

⁵⁵⁶⁸ BGH *NJW* 2000, 515 (519); 2006, 2545 (2547), BVerwG *NJW* 1998, 3216 (3219), WHL/*Wolf* § 9 AGBG para 148.

⁵⁵⁶⁹ BGH *NJW* 2001, 2012 (2013 *et seq*).

⁵⁵⁷⁰ OLG Frankfurt/M. *NJW-RR* 2000, 1367.

⁵⁵⁷¹ BGH *NJW* 1996, 455 (456).

⁵⁵⁷² BGH *NJW* 2006, 211.

provisions are.⁵⁵⁷³ Price-adjustment clauses must be so clear and comprehensible that the customer is able, when concluding the contract, to evaluate the scope of future price increases, and under which circumstances the supplier is entitled to increase its prices.⁵⁵⁷⁴

These examples demonstrate that the transparency requirement has (also) some significance for ancillary agreements concerning the price. The latter is normally not part of content control in terms of 307(3) 1st sent. since the law assumes that customers pay attention to the core terms of a contract (*essentialia negotii*) and safeguard their financial interests, e.g., by comparing prices.⁵⁵⁷⁵ This is not possible though where ancillary clauses impede a comparison between different prices because of their intransparency. Thus, when formulating standard terms, the drafter should pay special attention to a clear and comprehensible wording so that customers can understand the provisions without further ado. Only then, consumers are enabled to negotiate and benefit from market opportunities.⁵⁵⁷⁶

b) Requirement of extensive concretisation and certainty

Especially in cases where the standard terms user reserves the right to benefit from several options, the conditions and legal consequences must be so concrete and certain that the consumer can apprehend in which sense the user might use his or her rights.⁵⁵⁷⁷ Such unilateral reservations can only be accepted if the trigger for one option or another and the directives and limits for its application are precisely formulated.⁵⁵⁷⁸

Thus, a clause of an automobile manufacturer in a contract with an independent car dealer without territorial protection according to which the manufacturer has the right to reduce the dealer's territory unilaterally 'for reasons of market coverage' violates the transparency requirement if the application of the contract clause is not restricted to cases that present serious reasons for the reduction of the territory, does not limit the extension of the reduction and does not provide for compensation.⁵⁵⁷⁹

Furthermore, the provision of a 'cover charge' (*'Rahmengebühr'*) 'up to 75 DM' in the standard clauses of a financial institution, without further defining in which circumstances such a fee must be paid is a violation of the transparency requirement. In the given case, the bank charged

⁵⁵⁷³ Larenz and Wolf *BGB-AT* 790.

⁵⁵⁷⁴ BGH *NJW* 2003, 507 (509), Neuner and Grigoleit *BGB-AT* 165.

⁵⁵⁷⁵ Wertenbruch *BGB-AT* 150.

⁵⁵⁷⁶ BGH *NJW* 1990, 2383, UBH/*Fuchs* § 307 para 336.

⁵⁵⁷⁷ '*Bestimmtheitsgebot*'. See PWW/*Berger* § 307 para 14, with further references, Boecken *BGB-AT* 312.

⁵⁵⁷⁸ BGH *NJW* 2000, 651 (652), BAG *NZA* 2006, 1149 (1152).

⁵⁵⁷⁹ BGH *NJW* 1984, 1182; 2000, 515 (516 *et seq.*).

such a fee for the treatment of attachments (in the legal sense). The court held that this kind of activity is generally known to be performed by banks (i.e., not exceptional) and that the bank had to define in its standard terms for which activities precisely and to which exact amount it would charge such a fee.⁵⁵⁸⁰

c) Requirement of legal clarity (prohibition of fraudulent misrepresentation)

Transparency also means that the standard business terms user must not formulate the other party's legal position unclearly. According to the courts, a clause that wrongly or unclearly presents the consumer's legal position so that the user can repel possibly justified claims are not transparent because they disadvantage the consumer unreasonably. The objective possibility of such a disadvantage is sufficient in this regard.⁵⁵⁸¹

A clause in an insurance contract that excludes claims if the insured does not formulate the given claim in writing violates the transparency requirement as such a clause might prevent the insured from ensuring his or her rights effectively before the introduction of legal proceedings.⁵⁵⁸²

3.6.4 Limits of the transparency requirement

The requirement to formulate standard clauses transparently has its limits, though. The transparency requirement exists only to the extent that it is possible and reasonable to follow.⁵⁵⁸³ Furthermore, the standard terms user is not required to explicitly repeat legal provisions or rights that are linked to the nature of the contract, or corresponding information to the other party.⁵⁵⁸⁴ Otherwise, the transparency requirement would be counterproductive because the standard terms would be too lengthy and detailed, which is not in the consumer's interest. Fuchs formulates this postulate as follows: Transparency also means 'to focus on the presented information on certain central parameters or the core of a clause'.⁵⁵⁸⁵ What is more, one must not lose sight of the supplier's interests, which is why the divulcation of the internal calculation can generally not be required, for instance.⁵⁵⁸⁶

A provision in standard terms under which the calculation of the residual value is disclosed is not required in terms of transparency as long as the client is able to understand clearly which

⁵⁵⁸⁰ BGH NJW 2000, 651 (652).

⁵⁵⁸¹ 'Täuschungsverbot'. PWW/Berger § 307 para 14, BGH NJW-RR 2005, 1500.

⁵⁵⁸² BVerwG NJW 1998, 3216 (3220).

⁵⁵⁸³ BGH NJW-RR 2005, 1496 (1498).

⁵⁵⁸⁴ BGH NJW 2000, 2103 (2106), PWW/Berger § 307 para 15.

⁵⁵⁸⁵ UBH/Fuchs § 307 para 349. My own translation.

⁵⁵⁸⁶ UBH/Fuchs § 307 para 350.

amount he or she will owe and the contract includes all necessary information for the calculation of this amount.⁵⁵⁸⁷ The same applies to insurance contracts where it is not required that the calculation of the surplus participation be disclosed as long as it is apparent that the amount of this participation might vary.⁵⁵⁸⁸ Standard provisions referring to legal norms or provisions of other instruments are not intransparent *per se*.⁵⁵⁸⁹ The supplier's rationalising interest might justify such cross-references. In any case, one has to assess if the user had alternative formulations at hand.⁵⁵⁹⁰ Generally, dynamic references (i.e., where the contents of the instrument to which is referred to might change without the client being able to influence this) are more problematic than static references.⁵⁵⁹¹ A contract of employment which contains references to provisions of the applicable collective agreement is not intransparent as such references serve the unification of employment contracts within a company.⁵⁵⁹²

3.6.5 Legal consequences of the violation of the transparency requirement

An unclear and incomprehensible, i.e. intransparent, clause leads to its ineffectiveness because an unreasonable disadvantage due to intransparency leads to this consequence in terms of § 307(1) 2nd sent. If the gap created by the ineffective provision cannot be closed by statutory law, it might be closed by way of a gap-filling interpretation of the contract.⁵⁵⁹³

Furthermore, one could argue that the Unfair Terms Directive suggests that the customer has the right to cancel the entire agreement unilaterally if a clause defining the performance is intransparent, or where the transparency requirement aims to ascertain an informed decision of the client.⁵⁵⁹⁴ This solution can be justified either by assuming that a violation of the transparency requirement constitutes a fault of the supplier, or by assuming that the remaining clauses do not constitute a valid legal transaction in terms of § 306(1).⁵⁵⁹⁵ The latter solution might be pertinent if the core of the performance is intransparent, and the client should therefore be able to cancel the entire agreement.⁵⁵⁹⁶

⁵⁵⁸⁷ BGH NJW 1997, 3166.

⁵⁵⁸⁸ BGH NJW 2001, 2014 (2017 *et seq*).

⁵⁵⁸⁹ BGH NJW 1995, 589 *et seq* (reference to the business plan in the standard terms of an insurance company), BGH NJW 2002, 507 (dynamic reference to the framework contract in a pre-formulated contract for the care in a nursing home).

⁵⁵⁹⁰ Oethker JZ 2002, 337.

⁵⁵⁹¹ PWW/Berger § 307 para 14.

⁵⁵⁹² Thüsing/Lambrecht NZA 2002, 1364.

⁵⁵⁹³ BGH NJW 2005, 3559 (3565).

⁵⁵⁹⁴ Stoffels AGB-Recht 243.

⁵⁵⁹⁵ Rosenow/Schaffelhuber ZIP 2001, 2215 *et seq*.

⁵⁵⁹⁶ Stoffels AGB-Recht 226.

3.7 Conclusion

The German general clause of § 307 is the core element of content control. The prohibitions contained in §§ 308 and 309 are built on § 307 and are a concretisation of the latter. The general clause is also essential for content control of B2B contracts as § 309 does not apply to these contracts at all, and § 308 only partly. Finally, § 307 completes the protection granted by §§ 308 and 309 since these specific prohibitions merely serve as examples and are not comprehensive.

Declaratory clauses, i.e., provisions that merely reflect the contents of statutory provisions, are not subject to content control. The same applies to clauses providing for the specification of the performance and the price. These are core elements of the given agreement (cardinal obligations) to which the principle of freedom of contract applies. They must nonetheless conform to the transparency requirement set out in § 307(1) 2nd sent. Standard clauses restricting cardinal obligations can be assessed under § 307, though.

§ 307 requires that the other party suffers an unreasonable disadvantage. Unreasonableness is assumed where there is a significant imbalance in the parties' rights and obligations to the detriment of the other party, and where the user is merely concerned with its own interests. The typical interests of the parties in the given type of contract as well as the economic objective are considered, among other factors. What is more, the statutory provisions from which the agreement deviates must not be lost of sight. The parties might also have agreed upon alternatives to the statutory provision so that the balancing of their interests could be achieved by other means. Price-adjustment clauses, primarily used in continuing obligations, are not disadvantageous *per se* and allow that suppliers can adapt their prices automatically to a changing market environment. They also protect consumers as they avoid higher prices from the outset because the supplier wants to protect its future margins.

In individual proceedings, the moment of evaluation is the time of the conclusion of the contract. Although the courts do not strictly apply this principle in the case of regulatory changes, this raises concern in terms of legal certainty as the demarcation between changes of the standard of evaluation before or after a regulatory amendment is too difficult to undertake. In institutional actions, the moment of the last oral proceedings is relevant.

In contrast to section 48 of the Consumer Protection Act, for the general clause of § 307, an abstract-universal approach is applicable. Where standard terms are used for different groups

of consumers (individual consumers or companies), the typical interests of these groups must be considered so that the result may be different for B2B or B2C agreements.

Theoretical divergences between § 307 and the 'general clause' of article 3(1) of the Unfair Terms Directive can mostly be resolved by applying the methods of interpretation. Since European law does not have a sufficiently concrete fairness standard, this standard can only be formulated by the national courts. Therefore, there is no place for an autonomous interpretation of article 3(1) of the Directive by the ECJ.

The abstract-general approach does not apply to consumer contracts because there, 'the other circumstances attending the entering into of the contract' must be taken into consideration too.

Unlike the Consumer Protection Act, content control always refers to a specific contractual provision and never to the entire agreement. The individual provisions must not be assessed in isolation however, but by taking into account the remainder of the agreement. In this regard, the accumulative and the compensational effects have been discussed. In the case of collectively negotiated contractual instruments, German courts are rather generous with the application of the compensational effect. These instruments are considered a 'general contractual order' that has become a 'readily useable legal order'.

When assessing a standard clause that passes the risk onto the other party, risk control is a relevant factor. In these cases, one has to ask which party can avoid the risk better and cheaper, and by which party the risks involved can be insured better ('cheapest insurer').

In German standard business terms legislation, the so-called 'price argument' is generally irrelevant because any legal disadvantage could somehow be justified economically, and clients are unlikely to receive fair compensation for this disadvantage. This applies with the exception where consumers have a real choice between different versions of an agreement entailing different prices. The price argument is also relevant, according to the BGH, where suppliers of electricity exclude their liability, with the *provisio* that the risk passed onto the client is manageable and the latter can evaluate the extent of that risk.

§ 307(2) can be regarded as a self-contained provision. The formulation 'in case of doubt' has no effect because § 307(2) is able to integrate the given transactions. In general, § 307(2) no. 1 takes precedence over no. 2. A precise demarcation is not always necessary or possible though as a deviation from essential principles of a statutory provision (no. 1) can also be a limitation of essential rights or duties inherent in the nature of the contract (no. 2), and *vice versa*.

The term 'essential principles' in § 307(2) no. 1 means the 'content of justice' of the statutory norm that has been replaced by a contractual provision. 'Statutory provision' in § 307(2) no. 1 comprises substantive provisions, customary law and principles developed by case law that have attained such a degree of concretisation that they are no longer distinguishable from legal provisions. On the other hand, the *ius cogens*, §§ 305 *et seq.* themselves and general legal principles are not considered 'statutory provisions' in terms of this norm.

For the determination of a (disadvantageous) divergence of the legal situation, the enquiry of the 'guiding model' of the statutory provision might be challenging. For agreements that have no model in the statutory law, a 'general similarity comparison' where the given agreement is artificially fitted into a somehow similar contract type must be rejected. Instead, one should look out for a statutory provision of any contract type that regulates the 'subject' or 'theme' of the given clause. For the evaluation of whether the deviation is compatible with the essential principles of the statutory provision, factors such as the degree of justice of the given statutory provision and the user's interest to deviate from the *ius dispositivum* have to be considered.

The rationale of § 307(2) no. 2 is that standard clauses must not restrict the parties' position in terms of the contents and objective of an agreement, which defines the nature of the contract. For the enquiry of the typical expectations of a consumer, an abstract standard is applied, with the exception of individually agreed clauses. The provisions agreed by the parties determine the nature of the contract, but since content control is legal control, external references must be taken into account, too.

External factors also influence the expectations of the customer. The typical expectations can be evaluated by means of commonly used clauses and provisions of new contract types as well as customary and commercial practice. Non-codified agreements developed by the courts (e.g., leasing contracts) are also part of the client's typical expectations. These expectations must be checked against the valuations of the objective law and adjusted accordingly so that a more objective approach is ascertained. The legitimate expectations are disappointed if the supplier's promises (e.g., in commercials) are not reflected in its standard terms. The evaluation requires the assessment of the entire contract so that the contractual purpose might also be attained by compensatory clauses.

§ 307(1) 1st sent. has a proper scope of application, especially where the given contract type has no codified model, or the agreement is so atypical that no similar regulations can be found. This is the case for gym membership contracts, for instance.

Although the application of certain provisions is excluded for B2B contracts in terms of § 310(1), §§ 307(1) 1st sent., 307(2) and the transparency control under § 307(1) 2nd sent. apply to these agreements. This is because content control aims to ensure that the principle of good faith is adhered to by applying a more flexible approach in B2B contracts. In agreements between businesses a generalised-abstract approach applies. § 310(1) sets out that reasonable account must be taken of the practices and customs that apply in business dealings though. The prohibitions contained in §§ 308 and 309 have a radiating effect on the general clause because they are an emanation of the principle of good faith.

§ 307(1) 2nd sent. provides that a standard clause may also be ineffective due to its intransparency. The objective of the transparency requirement is that customers can reach an informed decision by increasing the perception and comparability of contract clauses. § 307(3) 2nd sent. even regulates that this requirement is also applicable to areas where content control does not take place (*essentialia negotii*). B2B contracts are subject to transparency control too, as well as pre-formulated contract clauses in consumer contracts.

Generally, non-compliance with the transparency requirement leads to ineffectiveness of the clause if the other party suffers an unreasonable disadvantage therefrom. The determination of such a disadvantage is dispensable though where an irrefutable presumption exists for such a disadvantage, e.g., where an abstract danger of the loss of market opportunities exists.

For the evaluation of the transparency requirement, an abstract-general stance must be taken. Not only individual clauses but also their interplay is subject to transparency control. In addition, transparency has some significance for ancillary agreements concerning the price, which are generally excluded from content control.

The transparency requirement has its limitations, however. Suppliers are not required to repeat legal provisions or rights that are linked to the nature of the contract. What is more, the supplier's interests must be considered because it is not required to divulge its internal calculation, for instance.

CHAPTER 6 – ENFORCEMENT OF CONSUMER RIGHTS IN GERMAN STANDARD BUSINESS TERMS LEGISLATION

1. Individual proceedings

1.1 Court actions

Where individual parties are involved, the court decides whether a standard business clause is effective in a so-called 'incidental control', i.e., within the given proceedings (individual action). Hence, the legal force of the judgement only applies *inter partes*, and where other individuals wish to attack the same clause, they have to bring a new court action.⁵⁵⁹⁷

Example: Client A orders a kitchen with company B for EUR 5,000. Because of the high demand of this model the kitchen can only be delivered in 3 months. Both parties agree on a date of delivery. One month after the conclusion of the contract, B requires a supplement of EUR 800 because of higher costs for materials. Client A refuses to pay the additional EUR 800, and B sues A under § 433(2)⁵⁵⁹⁸ and its standard clauses which provide for the possibility to increase prices 'reasonably' due to higher costs for the user. In the individual proceedings, the court then has to decide if B's claim is justified in terms of § 433(2). To do so, it has to assess 'incidentally' whether B's standard clause is valid. The court will conclude that the given clause is ineffective in terms of § 309 no. 1 and will dismiss the action.⁵⁵⁹⁹

As regards individual proceedings and the incidental control, no special requirements apply.

Since the beginning, the German legislator, unlike the South African legislator,⁵⁶⁰⁰ has been concerned with measures designed to prevent the use of unfair terms rather than eliminating these terms *ex post facto*. In order to achieve such a 'positive enforcement', it considered that individual proceedings were not sufficiently effective, and that the introduction of a novel procedural solution, the institutional action, would be a better solution.⁵⁶⁰¹

⁵⁵⁹⁷ *Wendland* in: Staudinger/Eckpfeiler E para 20.

⁵⁵⁹⁸ § 433(2): 'The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased.'

⁵⁵⁹⁹ My own example.

⁵⁶⁰⁰ The CPA focuses on individual proceedings and leaves it rather to individual consumers to fight unfair terms. See Part I ch 3 para 4.1.1.

⁵⁶⁰¹ Maxeiner 2003 *Yale J. Int. Law* 157.

1.2 Industry ombuds

In Germany, many industries have implemented ombuds procedures, such as banks and insurance companies.⁵⁶⁰² Their procedure is quite similar. In the following, the procedure of the ombudsman for private banks⁵⁶⁰³ is described as an example:

The Private Banks Ombudsman is responsible for disputes between banks that have joined the conciliation procedure and consumers (applicants) concerning all products and services offered by the bank, in particular disputes under § 14 (1) UKlaG.⁵⁶⁰⁴

First, the ombuds' office examines all complaints received for admissibility and responsibility. If these criteria are met, the ombud checks the documents for completeness. If the documents are not complete, the ombud will contact the customer and request the missing information. As

⁵⁶⁰² Ombudsmann der privaten Banken (<https://bankenombudsmann.de>), Ombudsmann der Öffentlichen Banken (www.voeb.de), Ombudsmann der genossenschaftlichen Bankengruppe (www.bvr.de), Schlichtungsstelle beim Deutschen Sparkassen- und Giroverband (www.dsgv.de/schlichtungsstelle), Schlichtungsstelle der Deutschen Bundesbank (www.bundesbank.de), Versicherungsombudsmann (www.versicherungsombudsmann.de), Ombudsmann Private Kranken- und Pflegeversicherung (www.pkv-ombudsmann.de), Ombudsstelle geschlossene Fonds (www.ombudsstelle-gfonds.de), Ombudsleute der Privaten Bausparkassen (www.schlichtungsstelle-bausparen.de), Büro der Ombudsstelle des BVI - Bundesverband Investment und Asset Management e.V. (www.ombudsstelle-investmentfonds.de), Bundesanstalt für Finanzdienstleistungsaufsicht (www.bafin.de), to name but a few.

⁵⁶⁰³ The term 'ombudsman' is used when used in German terminology. It also includes ombudswomen.

⁵⁶⁰⁴ § 14 UKlaG: '(1) In case of disputes arising from the application 1. the provisions of the BGB concerning distance contracts for financial services 2. §§ 491 to 508, 511 and 655a to 655d of the BGB and article 247a(1) of the EGBGB, 3. the provisions concerning payment service contracts (), 4. the provisions of the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz - ZAG*), insofar as they create obligations for electronic money issuers or payment service providers vis-à-vis their customers 5. the provisions of the Payment Accounts Act (*Zahlungskontengesetz - ZKG*) governing the relationship between a payment service provider and a consumer 6. the provisions of the Investment Companies Code (*Kapitalanlagegesetzbuch - KAG*), if consumers are involved in the dispute, or 7. of other provisions in connection with contracts concerning banking transactions (...) between consumers and enterprises supervised under the Banking Act (*Kreditwesengesetz - KWG*), the parties may, without prejudice to their right to take action in the courts, take recourse to a private consumer arbitration board recognised by the Federal Office of Justice for such disputes or to the consumer arbitration board established at the Deutsche Bundesbank or the consumer arbitration board established at the Federal Financial Supervisory Authority. (...). (2) Each consumer conciliation body referred to in paragraph 1 must be composed of at least two conciliators who are qualified to hold judicial office. The arbitrators shall be independent and shall conduct the arbitration proceedings fairly and impartially. They shall base their mediation proposals on the applicable law and they shall in particular comply with mandatory consumer protection laws. A consumer may not be required to pay a fee for the arbitration procedure. (3) Upon request, the Federal Office of Justice shall recognise a conciliation office as a private consumer conciliation office pursuant to paragraph 1 sentence 1 if 1. the institution of the conciliation body is a registered association (*eingetragener Verein*) 2 the conciliation body is responsible for the disputes under paragraph 1 sentence 1 and 3. the organisation, financing and rules of procedure of the Conciliation Body comply with the requirements of this Act and the statutory ordinance issued on the basis of this Act. The rules of procedure of a recognised conciliation body may be amended only with the consent of the Federal Office of Justice. (4) The Federal Office of Justice shall include the consumer conciliation bodies under paragraph 1 in the list under § 33(1) of the Act on Alternative Dispute Resolution in Consumer Matters (*Verbraucherstreitbeilegungsgesetz – VSBG*) and shall publish the recognition and the revocation or withdrawal of recognition in the Federal Gazette. (5) (...).' My own translation.

soon as the client's documents are complete, it forwards the complaint to the management of the bank concerned. The bank must respond to the complaint within one month.

If the bank agrees with the complainant and resolves the disagreement in the interests of the customer, the conciliation procedure is closed. Otherwise, the complainant will be informed of the bank's rejection and referred to the possibility to comment on the bank's rejection within one month.

The case is then submitted to the conciliator for a decision. If the conciliator is unable to obtain further information from the parties on the basis of the opinions or documents submitted, he or she may request further information. The conciliator forwards his or her decision directly to the parties, which concludes the conciliation procedure. There is no legal remedy against the conciliation decision. If the complainant is not satisfied with the conciliation decision, he or she may submit the dispute to court at any time. The procedure is free of charge for bank customers and without risk. If a client does not agree with the ombud's decisions, the way to the ordinary courts remains open for him or her.

If the appeal is successful, customers are granted their rights quickly and easily. Legal disadvantages, e.g., due to statute of limitations, cannot occur during the conciliation procedure because the statute of limitations is considered to be suspended for the duration of the procedure.

The banks have undertaken to accept arbitration claims up to an amount in dispute of EUR 10,000. This binding effect is not mandatory as binding decisions are not part of the general standard for conciliation bodies voluntarily supported by the industry. Banks often also accept non-binding arbitration decisions made against them with a value in dispute in excess of EUR 10,000, however.⁵⁶⁰⁵

According to the information accessible on the website of the ombudsmen for private banks, about half of the complaints end in favour of the customers. The outcome of the proceedings shifted in 2014 and 2015 due to the wave of complaints on the subject of 'processing fees for consumer loans' though. In 2014, more than 100,000 complaints reached the office of the ombudsman for private banks. This is because the limitation period was to be suspended by the initiation of proceedings and the banks would repay the processing fees justifiably demanded in accordance with the rulings of the BGH. A very high proportion of these complaints have

⁵⁶⁰⁵ The procedure for ombudsmen of the private bank is accessible at <https://bankenombudsmann.de/ombudsmannverfahren/ablauf-des-verfahrens>.

been settled in advance in favour of the customers as the banks have followed the recovery claims.⁵⁶⁰⁶

Hence, this kind of pre-trial procedure is very efficient with regard to the high number of complaints handled, its speediness and cost-effectiveness. Since this procedure not only concerns §§ 305 *et seq.* BGB but all consumer-relevant matters, it is however difficult to say which proportion of standard business terms related matters are resolved by ombuds. As already mentioned, the banks' and insurance companies' standard terms are much more in line today than before due to institutional actions. As the example above concerning the justifiably demanded reimbursement of processing fees demonstrates, this kind of pre-trial proceedings seems to have its justification.

2. Institutional action

2.1 Institutional actions as a significant complement of the substantive standard terms legislation

In order to tackle unfair standard terms more efficiently, the German legislature provided for the possibility to file institutional actions.⁵⁶⁰⁷

In German law, four different types of institutional actions (*Verbandsklagen*) aiming at consumer protection have been created in the last decades. The oldest one of these institutional actions is set out in § 8 UWG⁵⁶⁰⁸ and has the purpose of combating unfair competition.

⁵⁶⁰⁶ See <https://bankenombudsmann.de/ombudsmannverfahren/beschwerde-statistik>.

⁵⁶⁰⁷ The term '*Verbandsklage*' can be translated as 'action in the collective interest' (Naudé 2010 *SALJ* 517), 'general use challenge' (Naudé 2010 *SALJ* 528), 'abstract challenge' (Naudé 2009 *SALJ* 515) or 'legal action taken by an association' (Dietl *Legal Dictionary* s.v. '*Verbandsklage*'). In the German part of this thesis, the term 'institutional action' is preferred.

⁵⁶⁰⁸ UWG = Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act). **§ 8 UWG:** 'Elimination; injunctive relief: (1) Whoever engages in an illegal commercial practice pursuant to [§] 3 or [§] 7 can be sued for elimination, and in the event of the risk of recurrence, to cease and desist. The claim to cease and desist shall already pertain in the event of the risk of such contravention of [§] 3 or [§] 7. (2) Where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate, the claim to cease and desist and the claim to elimination shall be deemed to apply in relation to the owner of the business as well. (3) The claims under [paragraph] (1) shall vest in 1. every competitor; 2. associations with legal personality which exist for the promotion of commercial or of independent professional interests, if a considerable number of entrepreneurs belong thereto, and which distribute goods or services of the same or similar type on the same market, provided such associations are actually in a position, particularly in terms of their personnel, material and financial resources, to pursue the tasks, under their memoranda of association, of promoting commercial or independent professional interests, and so far as the contravention affects the interests of their members; 3. qualified entities that prove that they are entered in the list of qualified entities pursuant to [§] 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests (OJ L 110 of 1.5.2009, p. 30); 4. Chambers of Industry and Commerce or Craft Chambers. (4) The assertion of the claims referred to in [paragraph] (1) shall be inadmissible where such assertion is improper having regard to all the circumstances, especially where it predominantly serves the purpose of generating a claim for reimbursement of expenses or of the costs of taking legal action against the contravening party. In such cases the party against which the claim is directed may demand reimbursement of the costs of his legal defence. Further

Furthermore, the former AGBG contained the institutional action against users and persons who recommend standard business terms, and which is now set out in § 1 UKlaG.⁵⁶⁰⁹ Relatively new is the right to require refrainment from practices infringing consumer protection legislation under § 2 UKlaG.⁵⁶¹⁰ The so-called 'model declaratory proceedings' (*Musterfeststellungsklage*) is the fourth type of institutional action. It has been introduced into German law in 2018.⁵⁶¹¹ The focal provision for the combating of ineffective standard terms by means of institutional actions is § 1 UKlaG,⁵⁶¹² which also shapes the character of the UKlaG.⁵⁶¹³ Therefore, this type of institutional action will be discussed in the following.

claims for reimbursement shall remain unaffected. (5) [§] 13 of the Injunctive Relief Act shall apply mutatis mutandis; in [§] 13 (1) and (3), second sentence, of the Injunctive Relief Act the claims listed therein under the Injunctive Relief Act shall be replaced by the claims under this provision. In all other respects, the Injunctive Relief Act shall not apply, unless one of the cases listed in [§] 4a of the Injunctive Relief Act applies.' Official translation of the UWG by the Federal Ministry of Justice, accessible at http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0116.

⁵⁶⁰⁹ UKlaG = Unterlassungsklagengesetz (Injunctions Act). There is currently no official translation of this statute by the Federal Ministry of Justice. In this thesis, the English translation of the EU Consumer Law Acquis Compendium No. 8 (IPR Verlag GmbH Munich 2005) is used. Where necessary, the author of this thesis has updated this translation to the current version of the UKlaG. This translation seems not to be available online anymore (28 March 2020).

⁵⁶¹⁰ **§ 2 UKlaG:** '§ 2 Right to require refrainment from practices infringing consumer protection legislation - (1) In the interests of consumer protection, those who infringe provisions serving to protect consumers (consumer protection laws) in a manner other than by use or recommendation of standard contract terms may be required to refrain from doing so. If the infringements are committed by an employee or agent in a business, this right can also be asserted against the owner of the business. (2) Consumer protection laws for the purposes of this provision are: the provisions of the [BGB] applying to sales of consumer goods, doorstep selling, distance selling contracts, time-share contracts, travel contracts, consumer loan contracts and to financial accommodation arrangements, instalment supply contracts and loan brokerage contracts between a businessperson and a consumer, the provisions transposing Articles 5, 10 and 11 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, p. 1), the Distance Learning Protection Act, the provisions of Federal and Land law transposing Articles 10 to 21 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23) as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 202, 30.7.1997, p. 60), the pertinent provisions of the Medicines Act and Article 1 §§ 3 to 13 of the Medical Advertising Act, § 23 of the Investment Companies Act and §§ 11 and 15h of the Foreign Investment Act. (3) An action cannot be brought if, in view of all the circumstances, it is abusive, and in particular if its primary purpose is to create a claim for legal expenses or costs against the infringing party.'

⁵⁶¹¹ Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage of 12 July 2018. See §§ 606-614 ZPO. See discussion on the *Musterfeststellungsklage* in Part III ch 6 para 4.

⁵⁶¹² **§ 1 UKlaG:** '§ 1 Right to require refrainment from use and withdrawal of recommendation of standard contract terms - Those who use provisions which are invalid under §§ 307 to 309 of the [BGB] in standard contract terms or who recommend such provisions for commercial use may be required to refrain from using such terms and to withdraw any recommendation made.'

⁵⁶¹³ MüKo ZPO/Micklitz before § 1 UKlaG para 12.

In the wake of the Modernisation of the Law of Obligations,⁵⁶¹⁴ the provisions governing the institutional action against ineffective standard terms has been systematically separated from the substantive standard terms provisions and inserted into the newly created UKlaG of 2002.

The institutional action is a core element of German standard business terms legislation. Its objective is to make content control more efficient and to allow for a broader effect. The UKlaG protects not individual consumers but the public in general.⁵⁶¹⁵ Moreover, institutional actions have the effect of inciting standard terms users to draft irreproachable clauses, and they often step in when customers refrain to take legal action because of the wording of certain clauses.

When assessing standard clauses within an institutional action, an abstract-universal approach is applied. Contrary to individual proceedings, the given clause is not declared invalid, but the user is required to refrain from using it, and persons who recommended the clause are required to withdraw any recommendation made. The court rulings of institutional actions have not only an *inter partes* effect but are also valid for the benefit of the contractual partners of the given standard terms user (§ 11 UKlaG).⁵⁶¹⁶

The restriction of the scope of application of §§ 305 *et seq.* under § 310(4), according to which contracts in the field of the law of succession, family law and company law or to collective agreements and private-sector works agreements or public-sector establishment agreements⁵⁶¹⁷ are excluded, also has an impact on the scope of application of the UKlaG. Furthermore, under § 15 UKlaG,⁵⁶¹⁸ the Act does not apply to labour law. This clarification was necessary because according to § 310(4), for content control of employment contracts, reasonable account must be taken of the special features that apply in labour law.

The reasons for the exclusion of labour law from institutional actions are two-fold. First, the legislator wished to avoid that the civil courts had to decide on ineffective clauses in employment contracts because the labour courts are more specialised in this field. Second, the interests of employees are traditionally represented by unions and employee representatives in

⁵⁶¹⁴ Schuldrechtsmodernisierungsgesetz of 26 November 2001, BGBl. I at 3138.

⁵⁶¹⁵ Consistent case law. See, e.g., BGH NJW 1994, 2693.

⁵⁶¹⁶ § 11 UKlaG: 'Effects of the judgment - If the user against whom judgment has been given fails to comply with an injunction based on § 1, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. However, this party cannot invoke the effect of the injunction if the user against whom judgment has been given could contest the judgment under § 10.' See Schmidt E. NJW 2002, 25-30.

⁵⁶¹⁷ See s 5(2)(f) and (g) CPA under which transactions giving effect to a collective bargaining agreement and collective agreements are excluded from the scope of application of the Act.

⁵⁶¹⁸ § 15 UKlaG: 'Exclusion of labour law – This Act shall not apply to labour law.'

the companies, and not by consumer associations.⁵⁶¹⁹ Hence, the legislator did not wish to add another actor in the already complicated labour law relations.⁵⁶²⁰

This is similar to section 5(2)(e) of the Consumer Protection Act that entirely excludes services to be supplied under an employment contract from the application of the Act.⁵⁶²¹

The existence of institutional actions is not unanimously praised. The opponents argue that institutional actions do not serve private interests but rather a public interest. The UKlaG and the ZPO where the procedural aspects of the institutional action are set out are designed for civil procedures though. Hence, the parties are in a position to continue or abandon their lawsuits at will. The opponents therefore assert that public interest litigation such as institutional actions would be better conducted in administrative proceedings.⁵⁶²² With a view to the fact that preventive control by administrative bodies has not reached the expected efficiency where it had been established,⁵⁶²³ it is submitted that the conduction of institutional action by public entities would not lead to satisfactory results and that the institutional action is more effective.

2.2 Impact of European legislation

The field of law governing institutional actions has been and is being shaped by European law. The Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests⁵⁶²⁴ aims to enable the 'free movement of actions for an injunction'⁵⁶²⁵ within the EU and to improve consumer protection in cross-border transactions. Difficulties arising in the field of consumer protection and having their source in the fact that standard terms users are located in other Member States than the country where the standard terms are used, shall be prevented by this Directive.⁵⁶²⁶ Although the Directive suggests two possible models for ensuring cross-border consumer protection, i.e., independent public bodies or private consumer organisations,⁵⁶²⁷ the German legislator chose the second option. This is because in Germany,

⁵⁶¹⁹ BT-Drs. 14/7052 at 189. *Wendland* in: Staudinger/Eckpfeiler E para 20 criticises the exclusion of employment contract from content control in terms of § 15 UKlaG, though.

⁵⁶²⁰ Stoffels *AGB-Recht* 478.

⁵⁶²¹ See discussion of the application of the CPA in Part I ch 2.

⁵⁶²² E. Schmidt *NJW* 2002, 25.

⁵⁶²³ See MüKo ZPO/Micklitz (2001) before § 13 AGBG para 13, with further references.

⁵⁶²⁴ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. This Directive replaced Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

⁵⁶²⁵ This phrase was coined in the Green Paper of the Commission of the European Communities on access of consumers to justice and the settlement of consumer disputes in the single market of 16 November 1993 (KOM (93) 576 at 77 *et seq.*

⁵⁶²⁶ See Recitals (4) to (8) of the Directive.

⁵⁶²⁷ Article 3 of the Directive.

private consumer protection organisations have ascertained consumer protection from the beginning. What is more, in a 'private law society', this option is more system-compatible. In addition, preventive control by administrative bodies has not reached the expected efficiency where it had been established.⁵⁶²⁸ Stoffels contends not without good reason that the tendency within EU law to shift the execution of consumer protective measures more towards administrative organisations⁵⁶²⁹ has thus to be seen critically.⁵⁶³⁰

By and large, the institutional action is an effective tool in the fight against unfair standard clauses, although it has not realised its full potential.⁵⁶³¹ Still many illegal and 'invented' clauses are used, and due to the Modernisation of the Law of Obligations which made a revision of many standard clauses necessary, the number of ineffective standard provisions might even have increased. The creation of the institutional action has not been in vain though because the standard business terms of financial institutions⁵⁶³² and insurance companies,⁵⁶³³ for example, are much more in keeping with the legislation today than they were before.⁵⁶³⁴ This fact was often preceded by spectacular and high-profile court actions brought by consumer associations.⁵⁶³⁵

Besides, when transposing the Directive into German law, the legislator adapted the *locus standi* of consumer organisations for cross-border transactions and created a registration procedure for eligible organisations.⁵⁶³⁶

Finally, due to the Consumer Protection Cooperation Regulation (EC) No. 2006/2004 of 2004,⁵⁶³⁷ the legislator completed the UKlaG by inserting § 4a⁵⁶³⁸ which extends punctually active legitimation for transnational transactions.

⁵⁶²⁸ See MüKo ZPO/Micklitz (2001) before § 13 AGBG para 13, with further references.

⁵⁶²⁹ E.g., by the Consumer Protection Cooperation Regulation (EC) No 2006/2004 of 27 October 2004.

⁵⁶³⁰ Stoffels *AGB-Recht* 480.

⁵⁶³¹ From 2000 to 2005, for instance, there were only 62 appeals on points of law (*Revisionen*) where consumer associations were involved. In the same period, there were 354 court actions in total, which is not a very high number either. This trend continued in subsequent years. The very active Verbraucherzentrale Bundesverband, for example, issued in 2009 105 warnings and 15 court actions. See UBH/Witt before § 1 UKlaG para 8.

⁵⁶³² UBH/Witt before § 1 UKlaG para 8.

⁵⁶³³ E.g., BGH *NJW* 1994, 2693.

⁵⁶³⁴ UBH/Witt before § 1 UKlaG para 8.

⁵⁶³⁵ UBH/Witt before § 1 UKlaG para 8, with further references.

⁵⁶³⁶ § 3 UKlaG.

⁵⁶³⁷ Regulation (EC) No 2006/2004 of the European Parliament and the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

⁵⁶³⁸ Currently, there is no official translation in English of this provision.

It can be expected that in the future, the development of the institutional action in Germany will probably more depend on Brussels than on Berlin. Stoffel doubts however with good reason that the realisation of the objective of the 'free movement of actions for an injunction' is realistic because the already overstrained consumer protection organisations are unlikely to be able to take on further cases. He therefore advocates for better financial resources of these organisations in order to improve their work in the long term.⁵⁶³⁹

There are also tendencies within EU law to harmonise the various national procedural provisions in order to improve consumer protection.⁵⁶⁴⁰ It is suggested that Stoffel's arguments mentioned above also apply here as long as consumer organisations are not granted more financial resources.

2.3 Abstract-general enquiry in institutional actions

The decision of inserting an abstract-universal approach into the former AGBG that came into force in 1977 was significant. After a very fruitful debate, the legislator opted for this approach because it was of the view that a particular-personalised approach would not lead to satisfactory results with respect of the combat of abusive standard clauses. If the individual clients would have to go to court, the following decisions would only have an *inter partes* effect, and other customers would not be able to benefit from the judgment. Experience has shown that individuals rather shy away from court proceedings. They often think that standard business terms have quasi-legislative authority. They also cannot evaluate the risks involved and are afraid of the costs involved with individual proceedings.⁵⁶⁴¹ Hence, it was logical to create an institutional control procedure with a broad effect that is disconnected from the particular contractual relationship between the user and the other party.⁵⁶⁴²

The South African legislator opted for another approach instead. Individual consumers have to file individual proceedings rather than consumer organisations bringing abstract-use challenges. Although section 77 of the Act sets out various support mechanisms for consumer protection groups, which might represent consumers in court 'either specifically or generally', the Act does not provide for any proceedings similar to institutional actions.⁵⁶⁴³

⁵⁶³⁹ Stoffels *AGB-Recht* 481. Also *Wendland* in: Staudinger/Eckpfeiler E para 20 is of the view that the biggest obstacle for an effective work of consumer associations is their weak financial resources.

⁵⁶⁴⁰ See Report of the Commission concerning the application of Directive 93/13/EEC, KOM (2000) 248. See also MüKo ZPO/Micklitz before § 1 UKlaG para 53 *et seq.*

⁵⁶⁴¹ MüKo ZPO/Micklitz (2001) before § 13 AGBG para 2.

⁵⁶⁴² Stoffels *AGB-Recht* 480.

⁵⁶⁴³ See discussion in Part I ch 5.

2.3.1 Injunctive relief against the user

In the following, the requisites for institutional actions will be discussed. First, the injunctive relief, i.e., the refrainment from the use of standard terms, will be presented. Afterwards, the claim for withdrawal of recommendations of standard provisions will be discussed.

Despite its more academic relevance, the legal nature of the injunctive relief and the claim of withdrawal shall be shortly presented. The prevailing view has always qualified these claims as substantive claims in the sense of § 194(1).⁵⁶⁴⁴ The BGH also advocated this opinion.⁵⁶⁴⁵

Others merely qualified these claims as a 'right to take legal action'⁵⁶⁴⁶ or a 'private-law control competence'.⁵⁶⁴⁷ Eike Schmidt argues that these claims serve the protection of consumer interests and therefore a public interest, which would be hardly compatible with a 'private individualisation'.⁵⁶⁴⁸ This dispute has been decided in favour of the prevailing opinion by the Act of 27 June 2000.⁵⁶⁴⁹ By this statute, the legislator replaced the phrase 'claims can only be exercised by (...) ('*Ansprüche ... können nur geltend gemacht werden*') in § 13(2) AGBG by the formulation 'the right to require' ('*Ansprüche ... stehen zu*') in § 3(1) UKlaG. The modification of this formulation makes it clear that the given claims are not of a procedural but of a substantive nature.⁵⁶⁵⁰ What is more, § 3(2) 2nd sent. UKlaG provides for a restricted right to assign the right of action. According to § 398, only (substantive) 'claims may be transferred by the obligee to another person by contract with that person (assignment)', but no procedural legal positions. The only caveat of this substantive claim opposed to others is that not the substantive rights of the plaintiff are concerned, but the rights of the concerned public.⁵⁶⁵¹

a) Ineffective standard business terms

Subject to institutional actions in terms of § 1 UKlaG are standard terms that are invalid under §§ 307 to 309 BGB as well as parts thereof that can be separated without the clause becoming inoperative. Clauses that are intended for non-recurrent use on only one occasion under

⁵⁶⁴⁴ Palandt/Bassenge § 1 UKlaG para 4, UBH/Witt § 1 UKlaG para 32, NK/Walker § 1 UKlaG para 2, Staudinger/Schlosser § 1 UKlaG para 3. **§ 194(1) BGB:** 'The right to demand that another person does or refrains from an act (claim) is subject to limitation.'

⁵⁶⁴⁵ E.g., BGH NJW 1995, 1488.

⁵⁶⁴⁶ *Prozessführungsbefugnis*. Hadding JZ 1970, 305 and 307 *et seq.*

⁵⁶⁴⁷ *Privatrechtliche Kontrollkompetenz*. Göbel *Prozesszweck der AGB-Klage* at 125 *et seq.*

⁵⁶⁴⁸ E. Schmidt NJW 2002, 25 (28).

⁵⁶⁴⁹ BGBl. I at 897, with rectification at 1139.

⁵⁶⁵⁰ See BT-Drs. 14/2658 at 52.

⁵⁶⁵¹ Stoffels *AGB-Recht* 487.

§ 310(3) no. 2 cannot be assessed in terms of the UKlaG since in abstract proceedings, the extent to which the other party could influence the clause's content cannot be evaluated.⁵⁶⁵²

The wording of § 1 UKlaG is too restrictive in that not only clauses that are ineffective under §§ 307 to 309 are subject to an institutional action, but also infringements against statutory prohibitions in terms of § 134⁵⁶⁵³ or formal requirements according to § 125.⁵⁶⁵⁴ The restrictions set out in § 307(3) also limit the claim for refrainment in terms of § 1 UKlaG, which is significant for clauses stipulating the price and the specification of performance. The latter are nonetheless subject to the transparency requirement in terms of § 307(3) 2nd sent., read in conjunction with § 307(1) 2nd sent.⁵⁶⁵⁵

The claim in terms of § 1 UKlaG requires that the given clause be invalid. Therefore, institutional actions cannot be based on provisions the legal consequence of which is merely the non-incorporation of a clause.⁵⁶⁵⁶ On the other hand, provisions that aim to override the incorporation requirements in terms of §§ 305(2) to 306 violate mandatory law and are subject to institutional actions.⁵⁶⁵⁷ The reason for the restrictive wording of § 1 UKlaG is that the BGB provisions for the incorporation of standard clauses, and especially § 305c(1) (surprising clauses), generally require an enquiry of the circumstances of the given case, which is not compatible with the general-abstract approach of the UKlaG. The surprising character of a clause can be eliminated where the user informs the other party of its content, for instance.⁵⁶⁵⁸

When evaluating a clause within an institutional action, one has to interpret the provision in the most unfavourable manner to the consumer.⁵⁶⁵⁹ The enquiry of the reasonableness of the clause is done in a general-abstract way that does not take into consideration the circumstances of the individual case.⁵⁶⁶⁰ Hence, the other circumstances attending the entering into of the contract according to § 310(3) no. 3 can also be considered in individual proceedings.⁵⁶⁶¹

⁵⁶⁵² Palandt/Bassenge § 1 UKlaG para 6, Staudinger/Schlosser § 1 UKlaG para 2.

⁵⁶⁵³ **§ 134 BGB:** 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'

⁵⁶⁵⁴ WLP/Lindacher § 1 UKlaG para 17. **§ 125 BGB:** 'A legal transaction that lacks the form prescribed by statute is void. In case of doubt, lack of the form specified by legal transaction also results in voidness.'

⁵⁶⁵⁵ UBH/Witt § 1 UKlaG para 6.

⁵⁶⁵⁶ UBH/Witt § 1 UKlaG para 13, Staudinger/Schlosser § 1 UKlaG para 12.

⁵⁶⁵⁷ Staudinger/Schlosser § 1 UKlaG para 12.

⁵⁶⁵⁸ Stoffels *AGB-Recht* 482 and 483.

⁵⁶⁵⁹ See discussion of interpretational control, Part II ch 4.

⁵⁶⁶⁰ Stoffels *AGB-Recht* 483.

⁵⁶⁶¹ UBH/Witt § 1 UKlaG para 7.

b) 'Use' of standard business terms

Besides the requirement of an invalid standard clause, the latter also must be used. A use in terms of § 1 UKlaG is given where the standard provision is used in commercial transactions.⁵⁶⁶² Since institutional actions aim to prevent the use of invalid clauses, it is not necessary though that the given clause has been incorporated into the agreement. It is sufficient that the intention of incorporating the standard provisions into contracts in the future is apparent.⁵⁶⁶³ This wide interpretation corresponds to article 7(2) of the Unfair Terms Directive according to which the abstract control must be designed for 'contractual terms *drawn up* for general use'.⁵⁶⁶⁴ Thus, a commercial offer or the invitation to make an offer concluding standard business terms,⁵⁶⁶⁵ or an invoice on which standard terms are printed, without the latter being incorporated,⁵⁶⁶⁶ fulfil the conditions of the 'use' of standard clauses in terms of § 1 UKlaG.

A distinction between the first and the recurrent use of standard terms does not take place. Hence, the use of standard terms does not end with their incorporation into the contract but also includes the reference to not incorporated or ineffective standard clauses when executing agreements that already have been concluded.⁵⁶⁶⁷ As a consequence, the user's intention not to present the given clauses to the other party in future transactions does not mean that there is no 'use' in terms of § 1 UKlaG.⁵⁶⁶⁸

'User' is generally the person that shall be a party to the contract. This is in most cases the company using the standard terms, and not the acting company organ (e.g., the managing director).⁵⁶⁶⁹ There is an exception in cases in which the representative of the company – or of the party – has a significant interest in the incorporation of the standard terms. Then, the representative is considered the user. This is the case, for instance, for a construction management company with respect to all standard provisions that aim to keep the construction costs low and therefore increase the company's profit. Furthermore, an architect who inserts clauses in its standard terms that are valid between its client and the construction company, and which are favourable in terms of his legal position *vis-à-vis* its client, is considered a user.⁵⁶⁷⁰

⁵⁶⁶² BGH NJW 1987, 2867.

⁵⁶⁶³ Palandt/Bassenge § 1 UKlaG para 7, UBH/Witt § 1 UKlaG para 24.

⁵⁶⁶⁴ WLP/Pfeiffer Art 7 RiLi para 7. Emphasis added.

⁵⁶⁶⁵ MüKo ZPO/Micklitz § 1 UKlaG para 20.

⁵⁶⁶⁶ LG Munich BB 1979, 1789.

⁵⁶⁶⁷ BGH NJW 2013, 593 *et seq.*

⁵⁶⁶⁸ Stöffels AGB-Recht 483.

⁵⁶⁶⁹ WLP/Lindacher § 1 UKlaG para 28.

⁵⁶⁷⁰ WLP/Lindacher § 1 UKlaG para 29.

c) Danger of recurrent use

A further and unwritten requisite of § 1 UKlaG is an existing danger of the recurrent use⁵⁶⁷¹ of incriminated standard terms.⁵⁶⁷² Such a danger can be assumed where the user already has used its terms in transactions.⁵⁶⁷³ The mere modification of the incriminated clause does not eliminate the danger of recurrence, neither does the user's declaration not to use the given clause anymore. In order to eliminate the danger of recurrence, there must be circumstances the existence of which regularly speaks for the assumption based on general experience that the user will not use the clause in the future anymore. The danger of recurrence persists however if the user insists during litigation that the clause it has used was valid and where the user is not ready to make a declaration of discontinuance the infringement of which is punishable.⁵⁶⁷⁴ Generally, a user can only dispel the danger of recurrent use if it makes a serious declaration of discontinuance and by expressing the seriousness of its declaration by accepting a contract penalty.⁵⁶⁷⁵ A short period in which the user can implement the modifications is acceptable, but not a period of permitted use of the remaining standard forms.⁵⁶⁷⁶

For the assumption of a danger of recurrent use, a seriously impending *first use* is sufficient. These cases shall be rather rare in practice though.⁵⁶⁷⁷ Hence, an entrepreneur who plans to create a 'pizza taxi company' and orders the printing of a flyer which presents its future business and includes invalid standard clauses creates a seriously impending first use. Injunctive relief is possible at this stage.⁵⁶⁷⁸

d) Content of the claim

The standard terms user must cease any conduct that can be qualified as 'use' of the given clause. This includes the prohibition of incorporating invalid clauses into new contracts and referring to them when executing already concluded agreements.⁵⁶⁷⁹ Usually, users fulfil these requirements by 'simply doing nothing'.⁵⁶⁸⁰ If the incriminated standard provisions are physically posted in the user's premises, a positive action is required, i.e., the removal or modification of the said terms. If the user employs agents, it must ensure, by taking appropriate

⁵⁶⁷¹ *Wiederholungsgefahr*.

⁵⁶⁷² BGH NJW 2002, 2386.

⁵⁶⁷³ MüKo ZPO/Micklitz § 1 UKlaG para 27, Staudinger/Schlosser § 1 UKlaG para 20.

⁵⁶⁷⁴ Stoffels AGB-Recht 484. *Strafbewehrte Unterlassungserklärung*.

⁵⁶⁷⁵ OLG Cologne NJW-RR 2003, 316.

⁵⁶⁷⁶ OLG Cologne NJW-RR 2003, 316. *Aufbrauchfrist*.

⁵⁶⁷⁷ Staudinger/Schlosser § 1 UKlaG para 20a.

⁵⁶⁷⁸ Example found in Stoffels AGB-Recht 484.

⁵⁶⁷⁹ Palandt/Bassenge § 1 UKlaG para 9.

⁵⁶⁸⁰ WLP/Lindacher § 1 UKlaG para 48 ('*schlichtes Nichts-Tun*').

organisational measures, that they do not use the invalid terms.⁵⁶⁸¹ The claim does not include the restitution of the remaining standard forms.⁵⁶⁸² The injunctive relief is immediately effective, and the user may not claim a period of allowed use.⁵⁶⁸³

2.3.2 Withdrawal of recommendation of standard terms

§ 1 UKlaG also provides that a person who recommends invalid provisions for commercial use may be required to withdraw such recommendation. The conditions for this claim are similar to those for the injunctive relief.⁵⁶⁸⁴

The claim for withdrawal of recommendation is a claim for elimination of the danger of continued use of invalid standard terms for which the withdrawal of recommendation is an appropriate and necessary measure.⁵⁶⁸⁵ It ceases to exist where the user unambiguously ceases its recommendation before litigation.⁵⁶⁸⁶

a) 'Recommendation' of standard terms

The BGB or the UKlaG do not contain a legal definition of 'recommendation'. Unlike the user, a person recommending standard terms is not a party to the contract but has the objective that third parties use its terms. He or she therefore recommends the use of specific standard provisions to a number of others, suggests their use or incites them to use such terms.⁵⁶⁸⁷

Examples are professional associations that design contract forms themselves or have them designed by others. This also applies to public corporations, such as law societies, medical associations or architect chambers.⁵⁶⁸⁸ Landowner associations which publish and circulate model lease forms are concerned too.⁵⁶⁸⁹ On the other hand, legal opinions published in law journals on the validity of specific standard terms are not 'recommendation'⁵⁶⁹⁰ because authors of scientific contributions do not intend their articles for commercial use.⁵⁶⁹¹ Moreover, lawyers who design standard terms for their clients or notaries public using form compendiums for the insertion of certain standard clauses into contracts do so for individual clients, but not for numerous persons. This is different though where lawyers or notaries public recommend

⁵⁶⁸¹ WLP/Lindacher § 1 UKlaG para 48.

⁵⁶⁸² UBH/Witt § 1 UKlaG para 35.

⁵⁶⁸³ Palandt/Bassenge § 1 UKlaG para 12.

⁵⁶⁸⁴ Stoffels *AGB-Recht* 485.

⁵⁶⁸⁵ Palandt/Bassenge § 1 UKlaG para 12.

⁵⁶⁸⁶ WLP/Lindacher § 1 UKlaG para 51.

⁵⁶⁸⁷ MüKo ZPO/Micklitz § 1 UKlaG para 35.

⁵⁶⁸⁸ Staudinger/Schlosser § 1 UKlaG para 30.

⁵⁶⁸⁹ UBH/Witt § 1 UKlaG para 28.

⁵⁶⁹⁰ WLP/Lindacher § 1 UKlaG para 41, Palandt/Bassenge § 1 UKlaG para 12.

⁵⁶⁹¹ UBH/Witt § 1 UKlaG para 31.

standard terms to several clients, even if this is done in the context of individual mandates.⁵⁶⁹² The authorisation of administrative bodies for the use of certain standard terms cannot be qualified as recommendation either.⁵⁶⁹³

b) Content of the claim

Persons who recommend the use of invalid standard terms have to cease any conduct in this regard that can be qualified as a recommendation. Furthermore, they have to withdraw their recommendation in the same fashion as the recommendation (§ 9 no. 4 UKlaG). The obligation to withdraw the recommendation has a much broader effect than the simple cessation of the recommendation and has thus a greater impact.⁵⁶⁹⁴ The injunction judgment must be made known in the same way as the recommendation.⁵⁶⁹⁵

2.3.3 Information for injunction proceedings under § 13 UKlaG

§ 13 UKlaG⁵⁶⁹⁶ grants a right of eligible bodies to information of the name and address for service of a party *vis-à-vis* providers of postal, telecommunications, television or media services if that information is necessary and cannot be obtained by other means.

The rationale of this provision is to safeguard the right of action under the UKlaG. It ensures that the plaintiff knows the user's address for service.⁵⁶⁹⁷ The eligible body must declare in writing that this information is necessary in order to assert a right under the UKlaG and cannot obtain it elsewhere. Eligible bodies are qualified consumer associations, associations with legal personality for the promotion of commercial and independent professional interests, as well as the Chambers of Trade and Industry or the Chambers of Crafts and Labour.

⁵⁶⁹² UBH/Witt § 1 UKlaG para 31.

⁵⁶⁹³ UBH/Witt § 1 UKlaG para 28.

⁵⁶⁹⁴ Stoffels *AGB-Recht* 486.

⁵⁶⁹⁵ § 9 no. 4 UKlaG.

⁵⁶⁹⁶ **§ 13(1) UKlaG:** '(1) Any party which by way of business provides postal, telecommunications, television or media services or contributes to the provision of such services shall, provide 1. eligible bodies that demonstrate that they are registered in the list pursuant to § 4 or the list of the qualified entities pursuant to article 4(3) of the Directive 2009/22/EC, 2. associations with legal personality for the promotion of commercial or independent professional interests, 3. the Chambers of Trade and Industry or the Chambers of Crafts and Labour on request with the name and address for service of a party involved in postal, telecommunications, television or media operations if the body or association declares in writing that this information is necessary in order to assert a right under §§ 1 to 2a or § 4a and cannot be obtained elsewhere.' (Translation edited by myself, as the official translation was not up-to-date).

⁵⁶⁹⁷ BT-Drs. 14/6857 at 39 (no. 145).

2.3.4 Limitation period

The legislator did not insert the special limitation periods of § 13(4) AGBG⁵⁶⁹⁸ in the UKlaG because they were dispensable due to the revision of the limitation periods in the BGB.⁵⁶⁹⁹ Hence, §§ 194 *et seq.* BGB are applicable. This means that for the claim for injunction and withdrawal of recommendation the standard 3-year limitation period of § 195 BGB⁵⁷⁰⁰ applies. If a user reuses its standard terms or the latter are recommended again, the limitation period starts from the beginning.⁵⁷⁰¹ As § 195 provides for the standard limitation period, it also applies to individual actions.

2.3.5 Eligible bodies

The claims contemplated in § 1 UKlaG are only granted to particular bodies, but not to partners to the given contract or competitors.⁵⁷⁰² § 3(1) UKlaG⁵⁷⁰³ governs the eligible bodies which will be discussed in the following.

a) Qualified entities

The German legislator took the term 'qualified entities' used in § 3(1) no. 1 UKlaG from articles 3 and 4 of Directive 98/27/EC. It includes consumer associations that are inscribed in the list of the Federal Agency of Justice.⁵⁷⁰⁴ The inscription in the list is done on request⁵⁷⁰⁵ and is constitutive. Consumer associations that are inscribed in the list of the European Commission of the European communities are equal to German associations.⁵⁷⁰⁶ In Germany, the request for inscription in the national list entails the automatic forwarding of the request for inscription to the European Commission in the European list and inscription in this list.⁵⁷⁰⁷ The European

⁵⁶⁹⁸ § 13(4) AGBG provided for a limitation period of two years from the moment at which the eligible body had knowledge of the user or recommendation of the invalid terms, otherwise a limitation period of four years.

⁵⁶⁹⁹ BT-Drs. 14/6040 at 275.

⁵⁷⁰⁰ § 195: 'The standard limitation period is three years.'

⁵⁷⁰¹ Erman/*Roloff* § 1 UKlaG para 12, Palandt/*Bassenge* § 1 UKlaG para 15.

⁵⁷⁰² Stöffels *AGB-Recht* 488.

⁵⁷⁰³ § 3(1) UKlaG: '(1) The following shall have the right to require refrainment and withdrawal as mentioned in §§ 1 and 2: 1. qualified entities which demonstrate that they are inscribed in the list of qualified entities as per § 4 or in the list of the European Commission as per Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 01/05/2009, p. 30), 2. associations with legal personality for the promotion of commercial and independent professional interests, insofar as their membership includes a considerable number of businesses marketing goods or commercial services of the same or a similar type on the same market, insofar as their staffing, material and financial resources enable them actually to perform the interest promotion functions laid down in their statutes, and insofar the infringement relates to the interests of their members, 3. the Chambers of Trade and Industry or the Chambers of Crafts and Labour. The right of action may be assigned only to bodies within the meaning of sentence 1.'

⁵⁷⁰⁴ Bundesamt für Justiz.

⁵⁷⁰⁵ § 4(2) 1st sent. UKlaG.

⁵⁷⁰⁶ § 3(1) 1st sent. no. 1 2nd alt. UKlaG.

⁵⁷⁰⁷ § 4(1) 2nd sent. UKlaG.

list is published in the Official Journal of the EU and updated every six months.⁵⁷⁰⁸ In contrast, the German list is updated once a year and published on 1 January in the Federal Gazette (*Bundesanzeiger*).⁵⁷⁰⁹ The Federal Agency (Bundesjustizamt) publishes a list on its homepage that is updated at quarterly intervals though.⁵⁷¹⁰ Witt correctly indicates that there is a divergence between the publishing dates of the *Bundesanzeiger* and the Official Journal of the EU, and that the Federal Agency of Justice immediately forwards the names and addresses of newly inscribed associations to the Commission. One should therefore exclusively refer to the EU list in order to know whether an association has *locus standi*. The informative value of the German list in this regard is thus limited.⁵⁷¹¹

In legal proceedings, the complaining qualified entity must demonstrate its *locus standi* by presenting a certification showing that it is inscribed in the given list, or an excerpt of the Official Journal of the EU.⁵⁷¹² The court must also verify whether the standing is covered by the statutory object of the given entity.⁵⁷¹³

An association must be inscribed in the list if it fulfils the requirements of § 4(2) UKlaG. Hence, it must have legal personality, which is regularly the case for registered associations⁵⁷¹⁴ under § 21 BGB.⁵⁷¹⁵ Their functions as laid down in their statutes must include the promotion of consumers' interests by education and advice on a non-commercial and non-temporary basis.⁵⁷¹⁶ These functions must actually be exercised.⁵⁷¹⁷ This field of activity must not necessarily be their main activity, but it must not play a minor role in the entity's functions.⁵⁷¹⁸ Furthermore, the association must at least have 75 natural persons or three associations as members and actually exist. It must also afford assurance that it performs its function correctly due to its previous activity.

⁵⁷⁰⁸ Article 4(3) Directive 98/27/EC.

⁵⁷⁰⁹ § 4(1) 2nd sent. UKlaG.

⁵⁷¹⁰ <https://www.bundesjustizamt.de>. The English version of this homepage is accessible at https://www.bundesjustizamt.de/EN/Home/homepage_node.html.

⁵⁷¹¹ UBH/Witt § 4 UKlaG para 6.

⁵⁷¹² § 4(3) 2nd sent. UKlaG.

⁵⁷¹³ In BGH NJW 2012, 1812 (1813 *et seq*), the BGH decided that the area of activity of the consumer protection association of Rhineland-Westphalia (*Verbraucherzentrale Nordrhein-Westfalen*) is not geographically limited.

⁵⁷¹⁴ *Eingetragene Vereine* (e.V.).

⁵⁷¹⁵ § 21 BGB: 'An association whose object is not commercial business operations acquires legal personality by entry in the register of associations of the competent local court [*Amtsgericht*].'

⁵⁷¹⁶ Section 77(a) CPA contains the same requirements for the support for consumer protection groups by the Commission.

⁵⁷¹⁷ Palandt/Bassenge § 4 UKlaG para 6.

⁵⁷¹⁸ BGH NJW 1986, 1613.

Examples for qualified entities are tenant associations⁵⁷¹⁹ or automobile clubs such as the ADAC,⁵⁷²⁰ but not homemakers' associations because the representation of consumer interests is only of minor significance for them.⁵⁷²¹ Since employees are considered consumers *vis-à-vis* their employers under § 13 BGB⁵⁷²² and unions have a special interest in defending the interests of their members, also unions can be inscribed as qualified entities in terms of § 3 UKlaG.⁵⁷²³ In this regard, § 15 UKlaG, which excludes the application of the UKlaG to labour law, must be considered.⁵⁷²⁴ There is an irrefragable presumption that consumer centres and other consumer associations supported by public funding satisfy these requirements.⁵⁷²⁵

In terms of § 3(2) UKlaG, eligible entities may not seek injunctions requiring refrainment and withdrawal under § 1 UKlaG where standard contract terms are applied in relations with an entrepreneur,⁵⁷²⁶ or if they are recommended solely for use in relations between entrepreneurs. Where the use of the recommendation of standard terms concerns both consumers and entrepreneurs, the qualified entity can only restrict its claim to the use or recommendation concerning consumers.⁵⁷²⁷

b) Associations for the promotion of consumers' interests

§ 3(1) no. 2 UKlaG also includes associations with legal personality for the promotion of commercial and independent professional interests.⁵⁷²⁸ This activity must not necessarily be the main function of the association but should not be merely accessory. It is sufficient if the promotion of commercial and independent professional interests is impliedly included in the statute.⁵⁷²⁹

Under no. 1 of the same provision, registered associations in terms of § 21 BGB fulfil this requirement, but also associations that obtained their legal personality by State awarding or by

⁵⁷¹⁹ BGH *NJW* 1998, 3114 (3115).

⁵⁷²⁰ BGH *NJW-RR* 1988, 1443.

⁵⁷²¹ Palandt/*Bassenge* § 4 UKlaG para 6.

⁵⁷²² **§ 13 BGB:** 'A consumer means every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession.'

⁵⁷²³ Stöffels *AGB-Recht* 489 and 490. Palandt/*Bassenge* § 4 UKlaG para 6 is of a different view, without giving any reasons.

⁵⁷²⁴ Stöffels *AGB-Recht* 490 note 12.

⁵⁷²⁵ The Homepage of the Federal Consumer Centre (*Verbraucherzentrale Bundesverband e.V.*) contains a list with the addresses of all consumer protection associations in Germany, accessible at <https://www.vzbv.de>.

⁵⁷²⁶ **§ 14 BGB:** '(1) An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession. (2) A partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities.'

⁵⁷²⁷ Stöffels *AGB-Recht* 490.

⁵⁷²⁸ This concerns the liberal professions. See Stöffels *AGB-Recht* 490 note 22.

⁵⁷²⁹ Palandt/*Bassenge* § 3 UKlaG para 7.

other public-law provisions, which is the case, e.g., for the chambers of commerce and industry.⁵⁷³⁰

Their membership must include a considerable number of businesses marketing goods or commercial services of the same or a similar type on the same market. This condition is aimed at preventing abuse of the *locus standi*. Therefore, the number of members is not exclusively to be considered, but rather the association's representativeness on the relevant market.⁵⁷³¹ The BGH therefore does not apply this condition as it does not consider it objectively justified.⁵⁷³²

In addition, their staffing, material and financial resources must enable them actually to perform the interest promotion functions laid down in their statutes, and insofar the infringement relates to the interests of their members.⁵⁷³³ The association does not need to employ lawyers in this regard as it is sufficient if it can recognise and handle simple cases without external help.⁵⁷³⁴ The main part of the association's financial resources must come from membership fees or donations.⁵⁷³⁵ The activity must actually be exercised. For regularly created and active associations, there is a presumption that this is the case.⁵⁷³⁶

Examples for associations under § 3(1) no. 2 UKlaG are bar associations,⁵⁷³⁷ medical associations, architect chambers⁵⁷³⁸ and trade associations whose legal personality is based on State awarding.⁵⁷³⁹

c) Chambers of Trade and Industry and Chambers of Crafts and Labour

The reference to the chambers of trade and industry and the chambers of crafts and labour in § 3(1) no. 3 is superfluous because these entities are already included in no. 2 of this provision.⁵⁷⁴⁰ Witt believes that the legislator inserted the given bodies in no. 3 because their activities have a different objective. He contends that associations in terms of no. 2 only exert their activities in the interests of all their members as a group, whereas the chambers mentioned in no. 3 exercise their activities also in other parties' interests in order to safeguard good

⁵⁷³⁰ Stoffels *AGB-Recht* 490.

⁵⁷³¹ Stoffels *AGB-Recht* 491.

⁵⁷³² BGH *NJW* 2003, 1241 (1242).

⁵⁷³³ MüKo ZPO/*Micklitz* § 3 UKlaG para 31, WLP/*Lindacher* § 3 UKlaG para 19.

⁵⁷³⁴ BGH *NJW* 2000, 73 (74).

⁵⁷³⁵ BGH *NJW-RR* 1990, 102 (104).

⁵⁷³⁶ BGH *NJW-RR* 2001, 36 (37).

⁵⁷³⁷ OLG Bamberg *NJW* 2012, 2282 (2285).

⁵⁷³⁸ BGH *NJW* 1981, 2351.

⁵⁷³⁹ Stoffels *AGB-Recht* 491, with further references.

⁵⁷⁴⁰ Stoffels *AGB-Recht* 491.

commercial and artisanal practice.⁵⁷⁴¹ No. 2 seems to be wide enough to cover these organisations too, however. In practice, this debate has no relevance as both types of associations are included in § 3.

d) Assignment of claims

Under § 3(1) 2nd sent. UKlaG, the right of action may be assigned only to the bodies as mentioned earlier. Since in terms of the law only the eligible bodies mentioned in § 3 are entitled, this provision has no proper meaning.⁵⁷⁴² With the insertion of this provision, the legislator aimed to end the debate of the legal nature of the claims according to § 1 UKlaG⁵⁷⁴³ and wanted to prevent a commercialisation of these claims.⁵⁷⁴⁴

2.3.6 Procedural aspects

a) Warning

Before an eligible body takes legal action against a user, it usually sends him a warning first. § 5 UKlaG⁵⁷⁴⁵ refers to § 12(1) 1st sent. UWG, according to which parties entitled to assert a claim to cease and desist should warn the debtor prior to initiating court proceedings and should give him the opportunity to resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty. The warning set out in § 5 UKlaG, read in conjunction with § 12(1) UWG, corresponds to the 'prior consultation' in Directive 98/22/EC. The issuing of a warning is not mandatory but a mere *Obliegenheit*.⁵⁷⁴⁶ Although the issuing of a warning has no impact on the admissibility and merits of the court action,⁵⁷⁴⁷ it can avoid the adverse consequences with regard to the costs according to § 93 ZPO, which is applicable in terms of § 5 UKlaG.⁵⁷⁴⁸ In fact, most incriminated standard clauses where consumer associations are involved are modified not after court actions, but by compliance by the user after an issued warning.⁵⁷⁴⁹ § 93 ZPO provides that 'where the defendant has not given cause for an action to be brought, the plaintiff shall bear the costs of the proceedings should the defendant immediately acknowledge the claim.' The defendant has given cause for an action if he or she does not act according to a justified warning. Apart from that, in most cases, the

⁵⁷⁴¹ UBH/Witt § 3 UKlaG para 10.

⁵⁷⁴² Stoffels *AGB-Recht* 491.

⁵⁷⁴³ See discussion above.

⁵⁷⁴⁴ BT-Drs. 14/2658 at 52.

⁵⁷⁴⁵ **§ 5 UKlaG:** 'Application of the [ZPO] and other provisions - The provisions of the [ZPO] and § 12(1), (2), (4) and (5) of the [UWG] shall apply to the procedure unless otherwise provided by this Act.' (Translation updated by myself).

⁵⁷⁴⁶ UBH/Witt § 5 UKlaG para 1.

⁵⁷⁴⁷ MüKo ZPO/Micklitz § 5 UKlaG para 9, Maxeiner 2003 *J. Yale Int. Law* 158.

⁵⁷⁴⁸ Stoffels *AGB-Recht* 492.

⁵⁷⁴⁹ UBH/Witt before § 1 UKlaG para 8.

statutes of the eligible bodies under § 3 UKlaG provide for such a prior warning.⁵⁷⁵⁰ A warning is dispensable however if it is in vain or unreasonable, e.g., where the infringement is so significant that the claimant cannot be expected to issue a warning before going to court.⁵⁷⁵¹

A warning consists of the five following elements:

aa) Reclamation

The claimant has to describe the infringement in a way that enables the user to assess whether the claim is justified. It therefore has to mention the given standard clause(s) and the infringed provision(s) under §§ 305 *et seq.* In cases where the infringement concerns an absolute prohibition, it is sufficient to refer to § 309.⁵⁷⁵² Infringement against the general clause or § 308 require a short explanation though so that the user or the recommender of the given standard clause can check whether the claim is justified.⁵⁷⁵³

bb) Invitation to issue a declaration to cease and desist

The invitation to issue a declaration to cease the use or recommendation of the given standard provision consists of requiring that the person refrains from using or recommending the standard terms in question according to § 9 no. 2 UKlaG. This also includes the referral to standard terms by the user that are contained in contracts that have already been concluded.⁵⁷⁵⁴

cc) Promise to pay a contractual penalty in case of infringement

In order to avoid the costs in terms of § 93 ZPO, it is customary and reasonable⁵⁷⁵⁵ to include in the warning the invitation of the promise to make by the user or recommender of the given standard terms to pay a contractual penalty in case of further infringements. Besides, by requiring such a promise, the claimant has a leverage against the user or recommender. Usually, the eligible body – and not the court – determines the given amount (e.g., EUR 2,500 for the use of each ineffective clause, or EUR 5,000 for each recommended clause).⁵⁷⁵⁶ According to Witt, a discount or a maximum amount in the case of numerous clauses that infringe legislation

⁵⁷⁵⁰ Stoffels *AGB-Recht* 492.

⁵⁷⁵¹ Palandt/*Bassenge* § 5 UKlaG para 7, WLP/*Lindacher* § 5 UKlaG para 12.

⁵⁷⁵² UBH/*Witt* § 5 UKlaG para 4.

⁵⁷⁵³ Palandt/*Bassenge* § 5 UKlaG para 3.

⁵⁷⁵⁴ WLP/*Lindacher* § 5 UKlaG para 18.

⁵⁷⁵⁵ The indication is not necessary however in order to avoid the negative consequences of § 93 ZPO, since they occur automatically.

⁵⁷⁵⁶ UBH/*Witt* § 5 UKlaG para 5. Lindacher is of the view that the determination of the amount to be paid should be made by the court as the latter is neutral. He does not exclude though that the eligible bodies in terms of § 3 UKlaG or even third parties may determine this amount (WLP/*Lindacher* § 5 UKlaG para 18).

should not be granted.⁵⁷⁵⁷ This view is correct as otherwise, the seriousness of the violations would be weakened and the wrong signal given to users or recommenders.

dd) Deadline

The warning should also contain a reasonable deadline for the issuing of the declaration to cease and desist. A deadline of two weeks should be appropriate and corresponds to article 5(1) 3rd sent. of Directive 2009/22/EC.⁵⁷⁵⁸ If the deadline is too short, it is replaced by a reasonable timeframe.⁵⁷⁵⁹

ee) Threat of taking legal action

It is sufficient if the warning merely contains a threat to take legal action in the case where the user or recommender does not issue a declaration to cease and desist. It is not necessary though that the type of legal action is indicated.⁵⁷⁶⁰

In addition, the body issuing the warning should provide details with regard to its *locus standi* since § 3(2) UKlaG excludes claims concerning standard terms that have been used *vis-à-vis*, or recommended to an entrepreneur.⁵⁷⁶¹

Under § 5 UKlaG, which refers to § 12(1) 2nd sent. UWG, reimbursement of the necessary expenses can be demanded. These expenses are *necessary* if they actually occurred and were objectively necessary in the given case from the eligible entity's standpoint.⁵⁷⁶² The reimbursement of lawyer fees can only be demanded if hiring a lawyer was necessary with regard to the difficulty of the case.⁵⁷⁶³ The legislator is of the opinion that this is regularly not the case for the eligible bodies in terms of §§ 3 and 3a UKlaG.⁵⁷⁶⁴ The costs for the issued warning are no recoverable costs under § 91 ZPO⁵⁷⁶⁵ and must be demanded in a separate court action.⁵⁷⁶⁶

⁵⁷⁵⁷ UBH/Witt § 5 UKlaG para 5.

⁵⁷⁵⁸ WLP/Lindacher § 5 UKlaG para 18, UBH/Witt § 5 UKlaG para 5. **Art 5(1) 3rd sent. Directive 2009/22/EC:** 'If the cessation of the infringement is not achieved within two weeks after the request for consultation is received, the party concerned may bring an action for an injunction without any further delay.'

⁵⁷⁵⁹ WLP/Lindacher § 5 UKlaG para 21.

⁵⁷⁶⁰ Palandt/Bassenge § 5 UKlaG para 5.

⁵⁷⁶¹ See discussion above.

⁵⁷⁶² BGH NJW 2012, 3023 (3030).

⁵⁷⁶³ MüKo ZPO/Micklitz § 5 UKlaG para 12.

⁵⁷⁶⁴ See Stoffels *AGB-Recht* 494, with further references.

⁵⁷⁶⁵ **§ 91(1) 1st sent. ZPO:** 'The party that has not prevailed in the dispute is to bear the costs of the legal dispute (...).'

⁵⁷⁶⁶ Erman/Roloff § 5 UKlaG para 4, Palandt/Bassenge § 5 UKlaG para 6.

b) Provisional injunction

In terms of article 2(1) lit. a) of Directive 2009/22/EC, the Member States shall implement 'an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement'. With the reference in § 5 UKlaG to § 12(2) UWG, the German legislature has inserted the procedure of a provisional injunction at least indirectly into the UKlaG. Under § 12(2) UWG, 'provisional injunctions can be granted in order to secure the claim to cease and desist specified in th[e UWG], also without exposition and substantiation of the conditions required by sections 935⁵⁷⁶⁷ and 940⁵⁷⁶⁸ [ZPO].'⁵⁷⁶⁹

Stoffel⁵⁷⁷⁰ argues that the reference in § 5 UKlaG to § 12(2) UWG will most likely not give more meaning to provisional injunctions within institutional actions because the prevailing view always asserted that provisional injunctions were already possible before the amendment of the law.⁵⁷⁷¹ To date, the insertion of the given UWG provision into the UKlaG had certainly no significant impact on the number of provisional injunctions.⁵⁷⁷²

Note should be taken that only the injunctive relief under § 1 UKlaG can be subject to a provisional injunction, but not the right to require withdrawal. Otherwise, the decision in the principal proceedings would be anticipated, which would be equal to a final decision.⁵⁷⁷³ For the injunctive relief, the decision reached in a provisional injunction is only temporary, though.⁵⁷⁷⁴

The requisites for the provisional injunction are set out in the ZPO.⁵⁷⁷⁵ The claimant has to provide legitimate justification of the grounds for an injunction, i.e., that it is necessary in order to avert significant disadvantages.⁵⁷⁷⁶ Since § 12(2) UWG finds application by reference in § 5 UKlaG, the provisional injunction 'can be granted (...) without exposition and substantiation

⁵⁷⁶⁷ § 935 ZPO: 'Injunction regarding the subject matter of the litigation - Injunctions regarding the subject matter of the litigation are an available remedy given the concern that a change of the status quo might frustrate the realisation of the right enjoyed by a party, or might make its realisation significantly more difficult.'

⁵⁷⁶⁸ § 940 ZPO: 'Injunction serving to provide a temporary status - Injunctions are also admissible for the purpose of providing for a temporary status concerning a legal relationship that is in dispute, to the extent this provision is deemed to be necessary in order to avert significant disadvantages, to prevent impending force, or for other reasons, in particular in the case of legal relationships of a long-term nature existing.'

⁵⁷⁶⁹ The necessary amendment had already taken place by the Gesetz über Fernabsatzverträge of 2000 (BGBl. I at 897, with rectification at 1139), see § 15(1) AGBG in its last effective version.

⁵⁷⁷⁰ Stoffels *AGB-Recht* 494.

⁵⁷⁷¹ For the initial debate on this question, see UBH/Witt § 5 UKlaG para 9.

⁵⁷⁷² UBH/Witt § 5 UKlaG para 9.

⁵⁷⁷³ WLP/Lindacher § 5 UKlaG para 48, Palandt/Bassenge § 5 UKlaG para 9.

⁵⁷⁷⁴ Stoffels *AGB-Recht* 495.

⁵⁷⁷⁵ §§ 936, 920(2) and 294 ZPO.

⁵⁷⁷⁶ *Glaubhaftmachung des Verfügungsgrunds*.

[of the grounds for an injunction]' though. It is therefore sufficient if the claimant brings forward that a danger of recurrent use of the incriminated standard provisions, or of their first use exists. As there is a public interest to eliminate invalid standard clauses, the presumed urgency of the matter is not refuted where the claimant had knowledge of the given clause and did not intervene for a long time.

According to § 937 ZPO and 6 UKlaG, the court of the principal proceedings has jurisdiction. It decides either after an oral hearing by judgment or without a hearing for oral argument being held in urgent cases or if the petition that an injunction be issued is to be dismissed.⁵⁷⁷⁷ In this case, the court issues an ordonnance (*Beschluss*). For injunctions, an appeal on points of law (*Revision*) is excluded in terms of § 542(2) ZPO.⁵⁷⁷⁸

c) Court action / Principal proceedings

For the principal proceedings at court, the ZPO provisions are applicable in terms of §§ 12(1), (2), (4) and (5) UWG, if not otherwise provided in § 5 UKlaG. The reference to the ZPO provisions only has a clarifying function. These provisions would apply in any event because the given claim is a matter of private law (§§ 3(1) EGZPO and 13 GVG).⁵⁷⁷⁹

Directive 98/27/EC⁵⁷⁸⁰ does not require that the national legislator implement a pre-trial conciliation procedure. The German legislator did therefore not provide for a mandatory procedure (arbitration, conciliation or mediation), despite the current tendency to encourage such procedures.⁵⁷⁸¹

Section 69 of the Act contains an implied hierarchy in terms of which consumers are encouraged to first approach an alternative dispute resolution agent before approaching the Commission. The Commission may promote informal dispute resolution by first referring the matter to an alternative dispute resolution agent according to section 72(1)(b).⁵⁷⁸² In terms of

⁵⁷⁷⁷ § 937(2) ZPO.

⁵⁷⁷⁸ Stoffels *AGB-Recht* 495. § 542(2) 1st sent. ZPO: 'No appeal on points of law may be filed against rulings by which a decision was taken on the issuance, modification, or repeal of a seizure or an injunction.'

⁵⁷⁷⁹ Palandt/*Bassenge* § 5 UKlaG para 1, WLP/*Lindacher* § 5 UKlaG para 1. EGZPO = Einführungsgesetz zur Zivilprozessordnung (Introductory Act to the Code of Civil Procedure), GVG = Gerichtsverfassungsgesetz (Judicature Act).

⁵⁷⁸⁰ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

⁵⁷⁸¹ E.g., § 15a(1) 1st sent. *in pr.* EGZPO: 'The laws of the federal States may stipulate that an action may only be brought after an attempt has been made to settle the dispute amicably before a conciliation office that is established or recognised by the administration of justice of the federal State.' (My own translation). Stoffels *AGB-Recht* 496.

⁵⁷⁸² Naudé 2010 *SALJ* 524.

section 69(d) of the Act, consumers may approach a court with jurisdiction over the matter only if all other remedies available to that person in terms of national legislation have been exhausted. The contradiction of this provision with section 52, which favours the competence of ordinary courts has been discussed in Part I. Nonetheless, section 69 promotes ADR and other solutions before courts are involved.⁵⁷⁸³

Since § 5 UKlaG refers to the ZPO provisions, § 890 ZPO⁵⁷⁸⁴ is applicable.⁵⁷⁸⁵ In terms of this provision, a user who violates its obligation to cease and desist from actions can be sentenced to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention of up to six months. The individual coercive fine may not be levied in an amount over EUR 250,000, and the coercive detention may not be longer than a total of two years.

aa) Exclusive competence

Under § 6(1) UKlaG, the Regional Court (civil chambers) in whose district the defendant has his place of business or, failing that, his domicile shall have sole competence for actions under the UKlaG, irrespective of the amount in dispute.⁵⁷⁸⁶ As this provision establishes an exclusive jurisdiction, choice-of-court agreements are inadmissible in this regard.⁵⁷⁸⁷

In the interests of an efficient process or speedier litigation, the Land governments are empowered to assign, by statutory order, competence for the districts of several Regional Courts with respect to cases under this Act to a single Regional Court (§ 6(2) UKlaG). So far, Bavaria,⁵⁷⁸⁸ Hesse,⁵⁷⁸⁹ Mecklenburg-West Pomerania,⁵⁷⁹⁰ Northrhine-Westphalia⁵⁷⁹¹ and Saxony have made use of this provision.⁵⁷⁹²

The competence under § 6(1) UKlaG refers to the functional and regional competence and includes both claims for the refrainment from use and withdrawal of recommendation of

⁵⁷⁸³ See discussion in Part I ch 5.

⁵⁷⁸⁴ § 890(1) ZPO: 'Should the debtor violate his obligation to cease and desist from actions, or to tolerate actions to be taken, the court of first instance hearing the case is to sentence him for each count of the violation, upon the creditor filing a corresponding petition, to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention or coercive detention of up to six (6) months. The individual coercive fine may not be levied in an amount in excess of 250,000 euros, and the coercive detention may not be longer than a total of two (2) years.'

⁵⁷⁸⁵ Maxeiner 2003 *Yale J. Int. Law* 159.

⁵⁷⁸⁶ Stoffels *AGB-Recht* 496.

⁵⁷⁸⁷ § 40(2) 1st sent no. 2 ZPO. Stoffels *AGB-Recht* 496.

⁵⁷⁸⁸ Competence has been conferred to Landgericht Munich I, Landgericht Nuremberg and Landgericht Bamberg, depending on the district of the competent Oberlandesgericht (OLG).

⁵⁷⁸⁹ Landgericht Frankfurt/M.

⁵⁷⁹⁰ Landgericht Rostock.

⁵⁷⁹¹ Landgericht Düsseldorf (for the district of the OLG Düsseldorf), Landgericht Dortmund (for the district of the OLG Hamm) and Landgericht Cologne (for the district of the OLG Cologne).

⁵⁷⁹² Stoffels *AGB-Recht* 496, with further references.

standard terms under §§ 1 and 2 UKlaG as well as pleas of divergent decision under § 10 UKlaG.⁵⁷⁹³ With regard to § 937(1) ZPO, also provisional injunctions fall under this competence. On the other hand, § 6(3) UKlaG provides that the competence is excluded for actions concerning a right of eligible bodies to information in terms of § 13 UKlaG.⁵⁷⁹⁴

bb) Hearing of administrations

Under § 8(2) UKlaG, the court shall hear, before ruling on an action under § 1 UKlaG, the competent regulator for financial services⁵⁷⁹⁵ if the action relates to provisions in general terms of insurance or provisions in standard contract terms that are subject to approval under the Building and Loan Associations Act⁵⁷⁹⁶ or the Investment Companies Code.⁵⁷⁹⁷ This provision finds analogous application in declaratory actions⁵⁷⁹⁸ brought to court by the user or recommender as well as in provisional injunctions. In urgent cases, the decision may be issued without a hearing (§ 937(2) 1st alt. ZPO).⁵⁷⁹⁹

The existence of § 8(2) UKlaG demonstrates that content control is not excluded in cases where standard terms must be approved by an administration but are subject to legal control by the courts to a full extent. The given administration shall have the opportunity to explain its position in the hearing, but is not a party and can therefore not make applications. The rationale of § 8(2) is that the court should benefit from the administration's insight and technical knowledge.⁵⁸⁰⁰

The court must hear the administration before the ruling and has no discretion in this regard. Since the administration's technical knowledge is the reason for such a hearing, hearings are only necessary where a decision on the merits of the case is expected.⁵⁸⁰¹ Where the court merely rules on the admissibility of the action, a hearing is superfluous. The court has a certain discretion on how it prepares the hearing. It is sufficient if the court informs the administration of the given standard clause and of the extent of a possible prohibition to use it, and demands that the administration take position until the expiry of a deadline set by the court.⁵⁸⁰² It is

⁵⁷⁹³ Stoffels *AGB-Recht* 496.

⁵⁷⁹⁴ Stoffels *AGB-Recht* 496.

⁵⁷⁹⁵ Bundesanstalt für Finanzdienstleistungsaufsicht (www.bafin.de).

⁵⁷⁹⁶ Bausparkassengesetz (BauSparkG).

⁵⁷⁹⁷ Kapitalanlagegesetzbuch (KAGB).

⁵⁷⁹⁸ *Feststellungsklagen*.

⁵⁷⁹⁹ Palandt/*Bassenge* § 8 UKlaG para 5 *et seq.*, WLP/*Lindacher* § 8 UKlaG para 5.

⁵⁸⁰⁰ Staudinger/*Schlosser* § 8 UKlaG para 13, WLP/*Lindacher* § 8 UKlaG para 11.

⁵⁸⁰¹ Palandt/*Bassenge* § 8 UKlaG para 5.

⁵⁸⁰² Stoffels *AGB-Recht* 499.

advisable that the court also forwards the most important exchanges between the parties to the administration. It is reasonable to inform it of the outcome of the court action.⁵⁸⁰³

If the court renounces to carry out the mandatory hearing, it commits a procedural violation that is not remediable by subsequent approval of the parties or a statement without objection.⁵⁸⁰⁴

cc) Amount in dispute

Contrary to other civil actions, the amount in dispute in institutional actions is not calculated on the basis of the interest of a party with regard to the matter in dispute. The public has an interest to have eliminated illegal standard terms, however.⁵⁸⁰⁵ Thus, consumer associations are protected from the risk of costs involved.⁵⁸⁰⁶ Under § 3 ZPO, the court assesses the value at its sole discretion. The maximum amount for disputes according to the UKlaG is EUR 250,000.⁵⁸⁰⁷

The relatively low amounts have a rather symbolic significance.⁵⁸⁰⁸ In practice, the courts have developed 'flat fees'. For each clause that the user shall refrain from using in the future, an amount of EUR 3,000 to EUR 5,000 is considered reasonable.⁵⁸⁰⁹ Exceptionally, the economic significance for the consumer association in terms of the attacked clause can be taken into consideration. The BGH ruled that EUR 25,000 for a clause stipulating a processing fee for consumer credits is reasonable.⁵⁸¹⁰ In cases where the claimant wishes that the judgment be published according to § 7 UKlaG, this application is an independent matter in dispute and must be considered with 1/10 of the amount already determined for the principal matter.⁵⁸¹¹ For court actions aiming at refraining from, and withdrawal of a recommendation of standard clauses, a minimum amount of EUR 10,000 is considered appropriate because of the wide-ranging impact of such recommendations. Witt refers to an 'avalanche-like effect' in this regard.⁵⁸¹² Stoffels is however of the opinion that small businesses (e.g., an independent gym) should be granted a discount. In contrast, for bigger companies, the amount should be higher

⁵⁸⁰³ Stoffels *AGB-Recht* 499. Some authors are of the view that these steps are mandatory for the court: Palandt/*Bassenge* § 8 UKlaG para 6, UBH/*Witt* § 8 UKlaG para 9, Erman/*Roloff* § 8 UKlaG para 8.

⁵⁸⁰⁴ *Rügelose Einlassung*. WLP/*Lindacher* § 8 UKlaG para 29, Palandt/*Bassenge* § 8 UKlaG para 5.

⁵⁸⁰⁵ BGH *NJW-RR* 2007, 497.

⁵⁸⁰⁶ UBH/*Witt* § 5 UKlaG para 29.

⁵⁸⁰⁷ § 48(1) 2nd sent. GKG.

⁵⁸⁰⁸ UBH/*Witt* § 5 UKlaG para 29 ('mere symbolic value').

⁵⁸⁰⁹ UBH/*Witt* § 5 UKlaG para 30.

⁵⁸¹⁰ BGH *BKR* 2014, 330, Stoffels *AGB-Recht* 500.

⁵⁸¹¹ BGH *NJW* 2013, 995 (1001).

⁵⁸¹² UBH/*Witt* § 5 UKlaG para 30.

so that the economic significance of the given clause is taken into account.⁵⁸¹³ This opinion is convincing, also with a view to § 5 UKlaG. Under § 5 UKlaG, read in conjunction with § 12(4) UWG, the court may, upon the application of a party, order that said party's obligation to pay court costs shall be proportionate to a part of the value in dispute as adjusted to its economic situation. With regard to the relatively low amounts in dispute, courts should apply their discretion with reservation, however.

Witt criticises that despite these 'flat fees', no clear line is visible as regards the determination of these values. He argues that courts lack the practice to assess standard clauses depending on their economic impact.⁵⁸¹⁴ In this regard, it shall be reminded that the same problem exists in terms of price-control mechanisms that have been discussed earlier in Part I.⁵⁸¹⁵ For instance, for a standard clause of a car dealer of second-hand vehicles stipulating a waiver, the amount of DM 20,000 (approximately EUR 10,000) was set.⁵⁸¹⁶ In contrast, the value for six incriminated clauses of the transportation conditions of the air carrier Lufthansa was only DM 180,000 (EUR 90,000).⁵⁸¹⁷ This is very low with regard to the economic significance of these six clauses. At any rate, the maximum amount of EUR 250,000 should be reached where the entire instrument of an economically significant company is ineffective.⁵⁸¹⁸ To date, this amount has only been set once for the (entirely ineffective) terms and conditions of a concert organiser.⁵⁸¹⁹

d) Application and operative part of the judgment

§§ 8(1) and 9 UKlaG contain specific provisions for the application and the operative part of the judgment which will be presented in the following.

aa) Application

In terms of § 8(1) UKlaG, in actions under § 1, the application must contain, *inter alia*: the wording of the standard contract term provisions to which objection is made and the identification of the type of transaction for which objection is made to the provisions. The provision therefore complements § 253(2) ZPO.⁵⁸²⁰ If the application is – and remains –

⁵⁸¹³ Stoffels *AGB-Recht* 500.

⁵⁸¹⁴ UBH/Witt § 5 UKlaG para 30.

⁵⁸¹⁵ Chapter 3 para 4.1.1 a).

⁵⁸¹⁶ BGHZ 74, 383 = BGH NJW 1979, 1886.

⁵⁸¹⁷ BGHZ 86, 284 = BGH NJW 1983, 1322.

⁵⁸¹⁸ UBH/Witt § 5 UKlaG para 30.

⁵⁸¹⁹ OLG Celle NJW 1995, 890.

⁵⁸²⁰ § 253(2) ZPO: 'The statement of claim must include: 1. The designation of the parties and of the court; 2. Exact information on the subject matter and the grounds for filing the claim, as well as a precisely specified petition.'

incomplete after an indication by the court according to § 139(3) ZPO,⁵⁸²¹ the action is inadmissible.⁵⁸²² § 8(1) no. 1 should not lead to formalistic sophistry though. If the claimant presents a copy of the given standard terms and individualises the clause he or she wants to challenge, this should be sufficient.⁵⁸²³

As standard clauses are not ineffective *per se* if they are seen in isolation, the application must contain the type of legal transactions for which the use of the clause should be prohibited. The concretisation should be concise and distinguish between contract types, types of transactions or case groups (e.g., 'apartment leases', 'contracts for delivery in instalments').⁵⁸²⁴ Furthermore, the application should indicate whether the refrainment or withdrawal only applies to B2C agreements, and/or to B2B contracts. This distinction is essential in terms of § 3(2) UKlaG which restricts the *locus standi* of consumer organisations.⁵⁸²⁵

bb) Operative part of the judgment

Complementary to § 313(1) no. 4 ZPO, § 9 no. 1 to 4 UKlaG provides for the particular features of the operative part of the judgment. In terms of this provision, the operative part of the judgment must contain, *inter alia*: the wording of the standard contract term provisions to which objection was made (no. 1) and the identification of the type of transaction for which the standard contract term provisions to which the action relates may not be used (no. 2).

It should be noted that § 9 no. 2 is also applicable to prohibitions concerning the recommendation of standard terms. The absence of this kind of prohibition in this provision is due to the legislator's negligence.⁵⁸²⁶

Furthermore, the operative part must contain an injunction to refrain from using standard contract terms having the same content. This shall prevent the user from rewording its incriminated standard clauses, and enable the claimant to enforce the judgment if this were the case. This provision has merely a clarifying function though as the user cannot evade a court ruling if the incriminating action is perpetuated only in a different wording of the clause.⁵⁸²⁷

⁵⁸²¹ § 139(3) ZPO: 'The court is to draw the parties' attention to its concerns regarding any items it is to take into account *ex officio*.'

⁵⁸²² Erman/Roloff § 8 UKlaG para 1, Palandt/Bassenge § 8 UKlaG para 1.

⁵⁸²³ WLP/Lindacher § 8 UKlaG para 3.

⁵⁸²⁴ UBH/Witt § 8 UKlaG para 4.

⁵⁸²⁵ Stöffels *AGB-Recht* 501.

⁵⁸²⁶ Palandt/Bassenge § 9 UKlaG para 3.

⁵⁸²⁷ Palandt/Bassenge § 9 UKlaG para 4.

Where the user's condemnation is based solely of the intransparency of a clause, the user might assert to furnish oral or written information to its clients in order to eliminate the intransparency.⁵⁸²⁸

§ 9 also provides that where the judgment requires the withdrawal of a recommendation, it must be made known in the same way as the recommendation. If it is not clear in which way the recommendation was performed, the court has to interrogate the recommender.⁵⁸²⁹ Where, how and to what extent the injunction must be made known is in the court's discretion. It is however not imperative to require the 'publication' of the entire judgment with its grounds.⁵⁸³⁰

e) Costs

In civil procedures like actions under the UKlaG, the succumbing party has to bear the costs according to §§ 91 *et seq.* ZPO. For UKlaG actions, eligible bodies such as consumer associations have in interest to hire a lawyer in the district of the competent court because travel expenses for an external lawyer to the court are generally not considered 'expenditures' under § 91(2) 1st sent. ZPO.⁵⁸³¹ The travel expenses of an attorney who has not established him- or herself in the judicial district of the court hearing the case and who does not reside at the location of the competent court, shall be compensated only insofar as it was necessary to involve him or her in order to bring an appropriate action, or to appropriately defend against an action brought by others (§ 91(2) 2nd sent. ZPO).

f) Authorisation to publish

Under § 7 UKlaG, if the application is upheld, the applicant may, on request, be authorised to publish the operative part of the judgment, identifying the defendant against whom judgment was given, at the defendant's expense in the Federal Gazette and otherwise at his own expense. The court may set a time limit on this authorisation.

As provisional injunctions in terms of § 5 UKlaG, read in conjunction with § 12(2) UWG, only have a temporary effect, there is no need, according to most authors, to interpret § 7 UKlaG beyond its wording and to extend the authorisation to publish to this form of legal remedy.⁵⁸³² Others argue that the authorisation to publish should always be granted for provisional

⁵⁸²⁸ Palandt/Bassenge § 9 UKlaG para 4.

⁵⁸²⁹ § 139 ZPO.

⁵⁸³⁰ WLP/Lindacher § 9 UKlaG para 9.

⁵⁸³¹ BGH NJW-RR 2013, 242.

⁵⁸³² Erman/Roloff § 7 UKlaG para 1, Palandt/Bassenge § 7 UKlaG para 1, UBH/Witt § 7 UKlaG para 3, Stoffels AGB-Recht 503.

injunctions in cases where the invalidity of the clause has significant implications for many consumers.⁵⁸³³ Even though both opinions have their merits, in practice, this debate should not have a significant impact. Because of the temporary character of a provisional injunction, the main action usually follows quite promptly, which means that the authorisation to publish should be granted then.

Although the wording of § 7 UKlaG indicates that the judge has no obligation to grant this authorisation ('may'), a refusal to do so is only justified if the adverse impact of the given clause for the public is so minor that a publication is not necessary.⁵⁸³⁴

Many authors are of the view that the benefit of the provision is rather limited because it is doubtful if the 'interested public' also is part of the 'enthusiast readership' of the Federal Gazette.⁵⁸³⁵ A publication in newspapers is not very efficient either because the publication of the operative part of the judgement is not always very conclusive read in isolation. Furthermore, the costs for the publication are to be borne by the claimant. Consumer protection groups with rather limited resources might therefore tend to do without a publication.

g) Effects of the judgment

Because of § 11 UKlaG, the court's ruling has a broad effect. Typically, the judgments of civil courts have only an *inter partes* effect.⁵⁸³⁶ According to § 11 UKlaG though, if the user against whom judgment has been given fails to comply with an injunction based on § 1 UKlaG, the provision in the standard contract terms is to be regarded as void insofar as the party concerned invokes the effect of the injunction. Since the effect of § 11 UKlaG only occurs if the concerned party refers to the effect of the injunction, the prevailing view correctly asserts that this is a 'specific case of the legal force of the judgment'.⁵⁸³⁷ Individual consumers that are concerned with the ineffective clause in question therefore can assert a substantive objection.⁵⁸³⁸

This 'extension of the legal force of the judgment' does however only apply to decisions reached within an institutional action that have reached the state of legal force, and not those that can still be subject to an appeal. Even though provisional injunctions may have the form of a

⁵⁸³³ MüKo ZPO/Micklitz § 7 UKlaG para 2, NK/Walker § 7 UKlaG para 4.

⁵⁸³⁴ WLP/Lindacher § 7 UKlaG para 8.

⁵⁸³⁵ Staudinger/Schlosser § 7 UKlaG para 2, WLP/Lindacher § 7 UKlaG para 4, Stoffels *AGB-Recht* 503.

⁵⁸³⁶ Stoffels *AGB-Recht* 503.

⁵⁸³⁷ *Besonders ausgestalteter Fall der Rechtskrafteerstreckung*. Palandt/Bassenge § 11 UKlaG para 2, Staudinger/Schlosser § 11 UKlaG para 4, Erman/Roloff § 11 UKlaG para 2.

⁵⁸³⁸ Erman/Roloff § 11 UKlaG para 7, Stoffels *AGB-Recht* 503.

judgment, the extension of the legal force does not apply to them because they have not the same binding effect as final judgments.⁵⁸³⁹

Furthermore, infringements of the court ruling must take place after the judgment has become final. Hence, the extension of the legal force of the judgment does not apply to contracts that already have been executed. § 11 UKlaG includes agreements though that have not yet been performed because the 'use' of the invalid clause takes place after the conclusion of the contract and before its execution.⁵⁸⁴⁰

Finally, § 11 UKlaG only applies to *customers* of the user in question. A user can therefore not refer to a dismissed action *vis-à-vis* its clients.⁵⁸⁴¹ A user can assert the validity of a clause by referring to the individual circumstances of a given case (that were not considered within the institutional action), however.⁵⁸⁴²

h) Action to oppose enforcement in terms of § 10 UKlaG

In terms of § 10 UKlaG, the user of a provision who has been forbidden to use it may plead by means of an action under § 767 ZPO⁵⁸⁴³ that a decision has subsequently been reached by the Federal Court of Justice or the Common Senate of the Supreme Courts of Justice⁵⁸⁴⁴ which does not prohibit the use of this provision for the same type of transaction and that enforcement of the judgment against him⁵⁸⁴⁵ would cause unreasonable harm to his business.

⁵⁸³⁹ UBH/Witt § 11 UKlaG para 4, Erman/Roloff § 11 UKlaG para 4.

⁵⁸⁴⁰ Staudinger/Schlosser § 11 UKlaG para 6, UBH/Witt § 11 UKlaG para 4, MüKo ZPO/Micklitz § 11 UKlaG para 7.

⁵⁸⁴¹ UBH/Witt § 11 UKlaG para 9.

⁵⁸⁴² UBH/Witt § 1 UKlaG para 44.

⁵⁸⁴³ **§ 767 ZPO:** 'Action raising an objection to the claim being enforced - (1) Debtors are to assert objections that concern the claim itself as established by the judgment by filing a corresponding action with the court of first instance hearing the case. (2) Such objections by way of an action may admissibly be asserted only insofar as the grounds on which they are based arose only after the close of the hearing that was the last opportunity, pursuant to the stipulations of the present Code, for objections to be asserted, and thus can no longer be asserted by entering a protest. (3) In the action that he is to file, the debtor must assert all objections that he was able to assert at the time at which he filed the action.'

⁵⁸⁴⁴ Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes.

⁵⁸⁴⁵ **§ 890 ZPO:** 'Forcing the debtor to cease and desist from actions, or to tolerate actions- (1) Should the debtor violate his obligation to cease and desist from actions, or to tolerate actions to be taken, the court of first instance hearing the case is to sentence him for each count of the violation, upon the creditor filing a corresponding petition, to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention or coercive detention of up to six (6) months. The individual coercive fine may not be levied in an amount in excess of 250,000 euros, and the coercive detention may not be longer than a total of two (2) years. (2) The sentence must be preceded by a corresponding warning that is to be issued by the court of first instance hearing the case, upon corresponding application being made, unless it is set out in the judgment providing for the obligation. (3) Moreover, upon the creditor having filed a corresponding petition, the debtor may be sentenced to creating a security for any damages that may arise as a result of future violations, such security being created for a specific period of time.'

§ 10 UKlaG is an exception in civil procedures with regard to the fact that an objection concerning a change of the common law is sufficient, as opposed to a substantive objection. In addition, the plaintiff (user) does not object the enforceability of the judgment prohibiting the use of its standard terms under § 767 ZPO but the extended binding effect by virtue of § 11 UKlaG. Academia evaluates the plea of divergent decision very critically⁵⁸⁴⁶ as it is not system-compatible. In any event, the practical significance of § 10 UKlaG is very low.⁵⁸⁴⁷

i) Register of decisions

§ 20 AGBG provided that the court had to inform the Federal Cartel Office of any pending court actions under §§ 13 and 19 AGBG (now §§ 1 and 10 UKlaG) and court actions under §§ 13 and 19 AGBG with legal force as well as of any other terminations of the matter.

The UKlaG does not contain a similar provision because the legislator feared data protection infringements and was of the view that the AGBG register had lost its significance due to publications in legal journals.⁵⁸⁴⁸ The rulings that were contained in this register had to be deleted at the latest at the end of the year 2004 (ex-§ 16(2) UKlaG).

Stoffels indicates that the former AGBG register never fully fulfilled its function because it was designed only for court decisions and therefore only was useful *ex post facto*, i.e., too late. What is more, since the concerned actors did not – or simply could not – keep track of the register and the decisions contained therein, the latter were not sufficiently implemented, and infringements were only discovered by chance.⁵⁸⁴⁹ He therefore legitimately advocates the implementation of an 'information pool'. Such a pool could help to support the financially weak consumer protection organisations⁵⁸⁵⁰ by saving their resources and excluding the multiple engagements of several consumer associations for the same matter.⁵⁸⁵¹

Such an information pool could be accessible via a website where a search by keywords, type of transactions or field of application of a given standard clause is possible, and where relevant research (by consumer associations and academia) and former court rulings are visible. Hence, a 'matrix approach'⁵⁸⁵² could be applied where the site contains a catalogue of specific terms

⁵⁸⁴⁶ Staudinger/Schlosser § 10 UKlaG para 1.

⁵⁸⁴⁷ UBH/Witt § 10 UKlaG para 1, Staudinger/Schlosser § 10 UKlaG para 1.

⁵⁸⁴⁸ BT-Drs. 14/6040 at 276.

⁵⁸⁴⁹ MüKo ZPO/Micklitz before § 1 UKlaG para 36.

⁵⁸⁵⁰ MüKo ZPO/Micklitz (2001) before § 13 AGBG para 12 notes 27 and 42 qualifies consumer protection associations as 'overstrained' due to their weak financial allocation.

⁵⁸⁵¹ Stoffels *AGB-Recht* 481.

⁵⁸⁵² See Maxeiner 2003 *Yale J. Int. Law* 156.

across all type of controls in terms of §§ 307 to 309 with a categorisation by their legal nature and business sector. This would help to identify specific standard terms in their context. This approach would be similar to the structure of many specialised commentaries on standard business terms.

3. Conclusion

Individual consumers' complaints about unfair standard terms are assessed within a so-called 'incidental control' which takes place within the assessment of the plaintiff's claim (e.g., for delivery). Unlike South Africa, the German legislator chose the path of positive enforcement consisting of measures designed to prevent the use of unfair terms rather than their *ex post facto* elimination. Therefore, it introduced a novel procedure, the institutional action.

Before going to court, consumers quite often use the path of alternative dispute resolution. Many industries, such as the bank and insurance industries, provide for ombuds procedures. Although there are no statistics on the number of ombuds procedures concerning §§ 305 *et seq.*, pre-trial dispute resolution undoubtedly relieves the courts from many proceedings.

The institutional action this thesis is concerned with is set out in § 1 UKlaG, a statute containing the procedural aspects in relation to §§ 305 *et seq.* BGB. Institutional actions have a broader effect than individual actions and incite standard terms users to use clauses that are in line with legal provisions. For the enquiry of the given standard provisions, a strict abstract-general approach applies. The given standard terms are not declared invalid, but the user is required to refrain from further using them, and recommenders of standard provisions must withdraw any recommendation made.

The restricted scope of application of §§ 305 *et seq.* in terms of § 310(4) for certain fields of law also has an impact on the scope of application of the UKlaG. What is more, the UKlaG does not apply to labour law at all, unlike § 310(4) BGB where reasonable account must be taken of the special features that apply in labour law. The reason for this absolute exclusion in the UKlaG is that the legislator did not wish to add another actor in the already complex labour law relations where many other actors (unions etc.) are already involved.

The German legislator chose to opt for consumer protection ascertained by private consumer protection organisations rather than preventive control by administrative bodies. Preventive

control by the administration would not have been compatible with the German 'private law society' and has not reached the same efficiency where it has been implemented.

EU law has – and will have – a significant impact on German standard terms legislation. As discussed, the objective of free movement of actions for an injunction is however not realistic as long as consumer protection organisations are not funded properly in order to fulfil their functions.

The institutional action has not reached its full potential because many illegal clauses are still in circulation. On the other hand, it was very effective with respect to standard clauses of financial institutions and insurance companies. The legislator's decision to opt for an abstract-universal approach was significant in combatting unfair business terms because a particular-personalised approach would have led to an *inter partes* effect, and other customers would not have benefitted from court rulings.

In order to achieve an injunctive relief against the user under § 1 UKlaG, the given terms must be ineffective in terms of §§ 307 to 309 BGB. Clauses which are intended for non-recurrent use can however not be assessed in terms of the UKlaG because this statute does not take into account the other party's influence on the clause's content (strict abstract-general approach). Besides, the non-incorporation of a clause as the legal consequence is not sufficient in terms of the UKlaG since ineffectiveness of the clause is necessary.

For the use of standard business clauses in terms of § 1 UKlaG, it is sufficient that the intention of incorporating the given provisions into the contract in the future be apparent. This wide interpretation corresponds to the Unfair Terms Directive according to which the abstract control must be designed for 'contractual terms *drawn up* for general use' (art. 7(2)). By way of exception, also representatives of the other party are considered 'users' if they have a significant interest in the incorporation of certain standard terms.

The danger of recurrent use is an unwritten condition of § 1 UKlaG and is assumed where the user already has used the terms before. A seriously impending first use is sufficient though.

If the other party's claim is successful, the user must cease any conduct that can be qualified as 'use' in terms of § 1 UKlaG. He must not incorporate the invalid terms into new contracts or refer to them when executing already concluded agreements.

§ 1 UKlaG also provides for a claim for withdrawal of recommendation of standard business terms. Recommenders are generally professional associations that design contract forms for

third parties, but also bar associations or medical associations. Legal opinions published in law journals or standard terms designed by lawyers for their clients are not considered recommendations in terms of this provision.

If the claim is successful, the recommender has to cease any recommendation and withdraw its already issued recommendations. The withdrawal of a recommendation has a broader effect and is more significant than the simple cessation of the recommendation.

Under § 13 UKlaG, eligible bodies have a right to information regarding the name and address of a party *vis-à-vis* telecommunication providers etc. This possibility safeguards the right of action under the UKlaG because it ensures that the plaintiff has a valid address for service.

The eligible bodies for institutional actions are set out in § 3(1) UKlaG. In this regard, consumer associations that are inscribed in the list of the European Commission are equal to German associations in terms of their *locus standi*. In order to be inscribed in these lists, the given association must have legal personality and promote consumers' interests by education and advice on a non-commercial and non-temporary basis. Also associations promoting commercial and independent professional interests, or those that have obtained their legal personality by State awarding (e.g., the chambers of commerce and industry) are eligible.

Before eligible bodies institute an action at court, they usually issue a warning in which the user is invited to issue a declaration to cease and desist from the use of the given terms and to promise to pay a contractual penalty in case of infringement. Warnings also contain a deadline and the threat of taking legal action if the user or recommender does not issue a declaration to cease and desist. Warnings are not mandatory but can avoid negative cost consequences for the eligible body.

In order to secure the claim to cease and desist, the court can grant a provisional injunction, also without exposition and substantiation of the conditions normally required for such injunctions in terms of the ZPO. It thus suffices that the claimant argues that a danger of recurrent or first use of the given terms exists. Provisional injunctions are not supposed to anticipate the court's final decision, which is why only the injunctive relief in terms of § 1 UKlaG can be subject to a provisional injunction, but not the right to require the withdrawal of a recommendation.

The national legislator did not implement a mandatory conciliation procedure prior to court proceedings because the Directive on injunctions for the protection of consumer interests does not require such a procedure.

In court proceedings, the Regional Court of the defendant's place of business or domicile has exclusive competence, irrespective of the amount in dispute. Some Federal States have assigned sole competence to a single Regional Court in their territory.

In terms of § 8(2) UKlaG, where standard terms are subject to the approval of the regulator for financial services, the court must hear this administration before any ruling. The rationale of this provision is that the jurisdiction can benefit from the administration's insight and technical knowledge. It also shows that content control is not excluded where standard terms are to be approved by an administration, but are subject to legal control by the courts to a full extent.

In institutional actions, the amount in dispute is calculated on the basis of the public's interest to have eliminated illegal standard terms. Hence, the given amounts are relatively low, which protects consumer protection associations from the risk of costs involved. The courts have developed flat-fees over time. These are often criticised though since no clear line is visible regarding their determination and the economic impact of the given clauses.

According to § 7 UKlaG, the operative part of the judgment can be published in the Federal Gazette and otherwise. The benefit of this provision is rather limited though because the reach of such a publication is restricted in terms of the number of readers.

§ 11 UKlaG enhances the effect of the court's ruling tremendously as it grants an extension of the legal force of the judgment. Individual consumers that are concerned with the given clauses can assert a substantive objection.

The register of decisions provided for in the former AGBG has not been inserted into the UKlaG because of data protection concerns and the loss of its significance due to other forms of publication. What is more, this register was never very efficient. Therefore, an information pool using a 'matrix approach' which is applied in German legal commentaries could be more effective.

PART III – COMPARISON BETWEEN THE SOUTH AFRICAN AND GERMAN LEGISLATION

INTRODUCTION

After the presentation of the South African and the German regimes on unfair terms and conditions in Parts I and II, in the present Part III, the applicable Consumer Protection Act provisions will be compared to the corresponding BGB norms. As far as procedural questions are concerned, the applicable provisions of the UKlaG will be discussed in a comparative perspective too. Since Parts I and II already contain some comparative evaluations, it shall suffice to refer to these where possible in order to avoid unnecessary repetitions.

The legislative history of both countries is very different for historical reasons and due to the different legislative traditions in both countries. Germany is a civil law country with a codified law. Although the courts may develop the law, as we have seen in Part II,⁵⁸⁵³ there is no common-law tradition in the narrow sense like in South Africa. South Africa, on the other hand, has a mixed, or 'hybrid', legal system that has developed from various distinct legal traditions, namely a civil-law system inherited from the Dutch, a common-law system introduced by the British, and a customary law system originating from indigenous Africans.⁵⁸⁵⁴

A comparison of the legislative history of both countries might thus seem idle and a purely academic exercise at first sight. Hence, such a comparison should be more yielding with countries having historical links with South Africa, such as the Netherlands or the United Kingdom. To some extent, even a comparison with Roman law would be enlightening, even

⁵⁸⁵³ See Part I ch 1 para 1.1.

⁵⁸⁵⁴ For customary law, no generally accepted definition exists. Various South African authors discuss its contents and distinguish it from custom as such without formulating a definition. Olivier defines it as follows: 'Customary law denotes those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist, supplemented, amended and or superseded in part by: (a) changing community views and the demands of a changing world; (b) contact with societies that function within other legal backgrounds; (c) contact with and influence by other legal systems; and (d) direct and indirect influence of foreign (non-indigenous) government structures.' See Joubert and Kuhne *LAWSA* Vol 32 Intro Def 1.

from a practical point of view.⁵⁸⁵⁵ Nonetheless, some historical parallels and differences should be highlighted here before the actual comparison of the material norms is undertaken.

After emphasising some historical points, both regimes will be compared in terms of their substantive content. The point of departure will be the South African legislation.

CHAPTER 1 – HISTORICAL PARALLELS AND DIFFERENCES

1. The courts' role

Before the field of standard business terms⁵⁸⁵⁶ was codified in Germany and South Africa, the courts of both countries tried to fill this gap. In order to invalidate unfair terms, South African courts exclusively relied on common-law concepts at the beginning, such as the *exceptio doli generalis*, whereas German jurisprudence could also refer to codified principles, such as good faith (§ 242).⁵⁸⁵⁷

In this context, it is somehow striking that South African courts applied the *exceptio doli* inconsistently⁵⁸⁵⁸ and tried to uphold this defence stoically until the *Bank of Lisbon* case,⁵⁸⁵⁹ although it had never been clear whether it had been received in South African law. This defence certainly had been useful as a device for the achievement of equitable results in particular circumstances, i.e., the use of a contract for an end that was not intended when it was concluded. Despite the shortcomings of the *exceptio doli* and its unclear scope of application, the courts did not grasp the opportunity to develop other defences. Instead of 'look[ing] forward rather than back'⁵⁸⁶⁰ and seeking other solutions, such as a different approach to the

⁵⁸⁵⁵ The debate on the reception of the *exceptio doli generalis* in South African law is an example. See Part I ch 1 para 2.

⁵⁸⁵⁶ In the following, South African and German terminology is used indiscriminately if it means the same (e.g., terms and conditions/standard (business) terms, open agreements/continuing obligations, supplier – user/consumer – other party).

⁵⁸⁵⁷ In this chapter, provisions preceded by the word 'section' are those of the CPA, whereas those preceded by the '§' symbol are those of the BGB, if not indicated otherwise.

⁵⁸⁵⁸ The inconsistent application of the *exceptio doli* defence is illustrated in the following cases: *Weinerlein v Goch Buildings Ltd* 1925 AD 285; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T); *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T); *Paddock Motors v Igesund* 1976 (3) SA 16; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W). See discussion in Part I ch 2 para 2.2.

⁵⁸⁵⁹ *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A).

⁵⁸⁶⁰ Lewis 1990 SALJ 29.

interpretation of contracts, they kept on applying the *exceptio doli*. Only in 1988, Joubert JA referred to it as 'a superfluous, defunct anachronism' which had to be 'bur[ied]'.⁵⁸⁶¹

On the other hand, the German Reichsgericht, and later the Bundesgerichtshof, soon developed different approaches to tackle unfair contract terms. This jurisprudence applied, for instance, a restrictive interpretation of clauses in the other party's favour, the invalidation of unusual or inequitable contract provisions based on the consumer's 'declaration of submission',⁵⁸⁶² or, for monopolies, the application of the principle of public policy. Other clauses were invalidated by the application of the principle of good faith of § 242.⁵⁸⁶³ Although this jurisprudence was very complex and varied, and some solutions were dogmatically unsatisfactory, it had a single objective, namely to invalid inappropriate, inequitable or abusive standard clauses. In retrospect, this approach is seen today as a 'highly commendable performance of German jurisprudence'.⁵⁸⁶⁴

Today, in both countries, the area of standard business terms is regulated in pieces of legislation. In this regard, German courts enquire fairness within an incidental control. In individual proceedings, the court dealing with the principal matter is competent. This competence depends on the amount in dispute.⁵⁸⁶⁵ In institutional actions, the civil chambers of the Regional Court (*Landgericht*) in whose district the defendant has its place of business or, failing that, his or her domicile shall have sole competence for actions under the UKlaG, irrespective of the amount in dispute (§ 6(1) UKlaG).⁵⁸⁶⁶

On the other hand, the South African picture is more complex and characterised by a multitude of entities that are competent in this field. Under section 69 of the Consumer Protection Act, the civil courts merely serve as a 'last resort' after exhaustion of all other available remedies. As discussed earlier, this provision is problematic in terms of the constitutional right of access to the courts, however.⁵⁸⁶⁷

⁵⁸⁶¹ *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A). To emphasise the image of a 'burial' of the *exceptio doli*, Joubert JA even used the phrase '*Requiescat in pace*' (let it rest in peace) (607A-B).

⁵⁸⁶² *Unterwerfungserklärung*.

⁵⁸⁶³ See discussion in Part II ch 1 para 1.1.

⁵⁸⁶⁴ Zweigert and Kötz *Rechtsvergleichung* 329.

⁵⁸⁶⁵ Up to an amount in dispute of EUR 5,000, the *Amtsgerichte*, otherwise the *Landgerichte* are competent (§§ 23 and 71 GVG).

⁵⁸⁶⁶ Stoffels *AGB-Recht* 496. See discussion on the German redress procedures in Part II ch 6 para 2.3.6 c) aa).

⁵⁸⁶⁷ See Part I ch 4 para 2.5.

2. *Pacta sunt servanda* principle

After a period of strict application of the *pacta sunt servanda* principle in both countries, it soon became apparent that it produced unfair results where the parties have no equal bargaining power and consumers were presented a *de facto* take-it-or-leave-it situation. Whereas in South Africa jurisprudence felt a need 'to protect the poor and the ignorant',⁵⁸⁶⁸ which only can be explained by the socio-economic pattern of this country, in Germany, the observation was made that the legal characteristics of agreements did not reflect the statutory law anymore, and that a 'self-made law of the economy'⁵⁸⁶⁹ prevailed in this field. Raiser was of the view that the use of standard terms makes sense from an economic point of view, but their use must consider the public interest and the legal consciousness of the community. According to him, the existing statutory norms constitute an appropriate balance between the parties' interests and are thus the 'normal order' of the given circumstances.⁵⁸⁷⁰ A legal system based on balance through control by entities such as courts cannot accept structural imbalances of this order.⁵⁸⁷¹ Hence, imbalances must be tackled and cannot be accepted in the name of freedom of contract.⁵⁸⁷² The German approach was thus more dogmatic and systematic, which is also due to Ludwig Raiser's work.⁵⁸⁷³

3. Mitigation of freedom of contract by the principles of good faith and public policy

In both countries it became clear that the unfettered application of the *pacta sunt servanda* principle was an obstacle to the maxim of contractual fairness (*volenti non fit iniuria*).

South African courts tried to mitigate the unrestricted application of the *pacta sunt servanda* principle by introducing the concept of fairness in ticket contracts,⁵⁸⁷⁴ restraints of trade⁵⁸⁷⁵ and cases such as misrepresentation,⁵⁸⁷⁶ duress⁵⁸⁷⁷ and undue influence,⁵⁸⁷⁸ where consensus had been improperly obtained. In this regard, the *exceptio doli* defence played an essential role in order to prevent inequitable results. Its inconsistent application and abolition in 1988 has been

⁵⁸⁶⁸ Hahlo 1981 SALJ 70.

⁵⁸⁶⁹ Großmann-Doerth *Selbstgeschaffenes Recht der Wirtschaft*, *passim*.

⁵⁸⁷⁰ Raiser *Recht der AGB* 293 *et seq.* See also Eiselen *Control of Unfair Standard Terms and CISG* 172.

⁵⁸⁷¹ Raiser *Recht der AGB* 98 *et seq.*

⁵⁸⁷² WLP/Pfeiffer Introduction para 4.

⁵⁸⁷³ Raiser *Recht der AGB* *passim*.

⁵⁸⁷⁴ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A).

⁵⁸⁷⁵ *Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

⁵⁸⁷⁶ *Bayer South Africa Ltd v Frost* 1991 (4) SA 559 (A).

⁵⁸⁷⁷ *Broodryk v Smuts* 1942 TPD 47.

⁵⁸⁷⁸ *Hofer v Kevitt* 1998 (1) SA 382 (SCA). See Stoop *LLD thesis* 2012 at 72. The appeal court did not recognise 'commercial bribery' as a ground for rescission in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA). See Van der Merwe *et al Contract General Principles* (2012) 110.

discussed in Part I of this thesis.⁵⁸⁷⁹ After the abolition of the *exceptio doli* defence, it had become clear that the existing principles to ascertain fairness and reasonableness, like the principle that agreements must be obtained properly, the concept of legality, or the rules of interpretation, were insufficient in order to ensure justice.⁵⁸⁸⁰ South African courts thus also applied the principles of good faith and public policy, but from a different dogmatic angle compared to Germany. The Supreme Court of Appeal preferred a contextual, rather than a normative *bona fides* standard, and held that good faith operates only as an informing principle that shapes the nature and content of specific doctrines, such as public policy. The principle of good faith was hence not seen as an independent ('free-floating') principle.⁵⁸⁸¹

In Germany, a defence similar to the *exceptio doli* never existed. German courts never developed such a device and relied instead on codified principles, such as good faith (§ 242)⁵⁸⁸² and public policy (§ 138).⁵⁸⁸³ The Reichsgericht applied an approach for clauses that were 'contrary to accepted principles of morality', i.e., public policy⁵⁸⁸⁴ in cases where a business imposed its standard terms upon a client by taking advantage of its monopoly.⁵⁸⁸⁵ Other cases were based on unconscionability under § 242.⁵⁸⁸⁶ This approach became possible because courts had a statutory basis for intervention due to the introduction of the BGB in 1900.⁵⁸⁸⁷ The drawback of this approach was that it was restricted to monopolistic positions and that the application of public policy alone did not allow for the determination of a fair balance between the parties' rights and obligations.⁵⁸⁸⁸ Inspired by Raiser's ground-breaking work, the BGH therefore extended content control based on § 242 to all kinds of companies and abandoned its restriction to monopolies. According to the BGH, the principle of good faith limits the content of standard delivery terms⁵⁸⁸⁹ and requires that businesses consider the interests of potential

⁵⁸⁷⁹ Part I ch 2 para 2.2.

⁵⁸⁸⁰ Van der Merwe *et al Contract General Principles* (2012) 274-275.

⁵⁸⁸¹ *Magna Alloys & Research (S.A.) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman* NO 1997 4 SA 302 (SCA); *Brisley v Drotosky* 2002 (4) SA 1 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA). See discussion in Part I ch 3.

⁵⁸⁸² § 242: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.'

⁵⁸⁸³ § 138: '(1) A legal transaction which is contrary to public policy is void. (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.'

⁵⁸⁸⁴ In German, '*Verstoß gegen die guten Sitten*'.

⁵⁸⁸⁵ The first decision in this regard was RGZ 20, 115 (117). See also RGZ 62, 264 (266); 99, 107 (109); 102, 396 (397); 103, 82 (83); 115, 218 (219 *et seq.*).

⁵⁸⁸⁶ RGZ 168, 329.

⁵⁸⁸⁷ Maxeiner 2003 *Yale J. Int. Law* 109 (142).

⁵⁸⁸⁸ WLP/Wolf Introduction para 6.

⁵⁸⁸⁹ BGHZ 22, 90 *et seq.*

clients as well, and not exclusively their own interests.⁵⁸⁹⁰ The BGH justified the application of § 242 by the fact that businesses could abuse their freedom of contract by imposing their standard terms upon their customers and therefore claimed freedom of contract only for themselves. The guiding function of the *ius dispositivum* for the specification of the principle of good faith, based on Ludwig Raiser's concept, was another milestone in German jurisprudence.⁵⁸⁹¹

The difference in tackling unfairness in both countries is certainly based on the fact that the principles of good faith and public policy are codified in the BGB (§§ 242 and 138), whereas in South Africa, they have been developed by the courts, without a statutory basis.

In South Africa, also constitutional aspects played a role. In *Barkhuizen v Napier*,⁵⁸⁹² the Constitutional Court held that the enquiry of whether a clause is reasonable requires a weighing-up of public policy on the one hand, and the specific fundamental right involved in a case, on the other. The application of the *pacta sunt servanda* principle was regarded as subject to constitutional control. Thus, the values enshrined in the Constitution served to achieve a balance between the parties' interests. Hutchison legitimately maintains though that the question of fairness or reasonableness only became relevant where fundamental rights, such as the right to access to the courts, were at stake.⁵⁸⁹³ In *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited*,⁵⁸⁹⁴ it was held that the longstanding *in duplum* rule, according to which the debtor's interests cannot exceed the double amount of the capital, should be applicable during the litigation process. The debtors' right of access to courts and other valid policy considerations have to be considered, and a proper balancing of these rights must be undertaken. The application of constitutional aspects did not lead to an overarching fairness or reasonableness principle though.

In Germany, a direct referral to constitutional aspects was never necessary. Of course, all legal actions and legislation have to be measured against the Grundgesetz, the German Constitution. As the principles of good faith and public policy have been enshrined into the BGB since the beginning, the courts could refer to them in order to find solutions in terms of fairness of

⁵⁸⁹⁰ BGH NJW 1965, 246; 1969, 230

⁵⁸⁹¹ BGHZ 41, 151 *et seq.*

⁵⁸⁹² *Barkhuizen v Napier* 2007(5) SA 323 (CC).

⁵⁸⁹³ Hutchison *et al* *Law of Contract* 32.

⁵⁸⁹⁴ 2015 (3) SA 479 (CC).

standard provisions. Contrary to South Africa, public policy and good faith always have been seen as two separate principles that do not necessarily have to inform each other.

4. Legislative intervention

In order to achieve fairness and legal certainty, both countries decided to legislate the field of standard business terms.

In South Africa, the motivation was the fact that the common law had not succeeded in finding an overarching concept providing for equitable solutions but had ever since struggled with the dogmatic classification of concepts, such as the *exceptio doli*, public policy and good faith. There was an apparent need for legislative intervention in all contractual phases.⁵⁸⁹⁵ Moreover, the values reflected in the existing legislation did not mirror democratic values in the newly created South Africa and were especially at the expense of consumers and small businesses.⁵⁸⁹⁶ Hence, many statutes that had been enacted during the Apartheid area were repealed.⁵⁸⁹⁷ The enactment of the Consumer Protection Act was thus a necessary and logical step.

On the other hand, German jurisprudence had developed quite a respectable set of principles before the AGBG came into force. Although many of the courts' findings and principles were directly inserted into the AGBG (and later into the BGB), the need for legislation existed, however. The courts controlled only the most flagrant abuses, and because of the *inter partes* effect of court decisions, other consumers could not benefit from these rulings. The consumer protection movement in the 1970s also served as a catalyst.⁵⁸⁹⁸

5. Conclusion

In this introductory chapter, some historical parallels and differences have been discussed. The courts' role in both countries was very different from the beginning, above all due to the fact that South Africa has a much more developed common-law tradition, whereas in Germany, the courts' role in developing the law is more restricted due to the fact that the basis of their rulings is the codified law.

⁵⁸⁹⁵ SALRC *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998) at 60.

⁵⁸⁹⁶ Memorandum on the Objects of the Consumer Protection Bill, 2008, point 1 at 80.

⁵⁸⁹⁷ See Part I ch 1 para 5.

⁵⁸⁹⁸ See Part II ch 1 para 1.2.

Before the legislators of both countries codified the field of standard business terms, the courts tried to tackle the problem of unfair terms and conditions from different angles in both regimes. South Africa heavily relied on the *exceptio doli generalis* until it was abandoned in 1988, without developing further this defence though. German courts applied other mechanisms, such as good faith, public policy (as a self-standing principle) or the restrictive interpretation of standard clauses.

Today, the area of standard business terms is codified in both countries. In Germany, the enforcement procedures are much more streamlined though, whereas in South Africa various entities besides the civil courts are competent.

The mitigation of the *pacta sunt servanda* dogma has also been discussed. The reason for a less strict approach to this principle was that consumers are confronted with a take-it-or-leave-it situation. The socio-economic situation in South Africa required the protection of vulnerable consumers. In contrast, in Germany, a more systematic and dogmatic view prevailed, also due to Ludwig Raiser's seminal work. The 'self-made law of the economy' did not reflect the delicate balance of the *ius dispositivum* anymore because public interest and legal consciousness of the community were not sufficiently taken into account by standard term drafters.

In order to achieve contractual fairness, also the principle of freedom of contract had to be mitigated. This was done by applying the principles of good faith and public policy. South African courts applied a more contextual *bona fides* standard, whereas German courts put this principle in a more normative context. In German legislation, public policy and good faith were codified, and in South Africa, they were developed by jurisprudence.

The need to legislate existed in both countries. As in South Africa, the courts had not succeeded in developing an overarching concept providing for equitable solutions, and existing legislation did not mirror the democratic values of the new constitutional era, there was an apparent need for legislative intervention. The result was the Consumer Protection Act of 2008.

German courts already had developed a respectable set of principles before the AGBG came into force. Since only the most apparent abuses were brought before the courts, and because of the *inter partes* effect of court rulings, the need for legislation was felt also here. This led to the AGBG of 1976. The AGBG norms were integrated, with minor changes, into the BGB in 2002.

CHAPTER 2 – SCOPE OF APPLICATION

In this chapter, the scope of application of sections 48 *et seq.* CPA and §§ 305 *et seq.* BGB will be discussed in a comparative perspective.

1. Territorial scope of application

Section 5 of the Act is an emanation of the South African legislature's will to ensure the application of the Act and thus to protect consumers in a wide range of circumstances. This becomes clear, e.g., in section 5(8), in terms of which the Act applies irrespective of whether the supplier resides or has its principal office within or outside the Republic, operates on a for-profit or non-profit basis, is owned or directed by an organ of state, or is licenced in terms of any public regulation for the supply of goods or services to the public. The simultaneous physical presence of both parties is not necessary when they conclude their agreement because the transaction can 'occur' within the Republic several times. It is therefore sufficient if the supply of the goods or services takes place in South Africa.⁵⁸⁹⁹

The BGB provisions undoubtedly apply if the contract is concluded in Germany and both parties reside in the country. For international transactions, the applicability of the high protective standard of §§ 305 *et seq.* depends on German private international law. The elaborate mechanism of the Rome-I Regulation⁵⁹⁰⁰ unifies the different legislation of the EU Member States and solves conflict-of-law questions so that the courts can apply the same law.⁵⁹⁰¹

The parties are allowed to select the law applicable to their contract under article 3(1) of Rome I. This free choice of law even applies if the parties have no connection to the chosen law other than the choice of law itself.⁵⁹⁰² On the other hand, regulation 44(3)(bb) CPA greylists terms providing that a law other than that of South Africa applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.⁵⁹⁰³ Clauses providing that the law of a particular country will apply therefore only have an effect on the consumer's rights that are

⁵⁸⁹⁹ See Part I ch 2 para 2.1.

⁵⁹⁰⁰ Regulation (EC) no. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁵⁹⁰¹ See Part II ch 2 para 3.3.1.

⁵⁹⁰² See Part II ch 2 para 3.1.2.

⁵⁹⁰³ See discussion on reg 44(3)(bb) CPA in Part I ch 3.

not regulated in the Act.⁵⁹⁰⁴ Hence, in South Africa, freedom of contract is curtailed in this regard. It is suggested that this can only be explained by the legislator's concerns about consumer protection. Suppliers could otherwise circumvent the high protective standard of the Act by choosing the application of the law of another, more lenient country. This is understandable with respect to a country where consumers are more vulnerable due to their socio-economic situation, lacking experience in business matters and the fact that many of them live in remote areas. Since the EU offers a more unified approach for transactions within the EU and generally offers a very high consumer protection standard, the risk that suppliers choose a less protective law is lesser than in legislation where a harmonised approach does not exist.

Rome I also provides that where the parties have not made a choice as to the applicable law, different criteria for specific contract types, such as consumer contracts, have to be applied. For other contracts, the law of the country is applicable to which the contract has the closest connection, such as the supplier's habitual residence (article 4). In consumer contracts, mandatory provisions of the national law from which the parties cannot derogate are still applicable.⁵⁹⁰⁵

The favourability principle ensures that the BGB consumer protection provisions apply if they are more favourable to the consumer than the provisions of the selected law. What is more, consumers living outside the EU/EEC who conclude a contract within the EU/EEC are afforded the high protective standard of article 46 EGBGB.⁵⁹⁰⁶

The guidelines developed by the European Court of Justice applicable to e-commerce transactions assist in the determination of the applicable law where the supplier 'directs' its activities to an EU Member State.⁵⁹⁰⁷ These guidelines have been initially developed for the Brussels I Regulation,⁵⁹⁰⁸ which is similar to article 6(1) of the Rome-I Regulation.⁵⁹⁰⁹ The

⁵⁹⁰⁴ See Part I ch 2 para 2.1.

⁵⁹⁰⁵ For more details, see discussion on the mechanism of Rome I in Part II ch 2 para 3.

⁵⁹⁰⁶ Stoffels *AGB-Recht* 82. See Part II ch 2 para 3.1.3.

⁵⁹⁰⁷ See Part II ch 2 para 3.1.3.

⁵⁹⁰⁸ **Council Regulation (EC) No. 44/2001 of 22 December 2000** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). **Art 15(1)**: 'In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if: (a) it is a contract for the sale of goods on instalment credit terms; or (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'

⁵⁹⁰⁹ Staudinger/*Magnus* Art 6 Rom-I-VO para 115.

South African ECTA does not contain specific provisions for the determination of the applicable law. Sections 22(2), 23(b) and 23(c) provide for the possibility to determine the moment of the conclusion of the contract though, which is significant for the question of whether the consumer resided in South Africa when entering into the contract. Since it is irrelevant whether the supplier resided or has its principal office within or outside the Republic in terms of section 5(8)(a) CPA, the Act applies in cases where a consumer has entered into an electronic transaction while residing in South Africa.

For e-commerce transactions, both the CPA and BGB provisions thus afford their protection to consumers residing in South Africa or within the EU/Germany when entering into the contract.

In B2B contracts, German entrepreneurs can stipulate that the CISG should apply for the formation of their agreement. For the validity of the contract, the national law is applicable. As South Africa is not a signatory of the CISG, South African businesses cannot opt out of the application of the Consumer Protection Act in cases where the Act is applicable under the threshold provision of section 5(2)(b).

Thus, it can be said that for international transactions, both countries apply different approaches to ensure high consumer protection. The South African provisions ascertain that the Consumer Protection Act applies in a wide range of cases, whereas the German norms are part of a complex mechanism of European and international law. German law does not necessarily apply though where the protective standard is comparable with §§ 305 *et seq.* BGB.

2. Material scope of application

2.1. General scope of application

The Consumer Protection Act is not an overarching consumer protection statute since it does not repeal all statutes related to consumer protection.⁵⁹¹⁰ Under section 2(8), other legislation applies in conjunction with the Act.⁵⁹¹¹ What is more, in terms of section 2(10), consumers still have the right to rely on rights they may have under the common law. Because of the common-law principle of freedom of contract, the parties can exclude most of the residual rules of the

⁵⁹¹⁰ E.g., credit agreements under the NCA. The goods and services which form the subject of the credit agreement are subject to the CPA though. Other pieces of legislation which have not been repealed are the Long-Term Insurance Act of 1998, the Short-Term Insurance Act of 1998 and the Financial Advisory and Intermediary Services Act of 2002.

⁵⁹¹¹ This applies to the Public Finance Management Act, 1999 (Act 1 of 1999), the Public Service Act, 1994 (Proclamation No. 103 of 1994), the Public Finance Management Act, 1999 and the Public Service Act, 1994.

common law of contract by agreement.⁵⁹¹² Contrary to common law, the Act mostly affords rights that cannot be derogated, alienated or waived by the consumer. Hence, the Act grants a higher level of protection to consumers.

On the other hand, §§ 305 *et seq.* BGB aim to prevent abuse of freedom of contract-drafting and therefore protect *all* parties against the misuse of standard terms.⁵⁹¹³ The BGB provisions thus cannot be qualified as pure consumer protection provisions, with the exception of § 310(3) (consumer contracts).⁵⁹¹⁴

The provisions of the Act and §§ 305 *et seq.* BGB thus have a different rationale.

Once the Act covers an agreement, all terms contained therein are subject to a fairness review. In other words, all negotiated terms, e.g., those concerning the price or the definition of the main subject matter, as well as non-negotiated terms ('small print') are covered by the Act and may be challenged.⁵⁹¹⁵

On the other hand, individually agreed terms are expressly excluded from the fairness enquiry in terms of §§ 305(1) 3rd sent. and 305b. Clauses stipulating the specification of the performance and the price are not submitted to content control in German law either.⁵⁹¹⁶ 'Specification of the performance' refers to the type, the object, the amount or volume and the quality of the main performance, which is not determined by law.⁵⁹¹⁷ For these cardinal obligations, no statutory provisions exist because they are an emanation of the principle of freedom of contract and therefore depend exclusively on the parties' will.⁵⁹¹⁸ The transparency requirements of § 307(1) 2nd sent. must be met in these cases, however.⁵⁹¹⁹

The inclusion of negotiated terms as well as the core terms pertaining to the price and the performance can be justified in the South African context to a certain degree with the relative inexperience of consumers. One must consider though that consumers tend to check the price and the performance first. The possibility to overreach consumers in this regard cannot be excluded though, which is why the fairness enquiry of such terms might be justified. The courts must consider all the relevant factors in this enquiry, and the fact that these terms may have

⁵⁹¹² Hutchison *et al* *Law of Contract* 432. See Part I ch 2 para 1.

⁵⁹¹³ Eith *NJW* 1974, 16, 17.

⁵⁹¹⁴ Locher *JuS* 1997, 390. See Part II ch 1 para 2.3.

⁵⁹¹⁵ See Part I ch 2 para 2.2 d).

⁵⁹¹⁶ Larenz and Wolf *BGB-AT* 783.

⁵⁹¹⁷ Larenz and Wolf *BGB-AT* 783.

⁵⁹¹⁸ Leenen *BGB-AT* 351.

⁵⁹¹⁹ See Part II ch 5 para 1.6.

been negotiated should be factored in. This was also the position of the South African Law Commission of which one of the guidelines for the determination of unfairness was 'whether or not prior to or at the time the contract was made its provisions were the subject of negotiation'.⁵⁹²⁰

Since section 48 *et seq.* does not contain any provisions with respect to the material scope of application, one must refer to section 5(1) which defines the ambit of the Act. This definition is thus more extensive than the definition contained in § 305 BGB, which merely defines the scope of application for standard business terms. On the other hand, the Consumer Protection Act does not contain a provision that defines 'terms and conditions', unlike § 305(1). In terms of § 305(1), contract terms must be pre-formulated for a multitude of contracts and presented to the other party in order to be qualified as standard business terms. The 2nd sentence of this provision sets out that the form of the agreement, volume and visual characteristics are irrelevant in this respect. Moreover, individually negotiated terms are not considered standard terms under § 305(1) 3rd sent.

The Consumer Protection Act defines in section 5 to what kind of transactions the Act, and consequently, sections 48 *et seq.* apply. 'Transactions' under section 5(1)(a) does not include once-off transactions.⁵⁹²¹ Hence, the protection of sections 48 *et seq.* is not granted to these transactions. The same applies to §§ 305 *et seq.* BGB. This is expressed by the requisite that standard terms must be intended 'for a multitude of contracts' ('für eine Vielzahl von Verträgen'),⁵⁹²² which indicates that mass contracts are targeted.⁵⁹²³ On the other hand, if a clause has been drafted for a single contract and is later inserted in other agreements, the qualification as a standard clause only extends to the subsequent use, and not to the first contract.⁵⁹²⁴ It seems however that sections 48 *et seq.* CPA even apply if the given standard terms have been drafted for a single contract. As the supplier has to act in the ordinary course of its business, which means that in practice, such a case is likely to be the exception, this should have no practical relevance though.

The BGB provisions do not only apply to consumer contracts, but to contracts in general. Only with the insertion of § 310(3) due to the Unfair Terms Directive, the scope of application was

⁵⁹²⁰ SALRC Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts (Project 47) (1998) at 168.

⁵⁹²¹ Jacob/Stoop/Van Niekerk 2010 *PELJ* 312.

⁵⁹²² According to Geoffrey Thomas' and Gerhard Dannemann's translation (reprinted in Maxeiner *Yale J. Int. Law* 177 *et seq.*) which is more accurate in this regard than the official translation of the German Ministry of Justice.

⁵⁹²³ Stoffels *AGB-Recht* 45.

⁵⁹²⁴ BGH *NJW* 1997, 135. See Part II ch 2 para 1.1.1 b) bb).

extended to consumers.⁵⁹²⁵ Since sections 48 *et seq.* CPA refer to suppliers and consumers, the ambit of the Act is narrower in this regard.

What is more, for consumer contracts in terms of § 310(3) no. 2, a non-recurrent use on one occasion is sufficient for the application of §§ 305 *et seq.*⁵⁹²⁶ Therefore, the BGB widens the material scope of application as regards consumer contracts because also once-off transactions are included in this case.

The definition of 'transaction' in section 1 requires that the supplier act in the ordinary course of business. As discussed, 'ordinary course of business' is not defined in the Act, but a purposive interpretation can be useful on a case-to-case basis. In any event, 'ordinary' requires a certain degree of regularity.⁵⁹²⁷

The BGB contains a similar requirement only for consumer contracts in the sense of § 310(3), read with § 312. Consumer contracts are defined as contracts between an entrepreneur and a consumer (§ 310(3) *in pr.*). Under § 14(1), an entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession. The phrase 'in exercise of his or its trade' is similar to 'in the ordinary course of business'. For other agreements than consumer contracts, this requirement does not exist in German standard business law, even though in practice the user will regularly be an entrepreneur.

The requirement of consideration in terms of the definition of 'transaction' in the Act is also non-existent in §§ 305 *et seq.* The BGH applies these provisions to unilateral legal acts by analogy, such as declarations of termination of a contract, a binding promise in terms of § 657 or a bank transfer form by which the bank reserves the right to credit the amount also to another account of the customer. In these cases, no consideration is due.⁵⁹²⁸ An exception in respect of the consideration requirement of the Act is section 5(6)(a). This provision includes the supply of goods or services with regard to members of a club etc. whether for fair value consideration or otherwise. The reason for this exception is that each consumer should be granted protection, for instance, in the case of a faulty product which causes damage to the consumer, in terms of sections 53 to 61.⁵⁹²⁹

⁵⁹²⁵ See Part II ch 2 para 2.2.2.

⁵⁹²⁶ See Part II ch 2 para 1.1.1 b) cc).

⁵⁹²⁷ See Part I ch 2 para 2.2 a) aa).

⁵⁹²⁸ See Part II ch 2 para 1.1.1.

⁵⁹²⁹ See Part I ch 2 para 2.2 a) aa).

'Goods' in section 5(1)(b) is widely defined and includes legal interests in land or any other immovable property, as well as gas, water and electricity (section 1). For 'goods', ex-§ 1(2) HGB contained a legal definition before the commercial law reform in 1998 according to which goods are movable objects. Hence, immovable property are not goods in this sense,⁵⁹³⁰ but transactions relating to them are open to scrutiny in terms of § 307.⁵⁹³¹

Under § 310(2) BGB, the black- and greylists of §§ 308 and 309 do not apply to contracts of electricity, gas, district heating or water suppliers concerning the supply to special customers.⁵⁹³² With this mechanism, the legislator wants to prevent the preferential treatment of special customers in comparison to standard-rate customers.⁵⁹³³ Since the liberalisation of the energy supply market, consumers can also conclude contracts with utility suppliers and become special customers.⁵⁹³⁴ In this case, content control is possible only in terms of the general clause.⁵⁹³⁵ The level of protection must not fall below that of the Unfair Terms Directive however, which is why §§ 310(2) and 307 must be interpreted in conformity with the Directive.⁵⁹³⁶

In this respect, the BGB provisions are more restrictive in terms of utilities than the provisions of the Act as the German provisions only allow the application of the general clause.

The scope of application of the Consumer Protection Act in terms of goods is thus broader than in German law as it unrestrictedly includes immovable property and utilities.

'Services' in terms of §§ 305 *et seq.* are all contractual performances that are neither goods nor immovable objects (land plots).⁵⁹³⁷ The definition of 'services' in section 1 of the Consumer Protection Act is also very extensive and includes, among other things, any work or undertaking performed by a person for another, the provision of education, banking and financial services (with some exceptions), the transportation of persons and goods, the provision of accommodation, the letting of immovable property and the rights of a franchisee in terms of a franchise agreement. What is more, in terms of the Act, also intermediaries are included in the definition of 'services' ('irrespective of whether the person (...) participates in, supervises or engages directly or indirectly in the service'). Although in German law, a *cessio*

⁵⁹³⁰ WLP/Dammann § 309 no. 1 para 32.

⁵⁹³¹ Stoffels *AGB-Recht* 333.

⁵⁹³² See discussion in Part II ch 5 para 1.1.

⁵⁹³³ *Tarifkunden*. BGH *NJW* 1998, 1640 (1642).

⁵⁹³⁴ *MüKo/Basedow* § 310 para 19.

⁵⁹³⁵ BGH *NJW* 2013, 3647 (3650 *et seq.*), Erman/*Roloff* § 310 para 9.

⁵⁹³⁶ UBH/*Schäfer* § 310 para 105, Erman/*Roloff* § 310 para 9.

⁵⁹³⁷ WLP/Dammann § 309 no. 1 para 33. See discussion on § 309 no. 1 in Part II ch 5 para 1.2.1.

legis is possible, i.e., the recourse of the former obligor who satisfied the creditor against a third party,⁵⁹³⁸ in contract law, a direct recourse against a person who did not directly participate in a contract is generally excluded. § 651v(3) contains an exception for tour operators that do not have their registered office within the EU or the EEC. In this case, the travel agent has the same obligations in terms of §§ 651i to 651t in case of a defective trip. In addition, for distance learning contracts, the compelling provisions of the Fernunterrichtsschutzgesetz (FernUSG) which are *leges speciales* to the BGB provisions, apply.⁵⁹³⁹

The German understanding of service is therefore more inclusive because it does not positively enumerate the performances included in the definition, unlike the Consumer Protection Act. In terms of §§ 305 *et seq.*, a differentiation of the type of transaction is not necessary because the German provisions apply to all contract types (with the exceptions mentioned in § 310(4)).

The definition of 'service' in section 1 of the Act excludes services that are regulated by the Long-Term Insurance Act⁵⁹⁴⁰ or Short-Term Insurance Act,⁵⁹⁴¹ for example. Section 1 of the Long-Term Insurance Act defines 'long-term insurance' and covers, for instance, life, health and disability policies. The same applies to liability, property or transportation policies in terms of the Short-Term Insurance Act. These types of insurances are thus excluded from the application of the Consumer Protection Act. On the other hand, the German VVG⁵⁹⁴² also covers these types of policies.⁵⁹⁴³ The applicable insurance standard terms are not excluded from the application of §§ 305 *et seq.* BGB though.

The demarcation between 'goods' and 'services' is therefore not necessary when determining the scope of application of §§ 305 *et seq.*, but only in terms of the content control provisions (§§ 307, 308 and 309). In German standard business terms legislation, the discussion of whether the rights of a franchisee in terms of a franchise agreement are qualified as a 'service' is therefore irrelevant in this regard. For the sake of completeness, it should be mentioned that the rights of a franchisee are not treated differently than other contractual claims of the law of obligations. They are thus not considered 'services' in German law. It is suggested that the South African legislator included them in the definition of 'service' since the Act applies to

⁵⁹³⁸ See Creifelds *Rechtswörterbuch* s.v. 'Regress'.

⁵⁹³⁹ See discussion on § 309 no. 9 in Part II ch 5 para 1.2.9.2.

⁵⁹⁴⁰ 52 of 1998.

⁵⁹⁴¹ 53 of 1998.

⁵⁹⁴² *Versicherungsvertragsgesetz*.

⁵⁹⁴³ See §§ 150 to 171 (life insurance), 192 to 208 (health insurance), 172 to 177 (occupational disability insurance), 100 to 112 (liability insurance), 88 to 99 (property insurance) and 130 to 141 (transport insurance).

transactions on goods or services. As franchise agreements are included in the Act's protection too, the legislator had to make this somewhat artificial choice and include them either in the definition of 'goods' or in the definition of 'services'.

As discussed in Part I, the Act does not contain a definition of 'terms and conditions'.⁵⁹⁴⁴ The suggested definition⁵⁹⁴⁵ would cover all possible kinds of terms and conditions and ascertain a uniform application of the Act and unfairness control. It would also remove all ambiguities of whether certain terms and conditions are part of an agreement. Subsidiary agreements, side letters and other arrangements would be included so that suppliers would not be able to circumvent the application of the Act by 'swapping out' specific terms and applying other 'creative' contract design measures. The BGB prevents these difficulties by defining the conditions and characteristics and providing a negative demarcation to individually negotiated terms in § 305(1). Since this definition is quite extensive, its rationale should always be kept in mind, i.e., the unilateral usage of freedom of contract by the user.⁵⁹⁴⁶

The Consumer Protection Act promotes consumer protection comparable to the Unfair Terms Directive. Its application is thus limited to consumer contracts. It applies an individual approach where the circumstances of the given contract are taken into account. This is particularly expressed in section 52(2) where the factors that the court can consider are indicated.

On the other hand, §§ 305 *et seq.* apply the so-called 'contract model'⁵⁹⁴⁷ which does not assess a term's fairness, but whether the user's standard terms serve as a good faith basis for the parties' contractual relationship.⁵⁹⁴⁸ The scope of the contract model focuses on the challenged terms, the relevant statutory provisions and the contract concerned. On the other hand, the circumstances of the parties involved in a particular transaction are not taken into account, but rather the transactions of the type and classes of the participants.⁵⁹⁴⁹ This approach is thus 'supra-individual and generalising (or 'abstract-universal', 'abstract-general' or 'generalised-

⁵⁹⁴⁴ See Part I ch 2 para 2.2 a) ff).

⁵⁹⁴⁵ "'Terms and conditions'" means any general and special arrangements, provisions, requirements, rules, specifications and standards contained in an agreement between a consumer and a supplier, irrespective of their denomination, content and presentation.' See also Stevenson and Waite *Oxford Dictionary* s.v. 'terms' and The Business Dictionary online: <http://www.businessdictionary.com/definition/terms-and-conditions.html> s.v. 'terms and conditions'. See Part IV II. para 1.

⁵⁹⁴⁶ BGH NJW 2010, 1277, UBH/Habersack § 305 para 5 *et seq.* See Part II ch 2 para 1.1.1.

⁵⁹⁴⁷ *Vertragsmodell.*

⁵⁹⁴⁸ Maxeiner 2003 *Yale J. Int. Law* 109 (148).

⁵⁹⁴⁹ BGHZ 22, 91 (98); 17,1 (3).

typified),⁵⁹⁵⁰ and not 'particular-personalised'.⁵⁹⁵¹ The relevant statute has a 'classifying and guiding function' in this regard.⁵⁹⁵² The BGB makes an unsystematic exception for consumer contracts (§ 310(3)) due to the requirements of the Unfair Terms Directive.

The abstract approach applied by §§ 305 *et seq.* is more suited for standard business terms because they have been drafted for mass contracts.⁵⁹⁵³ In a particular-personalised approach, the individual client has to go to court. The following decision only has an *inter partes* effect, and other consumers cannot benefit from the judgment.⁵⁹⁵⁴ Hence, the German approach is more efficient and effective to fight unfair standard terms than the South African one. The South African legislator could balance this deficiency by introducing an abstract-challenges mechanism similar to the German institutional action. By doing so, the courts would apply a supra-individual and generalising approach, detached from individual consumers, and unfair terms could be eradicated for all the given supplier's customers.

2.2. Exceptions

Both the Act and the BGB contain several exceptions concerning the scope of application.

a) State

Section 5(2) of the Act excludes the State from the protection of the Act where it is a consumer. As discussed in Part I,⁵⁹⁵⁵ it is not clear whether 'State' includes organs of state, or whether 'State' merely comprises departments of state at the national, provincial and local level, as De Stadler opines.⁵⁹⁵⁶ Although this question has little practical relevance because parastatals are most likely excluded from the application of the Act due to their annual turnovers or asset values, the legislator should clarify this question and insert a definition of 'State' in the Act. Besides, where the State is a shareholder of private companies and exerts a direct influence on the policies of the given company, the entity in question should not afford the protection of the Consumer Protection Act, as discussed.⁵⁹⁵⁷

§ 310(1) excludes the application of the incorporation requirements set out in § 305(2) and (3) as well as the application of most provisions of § 308, and all provisions of § 309 where legal

⁵⁹⁵⁰ *Abstrakt-generell.*

⁵⁹⁵¹ *Konkret-individuell.* Heinrichs *NJW* 1993, 1817, 1820.

⁵⁹⁵² *Ordnungs- und Leitbildfunktion.* Schmidt-Salzer *Allgemeine Geschäftsbedingungen* 186-189.

⁵⁹⁵³ Staudinger/Rieble § 315 para 305. See Part II ch 5 para 1.1.1 b) cc).

⁵⁹⁵⁴ This will be discussed later in chapter 6 of Part III.

⁵⁹⁵⁵ Part I ch 2 para 2.2 b) aa).

⁵⁹⁵⁶ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 79.

⁵⁹⁵⁷ Part I ch 2 para 2.2 b) aa).

persons under public law and special funds under public law are customers. These entities thus enjoy only reduced protection. Legal persons under public law are the State (government), public corporations (e.g., municipalities), public agencies (e.g., universities or social security agencies), foundations of public law and the churches.⁵⁹⁵⁸ Special funds concern the Federal Railway Fund (Bundeseisenbahnvermögen – BEV) and the Fund of the European Recovery Program (ERP-Sondervermögen).⁵⁹⁵⁹ It is therefore irrelevant whether the given public entity is located on a national, federal or local level. Schools and universities, for instance, are governed by the *Länder* (federal states).⁵⁹⁶⁰ German private-law companies the shares of which are 100 per cent held by the State, such as the Deutsche Bahn AG, are not considered public entities or parastatals. Their protection is reduced in terms of §§ 305 *et seq.* however because they are entrepreneurs. The latter are also mentioned in § 310(1).

Due to the special relationship between the German State and the churches,⁵⁹⁶¹ the latter are also excluded from the scope of application of the given BGB provisions. In South Africa, such a link does not exist.

b) Businesses

The German provisions have no turnover or asset value requirements concerning businesses, unlike section 5(2)(b) of the Act. German entrepreneurs enjoy reduced protection if they are the 'other party' so that the general clause of § 307 is applicable, and the evaluations contained in §§ 308 and 309 are taken into account within the general clause. This allows for a flexible application of the law and the consideration of the practices and customs of the given industry.⁵⁹⁶²

This approach seems more appropriate than the formalistic approach of the Act which refers to the turnover or asset value of a company. This different approach is justified by the fact that the BGB and the Consumer Protection Act pursue different purposes. The Act is essentially consumer protection law, with an extended understanding of what constitutes a consumer. It therefore aims at protecting small businesses that are similarly vulnerable as natural persons. The Act hence assumes that entities that are not juristic persons deserve the same protection as other consumers. This approach takes into account the socio-economic realities in South

⁵⁹⁵⁸ Stoffels *AGB-Recht* 71. Concerning the Roman-Catholic Church, see BGHZ 124, 174.

⁵⁹⁵⁹ The ERP Fund is based on a convention between the United States of America and the Federal Republic of Germany for economic cooperation. It was concluded in 1949 (BGBl. 1950 at 9). See Creifelds *Rechtswörterbuch* s.v. 'ERP-Sondervermögen'.

⁵⁹⁶⁰ Article 70(1) read with art 73(1) GG.

⁵⁹⁶¹ See Art 140 GG read with art 136-141 WRV.

⁵⁹⁶² See Part II ch 2 para 2.1.3.

Africa. The application of turnover and asset thresholds to juristic persons excludes companies that do not need protection and assures that the majority of companies who need protection are actually protected. This has the consequence that a sole proprietorship-consumer with a sizeable annual turnover exceeding the threshold is protected by the Act, whereas a company, i.e., a juristic person, with a similar annual turnover is excluded from its protection.

The more formalistic approach of the Act thus seems to be a better solution for South Africa.

As discussed in Part II,⁵⁹⁶³ in terms of the so-called 'battle of forms', the last shot doctrine is not convincing because of its numerous drawbacks (e.g., 'ping-pong play'⁵⁹⁶⁴ with accidental results,⁵⁹⁶⁵ difficulties of proof,⁵⁹⁶⁶ economically unrealistic⁵⁹⁶⁷). Furthermore, the application of the strict mirror approach or the last shot rule would destroy the contract, whereas it is in the parties' interests to assume the valid conclusion of such a contract and to presume a dissent only where one party expressly wanted to have treated its standard terms as a condition for the validity of the agreement.

On the other hand, the knock out approach⁵⁹⁶⁸ assures that the transaction is not destroyed because of conflicting standard terms, and that colliding clauses are replaced by statutory provisions so that a viable contract in which the corresponding standard terms are upheld is the result. Furthermore, this approach reflects the parties' intentions in commercial relations and leads to fair and predictable results by avoiding an arbitrary choice as it is the case for the last shot rule.⁵⁹⁶⁹ This contributes to legal certainty.⁵⁹⁷⁰ This is probably why, from an international point of view, the majority of the commentators and case law show a preference for this approach.⁵⁹⁷¹

⁵⁹⁶³ See Part II ch 3 para 1.5.

⁵⁹⁶⁴ L/GvW/T/Löwe § 2 AGBG para 41.

⁵⁹⁶⁵ Eiselen/Bergenthal 2006 *CILSA* 220.

⁵⁹⁶⁶ Striwe *JuS* 1982, 729.

⁵⁹⁶⁷ Eiselen/Bergenthal 2006 *CILSA* 221.

⁵⁹⁶⁸ In terms of this approach, the parties' standard terms that are not in conflict form part of the agreement, and conflicting terms are replaced by the *ius dispositivum*. See Eiselen/Bergenthal 2006 *CILSA* 216.

⁵⁹⁶⁹ CISG-AC Opinion No. 13 Rule 10.6.

⁵⁹⁷⁰ Eiselen/Bergenthal 2006 *CILSA* 227.

⁵⁹⁷¹ See CISG-AC Opinion No. 13 Rule 10.6, with further references. The knock out approach is also applied in terms of **art 2.22 of the UNIDROIT Principles**: '(Battle of forms) Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.'

Because of its undeniable advantages, this approach should thus be applied both in Germany and in South Africa.

c) Employment contracts

Section 5(2)(e) CPA excludes services under an employment contract from the scope of application of the Act. As submitted in Part I, the Act applies though where an employee buys a sub-standard service from its employer at a discount price. Only services supplied by the employee in terms of the employment contract should be excluded according to section 5(2)(e). The reason for this exemption is not to put too much burden on the relationship between an employer and an employee in terms of the fulfilment of the contract. Where an employee buys services from the employer, this does not concern the fulfilment of the employment contract, however.⁵⁹⁷²

It is suggested that the inclusion of employment contracts into the scope of application of the Act would be superfluous. A comparison of the South African and the German approach would go beyond the scope of this thesis. Therefore, it should be sufficient to note that other pieces of legislation, such as the Labour Relations Act⁵⁹⁷³ the Basic Conditions of Employment Act,⁵⁹⁷⁴ the Employment Equity Act⁵⁹⁷⁵ or the Occupational Health and Safety Act,⁵⁹⁷⁶ already offer extensive protection for employees so that the inclusion of employment contracts into the Act is not necessary.

§ 310(4) limits content control in labour law. Under this provision, for employment contracts, reasonable account must be taken of the special features that apply in labour law.⁵⁹⁷⁷ The incorporation requirements of § 305(2) or § 305(3) (framework agreements) do not apply in this case. The inclusion of employment contracts is justified because, despite the protection by collective agreements and legal provisions to a certain extent, employees need protection because of their existential dependence on their employment.⁵⁹⁷⁸ Furthermore, there must be a counter-weight of the employer's power to determine the employment conditions unilaterally.⁵⁹⁷⁹ What is more, the inclusion of labour law into content control ascertains that

⁵⁹⁷² See Part I ch 2 para 2.2 b) ee).

⁵⁹⁷³ 66 of 1995.

⁵⁹⁷⁴ 75 of 1997.

⁵⁹⁷⁵ 55 of 1998.

⁵⁹⁷⁶ 85 of 1993.

⁵⁹⁷⁷ See Part II ch 2 para 1.2.4 c).

⁵⁹⁷⁸ See Part II ch 2 para 1.2.4.

⁵⁹⁷⁹ BT-Drs. 14/6857 at 54.

courts will no longer reach varying rulings leading to legal uncertainty. This also contributes to an equalisation of the level of protection of content control between labour and civil law.⁵⁹⁸⁰

For the meaning of 'special features that apply in labour law', the prevailing view legitimately asserts that content control in labour law takes place, but where a prohibitive provision is not adapted to labour law, corrections must be made.⁵⁹⁸¹ Such corrections can originate from the legislature's evaluations in labour and social law, deviating factual situations in labour law⁵⁹⁸² or special features of ecclesiastical labour law.⁵⁹⁸³ They can also originate from the fact that some prohibitions in §§ 308 and 309 are geared towards short-term relations having a paying customer in mind (e.g., the prohibition of contractual penalties in § 309 no. 6). Customary practise is not a special feature of labour law, however.⁵⁹⁸⁴ In this context, it should be reminded that the wide BGB definition of 'consumer' in § 13 means that employees are 'consumers' *vis-à-vis* their employers in terms of their contracts of employment.⁵⁹⁸⁵

A consequence of the previously mentioned inclusion of labour law is that the courts now differentiate between pre-formulated and individually agreed employment contract clauses.⁵⁹⁸⁶ Where employees can negotiate their working conditions to a certain degree, one must assume that they are able to defend their interests. This 'more' of freedom of contract must however not be nullified by considerations of equity (§ 315(3))⁵⁹⁸⁷ or public policy (*gute Sitten*) (§ 138(1)).⁵⁹⁸⁸

As mentioned earlier, an inclusion of labour law into the Act would be superfluous because of the sufficient protection offered by other South African pieces of legislation.

d) Collective agreements

Under section 5(2)(f) and (g), collective bargaining agreements and collective agreements are excluded from the ambit of the Act. As mentioned above, a comparison of the exclusion of this

⁵⁹⁸⁰ BT-Drs. 14/6857 at 54.

⁵⁹⁸¹ Thüsing *NZA* 2002, 591 *et seq.*, *ErfK/Preis* §§ 305-310 para 11.

⁵⁹⁸² BAG *NZA* 2008, 129 (133); 2011, 206 (209).

⁵⁹⁸³ BAG *NZA* 2011, 634 (637 *et seq.*).

⁵⁹⁸⁴ Staudinger/*Krause* Annex to § 310 para 144, Junker *FS Buchner* 378 *et seq.*

⁵⁹⁸⁵ BAG *NZA* 2005, 1111 (1115), confirmed by BVerfG *NZA* 2007, 85, 86; BAG *NZA* 2011, 89 (90); 2013, 1265 (1266), *ErfK/Preis* § 611 para 182, *Wendland* in: Staudinger/Eckpfeiler E para 15. Hence, the specific provisions for consumer contracts in § 312(3) must also be taken into consideration.

⁵⁹⁸⁶ Hanau *NJW* 2002, 1242, Stoffels *AGB-Recht* 63.

⁵⁹⁸⁷ § 315(3): 'Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.'

⁵⁹⁸⁸ § 138(1): 'A legal transaction which is contrary to public policy is void.' Thüsing/*Leder* *BB* 2005, 940, Stoffels *AGB-Recht* 63.

field from content control goes beyond the scope of this thesis. South African employees are sufficiently protected in this area by other pieces of legislation, such as the Labour Relations Act⁵⁹⁸⁹.

§ 310(4) *in fine* also excludes the application of collective agreements from §§ 305 *et seq.* The rationale of this norm is that since the bargaining power of the parties is balanced, there is no need for protection in terms of content control. Besides, neither party is the 'user' in the sense of § 305.⁵⁹⁹⁰ More importantly, the autonomy of collective bargaining⁵⁹⁹¹ is a constitutional right (article 9(3) GG),⁵⁹⁹² and the parties' power to shape their agreements must not unnecessarily be restricted by content control.⁵⁹⁹³

Both regimes thus exclude collective agreements from content control because employees are already sufficiently protected in this regard, either by other pieces of legislation or the fact that the parties' bargaining power is balanced through the negotiations already undertaken by their representatives (e.g., unions and employer organisations).

e) Other exclusions

According to section 5(2) of the Consumer Protection Act, transactions for which the Minister has granted an exemption (paragraph (c)) as well as credit agreements under the National Credit Act (item (d)) are excluded from the scope of application of the Act.⁵⁹⁹⁴ The Consumer Protection Act is intended to offer a default regime of consumer protection. Its purpose is not to override industry-specific laws that contain more specific consumer protection schemes. If the National Consumer Commission advises that the specific industry scheme protects consumers at least as much as the Consumer Protection Act, the Minister may grant an exemption.⁵⁹⁹⁵

⁵⁹⁸⁹ 66 of 1995.

⁵⁹⁹⁰ Stoffels *AGB-Recht* 63, with further references.

⁵⁹⁹¹ *Tarifautonomie*.

⁵⁹⁹² **Article 9(3) GG:** 'The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a [Compulsory military and alternative civilian service], to paragraphs (2) and (3) of Article 35 [Legal and administrative assistance and assistance during disasters], to paragraph (4) of Article 87a [Armed Forces], or to Article 91 [Internal Emergency] may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.'

⁵⁹⁹³ BT-Drs. 14/6857 at 54.

⁵⁹⁹⁴ See Part I ch 2 paras 2.2 b) cc) and dd).

⁵⁹⁹⁵ Section 5(4). See Memorandum on the Objects of the Consumer Protection Bill, 2008, point 3.2 at 82.

The Minister has granted such an exemption for banks concerning the application of section 14 (expiry and renewal of fixed-term agreements).⁵⁹⁹⁶ Furthermore, the pension fund industry,⁵⁹⁹⁷ the collective investment scheme industry⁵⁹⁹⁸ and the security services industry⁵⁹⁹⁹ had been exempted from the majority of the provisions of the Act for 18 months from 1 April 2011. These industries are now permanently exempt in terms of the Financial Services Laws General Amendment Act.⁶⁰⁰⁰

The German provisions do not contain similar exclusions.

Melville is of the opinion that the fact that the National Credit Act has not been repealed along with other statutes like the Long-Term Insurance Act of 1998,⁶⁰⁰¹ the Short-Term Insurance Act of 1998⁶⁰⁰² and the Financial Advisory and Intermediary Services Act of 2002⁶⁰⁰³ is a result of a resolute lobbying on the part of the financial sector.⁶⁰⁰⁴ In fact, section 90 of the National Credit Act dealing with unfair contract terms has not been repealed by the Consumer Protection Act. Generally, sections 89 and 90 of the National Credit Act offer less protection than sections 48 and 51 of the Consumer Protection Act. Better consumer protection in terms of the NCA could therefore be achieved by repealing section 90 of the NCA and making it subject to an amended Consumer Protection Act. Another solution could consist of amending section 90 by aligning it with the CPA provisions. Section 121, read with Schedule 1 of the Consumer Protection Act, and section 172, read with Schedule 1 of the National Credit Act, would have to be amended for this purpose. It is suggested that the amendment of section 90 NCA would be the better solution because a cross-referencing between the two pieces of legislation would be avoided.

On the other hand, § 310(4) BGB excludes contracts in the field of the law of succession, family law and company law from the ambit of §§ 305 *et seq.*⁶⁰⁰⁵ Similar exclusions are not contained in the Consumer Protection Act. The rationale of the exclusion of family law is that in this

⁵⁹⁹⁶ GN 532 in GG 34399 of 27 June 2011.

⁵⁹⁹⁷ Regulated by the Pensions Funds Act 24 of 1956.

⁵⁹⁹⁸ Regulated by the Collective Investments Schemes Control Act 45 of 2002.

⁵⁹⁹⁹ Regulated by the Financial Markets Act 19 of 2002.

⁶⁰⁰⁰ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 107. See Part 1 (amendment of the Pension Funds Act), Part 9 (amendment of the Collective Investments Schemes Control Act) and Part 12 (amendment of the Financial Markets Act) of the General Services Laws General Amendment Act 45 of 2013.

⁶⁰⁰¹ 52 of 1998.

⁶⁰⁰² 53 of 1998.

⁶⁰⁰³ 37 of 2002.

⁶⁰⁰⁴ Melville *Consumer Protection Act* 3.

⁶⁰⁰⁵ See Part II ch 2 para 1.2.

field, prescribed contract types prevail, and restricted possibilities of varying from legal provisions would not be appropriate. Like in the law of succession, contracts in this area are quite individualised, so that there is no need for strict content control.⁶⁰⁰⁶ The fact that these areas are not excluded in terms of the Consumer Protection Act should not have a significant effect, though, because in the given constellations, the parties usually are not consumers or suppliers. What is more, in the South African law of succession, the principle is that an agreement by a testator not to revoke a will is invalid (*pactum successorium*). Hence, provisions in a contract under which a person purports to regulate how his or her assets would be dealt with after death will not be binding. The rationale of this principle is that the testator should be entitled to determine how or to whom property should be left on death, and to revoke a will or other testamentary document at any time.⁶⁰⁰⁷ In South African family law, the question is whether a transaction between family members has been concluded at arm's length, i.e., under normal market conditions.⁶⁰⁰⁸ Only then, the given contract is valid.

Thus, the South African regime too excludes *de facto* contracts concluded in the areas of the law of succession and family law, with certain exceptions applying to family law.

§ 310(4) also excludes company law from the application of the German standard business terms regime since the application of these provisions would not be appropriate for provisions concerning the organisation of companies. Where legal provisions in this field are mandatory, they offer a balanced solution. Besides, company agreements are usually drafted by specialists. Only if specific instruments or provisions concerning the organisation of these structures, such as company agreements or articles of association, or constructions pertaining to the membership of the legal structure, are concerned, §§ 305 to 310 do not apply.⁶⁰⁰⁹

An exclusion of company law would not have been necessary in the context of the Consumer Protection Act since the parties cannot be defined as suppliers and consumers under section 1. Franchise agreements are an exception (section 5(6)(d)). Such agreements are often concluded between large franchisors and smaller juristic persons who can easily be overreached so that the protection afforded by the Act seems reasonable.⁶⁰¹⁰ In German law, §§ 305 *et seq.* are

⁶⁰⁰⁶ BT-Drs. 7/3919 at 41.

⁶⁰⁰⁷ Christie *Law of Contract* 374 and 375.

⁶⁰⁰⁸ See 'What is an Arm's-Length-Transaction?' at <https://www.thebalancesmb.com/what-is-an-arms-length-transaction-398128>.

⁶⁰⁰⁹ Stoffels *AGB-Recht* 57.

⁶⁰¹⁰ See Part I ch 2 para 2.2. a) aa).

applicable to franchise agreements as long as they do not concern the organisational structure but standard form contracts with supplementary provisions for the operation of the business.⁶⁰¹¹

3. Personal scope of application

Sections 48 *et seq.* of the Act apply to consumers and suppliers, whereas §§ 305 *et seq.* BGB refer to the user and the other party.

3.1 Consumer / other party

The term 'consumer' is defined in section 1 of the Act and includes the beneficiary or recipient of services as well as franchisees. Hence, consumers who had no knowledge of the transaction are protected too. What is more, also bystanders seem to be covered by the protection of the Act when they suffer harm as a result of unsafe goods.⁶⁰¹² Goods are unsafe if they, due to a characteristic, failure, defect or hazard, present an extreme risk of personal injury or property damage to the consumer *or to other persons*.⁶⁰¹³ What is more, section 61(5) refers to injury, death or illness of *any natural person*⁶⁰¹⁴ and damage or loss of any property and does not limit it to harm to consumers or their property. The Act therefore expands the term 'consumer' to a wide range of persons, even if the term is not consistently used throughout the Act and sometimes replaced by the term 'person'.⁶⁰¹⁵ The extension of the term 'consumer' to 'any natural person' in section 61(5) aims to make provision for products liability where the common law of delict has been deficient. What is more, no specific other legislation dealing with products liability exists.

The term 'other party' is also not consistently used in the BGB. Sometimes, the legislator refers to the 'other party to the contract' (*'der andere Vertragsteil'*), 'contractual partner' (*'Vertragspartner'*) instead of the 'other party' (*'andere Vertragspartei'*).⁶⁰¹⁶ The different wording has no meaning in practice though since these terms always refer to the user's counterpart. The supplier's counterpart is either the 'other party', or a 'consumer' in terms of a consumer contract under § 310(3).

The term 'other party' is not defined in the BGB but means the user's counterpart. § 13 defines the word 'consumer' as every natural person who enters into a legal transaction for purposes

⁶⁰¹¹ UBH/*Schmidt* Part 2 ch 13 (franchise agreements) para 7.

⁶⁰¹² De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 36.

⁶⁰¹³ Section 53(1)(d). Emphasis added.

⁶⁰¹⁴ Emphasis added.

⁶⁰¹⁵ De Stadler 'Section 5' in Naudé and Eiselen (eds) *CPA Commentary* para 38. See Part I ch 2 para 2.3 a).

⁶⁰¹⁶ See, e.g., §§ 307(1) or § 309 no. 14.

that predominantly are outside his trade, business or profession though. § 13 defines 'consumer' negatively since the legal transaction must be concluded neither for a commercial nor for an independent activity.⁶⁰¹⁷ Unlike the Unfair Terms Directive, § 310(3) does not require the parties to conclude a specific type of transaction, such as a sales agreement. Hence, for the German provision, consumption of the given item is not necessary, even though consumption will be the ultimate purpose of the contract for the consumer in most cases. On the other hand, the definition of 'consumer' in section 1 CPA only relates to goods and services. In this regard, this definition is thus more restrictive and only refers to certain agreements.

As long as a company does not exceed the thresholds in terms of section 5(2)(b) CPA, they can also be consumers so that the Act applies to them without restriction. On the other hand, the application of certain BGB provisions to entrepreneurs is excluded in terms of § 310(1) BGB (incorporation requirements, framework agreements, most items contained in § 308 and all items of § 309). This means that in German B2B contracts, the general clause of § 307 plays a more prominent role than in South Africa.

Hence, the German term '[the] other party' and its synonyms is more restrictive in that the South African regime expands the notion of 'consumer' to persons who are not directly involved in the transaction as well as to any natural person who suffers injury, death or illness in terms of section 65. This expansion aims to balance deficiencies of the common law of delicts and the fact that no other legislation dealing with product liability exist in South Africa. In Germany, these areas are already covered by §§ 823 *et seq.* BGB and the Produkthaftungsgesetz (ProdHaftG). An extension of the term 'other party' was thus not necessary for §§ 305 *et seq.* On the other hand, a 'consumer' in the Act merely relates to agreements related to goods or services. In contrast, for the German regime, such a restriction does not exist. In practice, most contracts deal with goods or services, however, which is why most transactions should be covered in the South African regime.

3.2 Supplier / user

In terms of section 1, a supplier is a person who markets any goods or services. When reading this definition with the definition of 'market' (verb) and 'promote' it becomes clear that the supplier must do so in the ordinary course of its business. Section 5(8)(c) provides that the legal

⁶⁰¹⁷ In the English translation, this is not sufficiently clear though as the German negatively formulated phrase for 'der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann' (*neither for ... nor for*) is translated in English by a positive grammatical structure that is closer to art 2 lit. b) of the Directive: 'for purposes that predominantly are *outside* his trade, business or profession'. Emphasis added.

nature of the supplier is irrelevant (individual, juristic person, partnership, trust, organ of state etc.).

§ 305(1) contains a legal definition of 'user' by providing that this is the party to the contract that presents pre-formulated contract terms to the other party upon entering into the contract. A restriction to goods or services is not required. As long as the user is not an entrepreneur under § 14, it is also not necessary that the user 'acts in exercise of his or its trade, business or profession'.

Hence, the South African definition of 'supplier' is more restrictive than the German term 'user' in that it only includes activities performed in the ordinary course of business and related to goods or services.

4. Conclusion

For the territorial scope of application of the Consumer Protection Act, the South African legislator aims to protect consumers in a wide range of circumstances. Hence, both parties do not need to be simultaneously present during the conclusion of their agreement for that the Act applies; it is sufficient if the supply of the given goods or services takes place in the Republic. Because of the embedding of German law into European law and the Rome-I Regulation, a more unified approach for transactions within the EU is possible. A circumvention of the high EU consumer protection standards is thus unlikely. Therefore, Rome-I makes it possible that the parties select the law applicable to their agreement. In consumer agreements, the parties cannot derogate from mandatory national provisions, however. What is more, the favourability principle ensures that in the case where the BGB provisions are more favourable to the consumer than the provisions of the selected law, the former apply. For e-commerce transactions, both the Act and the BGB afford protection to consumers residing in South Africa or within the EU/Germany when concluding their agreement.

Concerning the material scope of application, and even though the Act does not afford an overarching consumer protection mechanism because other legislation applies in conjunction with the Act, and consumers still may claim their rights in terms of the common law, consumers cannot derogate from most of the rights contained in the Act. Thus, it grants a higher level of protection to consumers than the common law or other legislation. Unlike the CPA, the BGB provisions cannot be qualified as pure consumer protection provisions, though (with the

exception of § 310(3) dealing specifically with consumer contracts). The provisions of the Act and §§ 305 *et seq.* BGB thus have different objectives.

Unlike German law, the South African regime covers all terms contained in an agreement, i.e., also negotiated terms and those pertaining to the price and the performance. In German law, negotiated terms and those pertaining to the main subject matter are considered to be an emanation of the principle of freedom of contract. Since South African courts must consider all the relevant factors in the fairness enquiry, they should consider the fact that these terms have been negotiated.

In order to apply, German standard business terms must have been drafted 'for a multitude of contracts', i.e., once-off transactions are not subject to content control. This does not apply to consumer contracts though where a non-recurrent use on one occasion is sufficient for the application of §§ 305 *et seq.* On the other hand, the CPA seems to apply even if the standard terms have been designed for a single contract. As the Act only refers to suppliers and consumers, its ambit is narrower than in §§ 305 *et seq.* though because the German provisions not only apply to consumers but to 'the other party', which is a broader concept.

The German provisions do not contain any requirement of consideration, unlike the Act, where the exchange of consideration is a requisite for a transaction in terms of section 1. An exception is section 5(6)(a), which qualifies the supply of goods or services with regard to members of a club etc. as a transaction, irrespective of whether there is an exchange of consideration or not.

§§ 305 *et seq.* are more restrictive with respect to utilities than their South African counterpart because for electricity, gas, district heating or water suppliers, only the general clause can be applied. The definition of 'goods' in South African legislation also includes immovable property, which is not the case in Germany.

The Consumer Protection Act contains an extensive definition of 'services' which also includes intermediaries. This is not the case for the German regime where a direct recourse against a third party that is not directly involved in the contract is generally excluded. The German understanding of 'services' is more inclusive, and a differentiation of the type of transaction is unnecessary. The demarcation between 'goods' and 'services' is not necessary for the determination of the scope of application, but for content control.

The Consumer Protection Act lacks a definition of 'terms and conditions', unlike § 305(1). In order to remove any ambiguities and to include subsidiary agreements, side letters or other

arrangements that enable the supplier to circumvent the application of the Act, a definition should be inserted into section 1.

Unlike the Act, which applies a particular-personalised approach, German standard terms are subject to an abstract-general enquiry where the particular circumstances of the case are irrelevant, except for consumer contracts.

Section 5(2) excludes the State from the personal scope of application and hence the protection of the Act. Under § 310(1), certain entities, such as persons under public law, enjoy reduced protection in terms of §§ 305 *et seq.* In this context, it is irrelevant whether the given entity is located on a national, federal or local level. The special relationship between the German State and the churches does not exist in South Africa, however.

The German approach concerning the renunciation of a turnover or asset value requirement in respect of businesses is less formalistic than the South African mechanism. This difference can be explained by the different purposes of both pieces of legislation. What is more, the South African approach is suited to reflect the socio-economic reality of this country and to protect most consumers that need protection.

With respect to the 'battle of forms' in B2B contracts, the internationally recognised knockout approach should apply both in South Africa and in Germany.

Employment contracts are excluded from the scope of application of the Act. South African employees already benefit from extensive protection afforded by other pieces of legislation. On the other hand, § 310(4) restricts content control in labour law, but reasonable account must be taken of the special features that apply in labour law. The German legislator justified this restricted protection with the existential dependence of employees and because employers determine the employment conditions mostly alone. Where employees can negotiate their working conditions to a certain degree, it is to be assumed that they can defend their interests. German courts thus differentiate between pre-formulated and individually agreed employment contract clauses.

Both the South African and the German regimes exclude collective bargaining agreements and collective agreements from content control.

The BGB excludes contracts in the field of the law of succession, family law and company law from the scope of application of §§ 305 *et seq.* The South African regime does not contain similar exclusions. The *pactum successorium* principle in the law of succession and the fact

that agreements between family members must be at arm's length exclude *de facto* the validity of most contracts in these areas. Excluding company law would not be necessary under the CPA as the parties cannot be defined as suppliers and consumers under section 1. Contrary to the Act, content control for franchise agreements is possible as long as they do not concern the organisational structure.

The Act expands the concept of 'consumer' to a wide range of persons, but only in relation to goods and services. Thus, the definition of the Act is somewhat restrictive and only refers to specific agreements. As in practice, most contracts deal with goods or services, the majority of transactions should be covered in the South African regime, however.

The Act unrestrictedly applies to companies that do not exceed the threshold requirements contained in section 5. On the other hand, the application of certain BGB norms to entrepreneurs is excluded, and the general clause applies.

The South African legislation defines 'supplier' more restrictively than the German regime defines 'user' in that it only includes activities performed in the ordinary course of businesses and related to goods or services.

CHAPTER 3 – INCORPORATION CONTROL

The following chapter deals with the comparison between the incorporation requirements according to the Consumer Protection Act and §§ 305 *et seq.* BGB.

1. Substantive incorporation prerequisites

§ 305(2) BGB strengthens the other party's position *vis-à-vis* the user by applying a formalistic approach that deviates from general contract law. This is done by requiring not only consent between the parties but also that certain conditions must be met. Only then, the user's standard terms become part of the agreement.⁶⁰¹⁸ The incorporation requirements apply to all standard business terms, irrespective of their content or form.

Too strict conditions for the incorporation of standard terms must be avoided though in cases where this might be an obstacle for legal transactions. This applies especially to mass contracts, where the rationalising effect is a significant factor to be taken into consideration.⁶⁰¹⁹ When interpreting § 305(2) and (3), one has thus to ask the question of whether the incorporation requisites are reasonably justified in terms of customer protection,⁶⁰²⁰ or whether a 'functional reduction' of § 305(2) must take place for specific contracts.⁶⁰²¹

Furthermore, § 305a contains several exceptions in which a facilitated incorporation of certain standard terms applies, namely to tariffs and regulations of regular passenger transportation services, the standard terms for the posting of items or the standard terms for certain telecommunication services. The reasons for such facilitation are of legal or practical nature.⁶⁰²²

§ 310(1) 1st sent. provides that the incorporation conditions set out in § 305(2) do not apply to standard terms which are used in contracts with an entrepreneur, a legal person under public

⁶⁰¹⁸ See Part II ch 3 para 1.1 b).

⁶⁰¹⁹ BT-Drs. 7/3919 at 13 and 17.

⁶⁰²⁰ UBH/*Ulmer and Habersack* § 305 para 102 argues that a cautious interpretation closely related to the general contract law of the BGB is therefore necessary.

⁶⁰²¹ The BGH decided that for bond terms for securities, a modified application of the standard business terms legislation is necessary in order to ensure a functional trading of securities (BGH *NJW* 2005, 2917). This presumes a standardised content of securities. If the content of a securitised right would depend on the circumstances of their acquisition, their transferability would not be possible. An implied incorporation of bond terms is therefore sufficient. See Stoffels *AGB-Recht* 42. Ekkenga *ZHR* 160 (1996) 59 *et seq* argues that the unrestricted application of §§ 305 *et seq* for bond terms is not possible because standard business terms legislation falls short of the factual circumstances of the issuance of bonds and that bond terms cannot be assessed for the lack of a normative control standard. In addition, the assessment of standard terms does not consider the collective relations of the market.

⁶⁰²² See Part II ch 3 para 1.3 a).

law or a special fund under public law. Instead, the laxer rules of the BGB governing the conclusion of a contract apply.⁶⁰²³ In these cases, the persons mentioned above have a lesser need for protection than individual customers do.⁶⁰²⁴

§ 305(2) does also not apply to pre-formulated employment conditions (§ 310(4) 2nd sent. 2nd subclause).⁶⁰²⁵ This caveat is due to the legislator's misjudgement concerning the regulatory content of the Evidence Act for Employment Relationships (NachwG).⁶⁰²⁶ Nonetheless, § 305(2) cannot be applied by analogy⁶⁰²⁷ so that the general legal provisions apply.⁶⁰²⁸

§ 305(3) provides that for certain transactions, the parties can conclude a framework agreement in advance according to which specific standard terms govern a specific type of legal transaction. This applies, for example, for current business relationships, especially between a bank and its clients.⁶⁰²⁹

The South African legislator chose to apply similar incorporation requirements in section 49 CPA. These apply only to four types of terms however, namely: 1.) exemption clauses, 2.) clauses by which the consumer assumes a risk or liability, 3.) indemnity clauses imposing an obligation on the consumer to indemnify the supplier or any other person for any cause, and 4.) acknowledgements of any fact by the consumer.⁶⁰³⁰ What is more, the incorporation requirements concern provisions or notices concerning activities or facilities that are subject to any risk of an unusual character or nature, that are unexpected, or that could result in serious injury or death.⁶⁰³¹ Besides these requirements, the incorporation requirements of the common law must be considered too. These apply to the extent that they have not been amended by section 49 as regards contracts and notices governed by the Act. According to the common law, the party who alleges the agreement bears the onus of establishing the content of the contract, i.e., what the terms are.⁶⁰³² This even applies to cases where a party wants to prove that a specific provision has not been incorporated into the contract.⁶⁰³³ If the supplier can prove

⁶⁰²³ Maxeiner *Yale J. Int. Law* 166. See §§ 145 *et seq.*

⁶⁰²⁴ See Part II ch 3 para 1.3 b).

⁶⁰²⁵ Brox and Walker *BGB-AT* 110.

⁶⁰²⁶ Nachweisgesetz (NachwG) of 20/07/1995, BGBl. I at 946. Stoffels *AGB-Recht* 108, Annuß *BB* 2002, 460, Richardi *NZA* 2002, 1058 *et seq.*

⁶⁰²⁷ BAG *NZA* 2008, 45 (47); 2013, 148 (150); *NZA-RR* 2009, 593 (594).

⁶⁰²⁸ BAG *NZA* 2013, 148 (150), Thüsing *AGB-Kontrolle im Arbeitsrecht* para 200. See Part II ch 3 para 1.3. c).

⁶⁰²⁹ See Part II ch 3 para 1.4.

⁶⁰³⁰ See s 49(1) in conjunction with subsection (3) to (5).

⁶⁰³¹ See s 49(2).

⁶⁰³² Naudé 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

⁶⁰³³ *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A), *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA982 (SCA).

that it had taken reasonable steps to bring the given clauses to the consumer's notice, the consumer is bound to the terms irrespective of whether it had read them or not.⁶⁰³⁴ In other words, reasonable reliance on the part of the supplier that the consumer had accepted the terms is sufficient. It suffices that the consumer knew that the document in question contains relevant clauses for the agreement.⁶⁰³⁵ Reasonable reliance of consensus under the common law is notably given if the consumer signed the document.⁶⁰³⁶ An exception exists for surprising terms of which the consumer was not specifically informed when concluding the agreement; the consumer will not be bound to them.⁶⁰³⁷

For transactions concluded electronically, the Electronic Communications and Transactions Act (ECTA)⁶⁰³⁸ applies. Since the ECTA contains specific provisions for consumer rights within the e-commerce context, its provisions apply only to electronic transactions and not to consumer agreements generally. Thus, the ECTA and the Consumer Protection Act must be read and applied together.⁶⁰³⁹ Under section 22(1) ECTA, agreements concluded partly or in whole by means of data messages are generally valid. Section 12 ECTA equates documents or information in the form of data messages with written documents or information, and section 13 ECTA sets out the requirements for electronic signatures in cases where the signature of a person is required by law. Documents or information that must be produced by law may also be produced in electronic form.⁶⁰⁴⁰ The ECTA still goes further in that specific information must be provided to the consumers,⁶⁰⁴¹ such as the opportunity to review the entire agreement before finally concluding it, or the right of a cooling-off period. Furthermore, the supplier must perform within 30 days after having received the order.⁶⁰⁴² If these requirements are not met, the consumer may cancel the agreement.⁶⁰⁴³ Hence, even though the ECTA simplifies the conclusion of the agreement by recognising the electronic form of the writing, signature and information, it provides for more incorporation requirements than the Consumer Protection Act in that the supplier must provide certain information before the conclusion of the contract.

⁶⁰³⁴ *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA982 (SCA), *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonareg (SA) (Pty) Ltd) v Papadogianis* 1992 (3) SA 234 (A).

⁶⁰³⁵ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 42, *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

⁶⁰³⁶ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 42, *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couries* 2007 (2) SA 599 (SCA).

⁶⁰³⁷ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

⁶⁰³⁸ 25 of 2002.

⁶⁰³⁹ Eiselen 'Section 121' in Naudé and Eiselen (eds) *CPA Commentary* para 6.

⁶⁰⁴⁰ Section 17 ECTA.

⁶⁰⁴¹ Section 43 ECTA.

⁶⁰⁴² Section 46 ECTA.

⁶⁰⁴³ Sections 43(4), 44(1) or 46(2) ECTA. See Eiselen 'Section 121' in Naudé and Eiselen (eds) *CPA Commentary* para 7.

Otherwise, the consumer may cancel the agreement. Therefore, the ECTA is stricter with respect to the incorporation requirements than the Consumer Protection Act.

The incorporation requirements of the Consumer Protection Act⁶⁰⁴⁴ do therefore not apply in a general manner but only in the limited number of cases mentioned above, whereas § 305(2) applies to all standard business clauses. The incorporation requirements of the South African common law are laxer than the Act in that reasonable reliance on the part of the supplier that the consumer had accepted the terms is sufficient. For electronically concluded transactions in terms of the ECTA, additional incorporation requirements are required.

2. Formal incorporation requirements

2.1 Drawing the consumer's attention to certain facts

Where the substantive conditions for incorporation are fulfilled, specific formal requirements must be met.

In terms of section 49(1) of the Act, read in conjunction with subsection (4), the supplier must *specifically* draw the fact, nature and potential effect of the notice or provision to the attention of the consumer.⁶⁰⁴⁵ Under § 305(2), such a specific indication is not necessary because the incorporation requirements apply to all kinds of standard business terms, with the exception of the cases mentioned earlier.⁶⁰⁴⁶

The CPA and BGB provisions thus differ in that § 305 merely requires that the user refer to its standard terms (without explaining their content). In contrast, section 49 requires that the supplier draw the consumer's attention to 'the fact, nature and potential effect' of a provision, notice or risk under section 49(2) and (3). It is suggested that this difference is justified because the reference to the potentially harmful effects of the given South African terms and conditions requires a higher standard with regard to the attraction of the consumer's attention to them.

§ 305(2) requires though that the user *explicitly* refer the other party to its standard terms. The user's reference to its standard terms is only explicit if it is unequivocal and clearly understandable for the consumer, irrespective of whether it is oral or written.⁶⁰⁴⁷ In cases where an explicit reference is possible only with disproportionate difficulty, a clearly visible notice at the place where the contract is entered into is sufficient.⁶⁰⁴⁸ The posting of the notice is only

⁶⁰⁴⁴ As regards the incorporation requirements in South African law, see Part I ch 2 paras 3 and 4.

⁶⁰⁴⁵ See Part I ch 2 para 3.2 b).

⁶⁰⁴⁶ See Part II ch 3 para 1.2.

⁶⁰⁴⁷ BGH WM 1986, 1194 (1196).

⁶⁰⁴⁸ § 305(2) no. 1.

clearly visible if the client can see it without further ado.⁶⁰⁴⁹ This presumes a particular visual design and the posting at a visible place.⁶⁰⁵⁰ The post merely has to replace the explicit reference to the standard terms and does not need to contain the standard terms themselves.⁶⁰⁵¹

This condition is expressed in section 49 CPA by the fact that the reference to the given notice or provision must be made in a conspicuous manner and form that is likely to attract the consumer's attention, having regard to the circumstances (section 49(4)(a)).

This is different from § 305(2) no. 1 as the fact that the user has to refer the other party *explicitly* to the standard terms excludes the consideration of the surrounding circumstances of the conclusion of the agreement when assessing the incorporation of standard terms.⁶⁰⁵²

Besides, the notice, condition or provision must be written in plain language (section 49(3)). As discussed, the plain language requirement concerns not only the vocabulary and sentence structure but also the organisation, form and style of a document as well as the use of illustrations and usage of legible font size, i.e., the visual design.⁶⁰⁵³

In summary, it can be said that the German provision has a broader effect than the South African one as it applies to all standard terms and not only to provisions in which specific risks are set out. The level of protection of section 49 is higher though because the consumer must not only be informed of the 'fact', i.e., the existence of the given provision, but also of the 'nature and potential effect' of it. What is more, German standard terms users do not have a similar obligation for standard terms applying to potentially dangerous activities or objects. The level of protection of the South African regime is therefore higher in this regard too.

Similar to both regimes is the fact that the reference to the user's standard terms under § 305(2) and to the notice or provision in terms of section 49 must meet the transparency and plain language requirements.

Even though the South African provision gives more leeway and flexibility to suppliers in that the surrounding circumstances are considered with regard to the conspicuous manner and form in which the consumer's attention must be attracted, this might cause interpretational problems.

⁶⁰⁴⁹ Stoffels *AGB-Recht* 99.

⁶⁰⁵⁰ See in this regard the discussion on plain and understandable language in Part I ch 3 para 3.2 a).

⁶⁰⁵¹ UBH/*Ulmer and Habersack* § 305 para 142.

⁶⁰⁵² Stoffels *AGB-Recht* 95.

⁶⁰⁵³ See Part I ch 3 para 3.2. a) aa).

The legislator should therefore give more guidance to suppliers in this regard and prescribe at least a minimum standard for the requirement of a 'conspicuous manner and form'.

2.2 Adequate opportunity

Under section 49(5), the supplier must give the consumer an adequate opportunity in the circumstances to receive and comprehend the given provision or notice. As discussed,⁶⁰⁵⁴ 'adequate opportunity' can be defined as the possibility given to a consumer to receive and understand a term in consideration of the surrounding circumstances, such as the type of the given agreement, its complexity, or the type of consumer. To a certain extent, the factors contained in section 52(2), applied analogously, can serve as a guideline for the determination of the surrounding circumstances.

Under § 305(2) no. 2, the user must give the other party, in an acceptable manner, the opportunity to take notice of the contents of the standard terms. The standard terms must entirely be made available to the client at the latest when concluding the contract. It is irrelevant whether the latter actually takes notice of them or not.⁶⁰⁵⁵ If both parties are present when concluding the contract, it is generally accepted that the user submits its standard terms to the client or offers at least their submission.⁶⁰⁵⁶ Where this might create an unnecessary obstacle for a smooth transaction between the parties, this is not mandatory⁶⁰⁵⁷ because the client is already aware of the existence of the standard terms by the user's explicit reference to them or the posting of the notice on the user's premises. These circumstances show the user's readiness to make the standard terms available to the customer, and the client can thus be expected to ask for a copy. In every-day transactions, the requirement that the user must give the other party the *opportunity to take notice* of the content of its standard terms under § 305(2) no. 2 should hence not be interpreted too strictly. The courts are stricter though with regard to the Construction Tendering and Contract Regulations (VOB/B) that must be issued to the other party in order to achieve their incorporation in the contract.⁶⁰⁵⁸

By doing so, the user must take into reasonable account any physical handicap of the other party that is discernible to the user. Section 49 does not specifically mention a physical

⁶⁰⁵⁴ See Part I ch 3 para 3.2 c).

⁶⁰⁵⁵ Stoffels *AGB-Recht* 99.

⁶⁰⁵⁶ BGH *NJW* 1990, 715 *et seq.*, Staudinger/*Schlosser* (2006) § 305 para 145.

⁶⁰⁵⁷ UBH/*Ulmer and Habersack* § 305 para 148.

⁶⁰⁵⁸ BGH *NJW* 1990, 715 *et seq.*, *NJW-RR* 1999, 1246 (1247).

handicap. It is suggested that any disabilities of the consumer that are discernible to the supplier are part the 'circumstances' that the supplier has to take into consideration.

The South African and German regimes differ thus insofar as in terms of § 305(2), the other party does not necessarily need to receive a copy of the given standard terms, except for the VOB/B. None of the regimes requires though that the customer take notice or understand the terms and conditions as long as he or she has been granted an (adequate) opportunity to do so.

Concerning the language of the reference to the user's standard terms, one has to distinguish between cases where the language of the contract is German or in another language. In any event, the transparency requirement of the Unfair Terms Directive necessitates the drafting in the client's language in transactions with significant implications.⁶⁰⁵⁹

In contrast to section 63(1) NCA, the Consumer Protection Act does not contain a provision that a contract or other document has to be drafted in a language or official language that the consumer understands.⁶⁰⁶⁰ With regard to the disproportionate financial burden for suppliers and the high number of official languages in South Africa, nearly all contractual documents are written in English at least, which can be seen as the *lingua franca*.⁶⁰⁶¹

Consumers have a certain degree of protection by section 40(2). According to this provision, a supplier must not knowingly take advantage of the fact that a consumer was unable to protect its own interests because of illiteracy, ignorance, inability to understand the language of an agreement and so forth. Hence, the supplier must ascertain that the consumer understands the agreement fully. If need be, the supplier must provide additional explanations and information, an interpreter, or even a (written) translation of the document.⁶⁰⁶² Otherwise, the agreement may be challenged under section 40(2).⁶⁰⁶³

Thus, except for transactions with significant implications where the agreement must be drafted in the client's language, the German regime offers less protection for customers since the given document will probably be written in German also in cases where the other party does not understand this language. In this regard, the Consumer Protection Act provides for protection

⁶⁰⁵⁹ See Part II ch 3 para 1.2. b).

⁶⁰⁶⁰ See Part I ch 2 para 3.2 a) ee).

⁶⁰⁶¹ Stoop/Chürr 2013 *PELJ* 536.

⁶⁰⁶² De Stadler *Consumer Law Unlocked* 112.

⁶⁰⁶³ Stoop/Chürr 2013 *PELJ* 536; Stoop 'Section 22' in Naudé and Eiselen (eds) *CPA Commentary* para 20. See Part I ch 2 para 3.2. a) ee).

in terms of section 40(2), by which the non-existing requirement that documents have to be written in the consumer's language is somewhat counter-balanced.

2.3 Signing or initialling

The BGB provisions do not require that the other party sign or initial the notice to the user's standard terms, in contrast to section 49 of the Act. The agreeing of the other party to the user's standard terms can be done impliedly as long as there is no requirement to honour specific formalities.⁶⁰⁶⁴ § 305(2) *in fine* provides that the other party must agree to the applying of the standard terms.⁶⁰⁶⁵ The client's consent does not need to be proved for every single clause; it is thus sufficient that it covers the contract as a whole.⁶⁰⁶⁶

As discussed, the South African legislature probably wanted to differentiate between the circumstances mentioned in section 49(1) and those indicated in section 49(2) and therefore imposed the additional requirement of signing or initialling the given provision and express assent in this way. The supplier is relieved of this obligation if the consumer acts in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision. (section 49(2) *in fine*).⁶⁰⁶⁷ This corresponds to the German regime where the client can impliedly agree to the user's standard terms where no specific formalities are required, e.g., when entering a car-wash facility.⁶⁰⁶⁸

Initialling or counter-signing of exemption clauses can be a double-edged sword, however. This requirement may strengthen the supplier's position because he or she could ultimately argue that they are always fair. What is more, exemption clauses for bodily injury or death caused negligently could be unfair even if the consumer had signed the given notice. In cases where the supplier is dispensed with this requirement, the question arises how the consumer's conduct dispensing the supplier can be proved.⁶⁰⁶⁹

It can thus be said that the formal requirement of signing or initialling potentially dangerous terms and conditions has many drawbacks for the consumer and does not grant any additional advantages with regard to consumer protection. Instead, it strengthens the supplier's position. In practice, clients will act in a manner from which the supplier can deduct that the consumer

⁶⁰⁶⁴ BGH NJW 1982, 1388 (1389), Staudinger/Schlosser § 305 para 161, Belke JA 1988, 479. See Part II ch 3 para 1.2 d).

⁶⁰⁶⁵ Brox and Walker BGB-AT 111.

⁶⁰⁶⁶ Stoffels AGB-Recht 103.

⁶⁰⁶⁷ Section 49(2) *in fine*.

⁶⁰⁶⁸ BGH NJW 1982, 1388 (1389), Staudinger/Schlosser § 305 para 161, Belke JA 1988, 479.

⁶⁰⁶⁹ See Part I ch 3 para 3.2 b) cc).

assents to the provisions in question so that no signing or initialling is necessary, however. The difficulties of proof involved with this dispense can only be avoided by posting clearly visible warning signs at the entrance of a potentially dangerous facility, or by warning the consumer otherwise.

2.4 Relevant moment

The conditions set out in § 305(2) no. 1 and 2 must be met at the moment when the contract is concluded. This means that the user must explicitly refer to its standard terms when making a binding offer (no. 1), and the other party must have had the opportunity to take notice of their content before accepting the offer (no. 2).⁶⁰⁷⁰

In this regard, the Consumer Protection Act distinguishes between the moment in which the fact, nature and effect of the provision or notice contemplated in section 49(1) must be drawn to the consumer's attention, on the one hand (section 49(4)(b)), and the granting of an adequate opportunity to receive and comprehend the given provision or notice (section 49(5)), on the other.

Section 49(5) does not require that the consumer be given an adequate opportunity *before* the conclusion of the agreement. Hence, it should be sufficient if the supplier grants a cooling-off period after the conclusion of the contract.⁶⁰⁷¹ On the other hand, under section 49(4)(b), the supplier must draw the consumer's attention to the given notice or provision before the earlier of the time at which the consumer enters into the transaction, begins to engage in the activity, or enters or gains access to the facility, or is required or expected to offer consideration for the transaction or agreement.⁶⁰⁷²

This means that the supplier must *draw the consumer's attention* to the document in question *before* the conclusion of the agreement, but that the opportunity to take notice of this document does not necessarily have to be concurrent with, or before the conclusion of the contract. The moment in which the consumer *receives and comprehends* the provision can thus be *afterwards*.

Both provisions are therefore different with respect to the moment in which the consumer/other party must have an 'opportunity to take notice' of the contents of the standard terms (§ 305(2)

⁶⁰⁷⁰ Locher *Recht der AGB* 43.

⁶⁰⁷¹ De Stadler 'Section 49' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁶⁰⁷² See Part I ch 3 para 3.2 b) bb).

no. 2) or an 'adequate opportunity (...) to receive and comprehend the provision or notice' (section 49(5)).

2.5 Written consumer agreements

For written consumer agreements in terms of the Act, irrespective of whether the written form is required by the Act or voluntarily, the consumer's signature is not required under section 50(2). The supplier must provide the consumer with a free copy or free electronic access to a copy of the provisions of the agreement, however. If written form is not prescribed by the Act or has been agreed between the parties, it is no prerequisite for the validity of the agreement.⁶⁰⁷³ In common law too, the written form is a constitutive or formal requirement only for particular legal acts (suretyship etc.). The formality requirements must be interpreted according to the law's objective (proof, legal certainty, the parties' protection etc.).⁶⁰⁷⁴

Also in German law, the principle of freedom of form prevails. Only in specific cases that are exhaustively regulated by law, or where the parties agree on a specific form, certain form requirements (written form, text form, notarial certification etc.) apply.⁶⁰⁷⁵

In 2001, the German legislator introduced the text form in § 126b.⁶⁰⁷⁶ In contrast to the written form, no signature is required so that the text form facilitates certain transactions. On the other hand, the evidential and warning function is reduced compared to the written form. Thus, the legislator allows text form mostly for quasi-contractual acts,⁶⁰⁷⁷ such as revocational instructions for consumer contracts (article 246(3) no. 1 EGBGB) or the new employer's information of the employees in case of a transfer of the company (§ 613a(5)).⁶⁰⁷⁸

The declaration in text form must be legible. This is the case if the parties are able to read the declaration made on a durable medium (paper) without further ado, or if a declaration made in an electronic document can be read employing a software.⁶⁰⁷⁹ In this regard, the plain language

⁶⁰⁷³ See Part I ch 3 para 4.2.

⁶⁰⁷⁴ See Part I ch 3 para 4.1.

⁶⁰⁷⁵ Brox and Walker *BGB-AT* 141.

⁶⁰⁷⁶ BGBl. 2001 I 1542. **§ 126b:** 'If text form is prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium. A durable medium is any medium that 1. enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and 2. that allows the unchanged reproduction of such declaration.'

⁶⁰⁷⁷ *Rechtsgeschäftsähnliche Handlungen*.

⁶⁰⁷⁸ **§ 613a(5):** 'The previous employer or the new owner must notify employees affected by a transfer in text form prior to transfer: 1. of the date or planned date of transfer, 2. of the reason for the transfer, 3. of the legal, economic and social consequences of the transfer for the employees, and 4. of measures that are being considered with regard to employees.' Brox and Walker *BGB-AT* 142.

⁶⁰⁷⁹ BT-Drs. 17/12637 at 44.

requirement contained in section 50(2)(b)(i) concerning the free copy or free electronic access to a copy is a similar prerequisite to § 126b.

Moreover, the person issuing the declaration must be named in the declaration. It is sufficient, though if this person can be identified within the given text.⁶⁰⁸⁰

The declaration must be made on a durable medium. § 126b defines 'durable medium' as any medium that enables the recipient to retain (paper) or store (electronic medium) a declaration included on the medium that is addressed to him or her personally such that it is accessible to him or her for a period of time adequate to its purpose (i.e., as long as the recipient can claim rights on the basis of the declaration), and that allows the unchanged reproduction of such declaration. The last condition is fulfilled for paper, USB sticks, CD-ROM, DVD, hard or external disks, for instance.⁶⁰⁸¹ On the other hand, the accessibility of the declaration on a website for the recipient is not sufficient because he or she cannot retain or store the declaration, and it cannot be excluded that the declaration will be modified at a later stage by the website owner.⁶⁰⁸²

In contrast to German law, for the free electronic access to a copy of the consumer agreement, under section 50(2)(b) it seems to be sufficient that the supplier provides the given document on its website. Hence, subsequent changes in the agreement made by the supplier are possible.⁶⁰⁸³

Section 50(2)(b) does not contain any provision in terms of which the electronically accessible copy has to be printable. Today, it is possible to upload documents that are not printable but only visible on screen.⁶⁰⁸⁴ Section 65 of the National Credit Act is unambiguous in this regard because the document has to be made available to the consumer through one or more of the means mentioned in this section, for instance 'by *printable* web-page'.⁶⁰⁸⁵

§ 126b BGB does neither require that the document be printable, but that the recipient is able to retain or store the document so that he or she can visualise it for a time adequate to its purpose. Section 50(2) does not contain such a requirement. The South African norm is therefore weaker with respect to the consumer's protection in that only access to the electronic

⁶⁰⁸⁰ Brox and Walker *BGB-AT* 143.

⁶⁰⁸¹ Brox and Walker *BGB-AT* 143.

⁶⁰⁸² BGH *NJW* 2014, 2857 (2858 *et seq.*).

⁶⁰⁸³ See Part I ch 3 para 4.2 b).

⁶⁰⁸⁴ For instance, Google Books (<https://books.google.com>).

⁶⁰⁸⁵ Section 65(2)(a)(iv) NCA. Emphasis added.

copy must be granted, but not that the copy must be printable (unlike section 65 of the NCA), or that the consumer must be able to retain or store the copy (unlike § 126b).

Section 19(1) ECTA considerably extends the meaning of 'copy' though by including data messages.⁶⁰⁸⁶ Therefore, no 'materialised' copy is necessary. What is more, section 15 ECTA gives data messages the same evidential weight as other documents. As long as the conditions of § 126b BGB are met in the form of a data message containing the document in question which can be retained or stored, the German provision is thus similar to section 19(1) ECTA.

The German provisions do not contain any requirements regarding a financial breakdown of the consumer's financial obligations or a record of transactions.⁶⁰⁸⁷ Since in German law, text form is mostly admitted for quasi-contractual acts and not for agreements, these prerequisites would make no sense for the German regime.

Hence, in both regimes, the principle of freedom of form prevails and written (or a stricter) form is only required by law in specific cases. Since text form (i.e., a written document without signature) entails a reduced evidential and warning function, the German legislator permitted this form only for certain documents involving mostly quasi-contractual acts. In South Africa, such a restriction does not exist, which might create some evidential problems. On the other hand, in both regimes, the plain language requirement must be fulfilled. Section 50(2) does not provide for the requirement that the declaration must be made on a durable medium, unlike the German regime; instead, the access to free electronic access to a copy of the agreement on the supplier's website is sufficient. With regard to subsequent modifications by the supplier, the level of protection of the German provision is thus higher. The level of protection of section 50(2) is also weaker in that it does not require that the document must be printable, retainable or storable by the consumer. For electronically concluded transactions in the form of data messages (e.g., e-mails) this problem should not exist, however. Problems thus rather exist where agreements are concluded on the supplier's website, and the contractual documents are not printable, storable or retainable and the supplier does not send a confirmation by e-mail with the exact content of the contract. The fact that South African suppliers must provide a financial breakdown assists consumers in their understanding of their financial obligations,

⁶⁰⁸⁶ **Section 19(1) ECTA:** 'A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time, is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.'

⁶⁰⁸⁷ Section 50(3).

especially for recurrent payments or those containing ancillary fees. The introduction of such a requirement was thus a wise choice of the South African legislature.

2.6 Non-variation clauses

Non-variation clauses admitted by the South African common law must be interpreted restrictively since they curtail freedom of contract, and harsh outcomes are possible.⁶⁰⁸⁸ By such clauses, the parties can prescribe writing as a formal precondition for variation of the agreement. When it is worded wide enough, no part of the contract, including the non-variation clause itself, may only be varied in writing.⁶⁰⁸⁹

According to the BGH and legal literature, written-form clauses cannot prevent the validity of an individually agreed term if the parties expressly agreed that their oral agreement prevails over the pre-formulated written-form clause.⁶⁰⁹⁰ This even applies if the written-form clause is valid in terms of the general clause of § 307.⁶⁰⁹¹ If there is a need for clarification and proof, e.g., in life-insurance contracts, the written form clause may be valid, however.⁶⁰⁹² It may also be valid if it is made before the conclusion of the contract in order to protect the supplier from agreements made by its agents that go beyond their power of representation.⁶⁰⁹³ In any event, the user's and the other party's interests have to be balanced against each other.⁶⁰⁹⁴

It can thus be said that both regimes restrict the validity of non-variation/written-form clauses. In South Africa, this restriction serves to ensure the principle of freedom of contract and to avoid harsh and unfair results. In contrast, in Germany, the legislator aims to make sure that written-form clauses cannot overturn individually agreed stipulations made orally.

3. Unexpected terms

The Consumer Protection Act does not provide for a provision dealing with surprising terms. This principle is recognised by the common law though as a party is not bound by an unusual contract term to which it did not and could not reasonably have agreed.⁶⁰⁹⁵

Naudé and Lubbe argue that a contract clause is surprising where it purports to vary the consequences of the contract in a manner contrary to the essence of the contract by undermining

⁶⁰⁸⁸ See Part I ch 3 para 4.1 a).

⁶⁰⁸⁹ Van der Merwe *et al Contract General Principles* 131, Hutchison 2001 *SALJ* 720.

⁶⁰⁹⁰ BGH *NJW* 1985, 320 (322), WLP/*Hau* § 305b para 33, with further references.

⁶⁰⁹¹ BGH *NJW* 2006, 138 *et seq*; *NJW-RR* 1995, 179 (180); UBH/*Ulmer and Schäfer* § 305b para 33.

⁶⁰⁹² BGH *NJW* 1999, 1633 (1634 *et seq*).

⁶⁰⁹³ BGH *NJW* 1991, 2559.

⁶⁰⁹⁴ See Part II ch 3 para 3.3 c).

⁶⁰⁹⁵ *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para [19].

the reciprocity between the essential obligations envisaged by the parties.⁶⁰⁹⁶ For this purpose, the underlying contractual purpose of the parties to the contract and the nature of the policy considerations of the given agreement must be determined.⁶⁰⁹⁷

The 'essential obligations' Naudé and Lubbe refer to are congruent with the 'essential principles' of the statutory provision from which a provision of an agreement deviates in terms of § 307(2) no. 1. In German law, these considerations are therefore not taken into account when determining whether a clause is surprising, but whether an unreasonable disadvantage under the general clause of § 307 exists. § 307(2) no. 1 is merely a concretisation of the German general clause.⁶⁰⁹⁸

For the determination of whether a standard clause is surprising, the German legislator chose another way instead. § 305c provides that provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract. The provision of § 305c is an emanation of the transparency requirement⁶⁰⁹⁹ and the principle of good faith.⁶¹⁰⁰ Hence, a substantial contract term that appears under a wrong heading and is not emphasised by special typographical means does not become part of the agreement.⁶¹⁰¹ There is a clear link in this case with the South African plain language requirement of section 50(2)(b)(i), read in conjunction with section 22 CPA.

It is important to note that Naudé's and Lubbe's argument in terms of the 'essential obligations' to be determined in the context of surprising terms cannot be applied in the context of the German incorporation control, but only within content control (§ 307(2) no. 1). This is because surprising terms need not necessarily be 'unreasonably disadvantageous' with respect to content control.⁶¹⁰² Therefore, the assessment under § 305c, as part of the incorporation control, must strictly be distinguished from content control.⁶¹⁰³ This applies with the caveat that § 305c, as a

⁶⁰⁹⁶ Naudé/Lubbe 2005 *SALJ* 454.

⁶⁰⁹⁷ Naudé/Lubbe 2005 *SALJ* 459.

⁶⁰⁹⁸ See discussion on the general clause in Part II ch 5.

⁶⁰⁹⁹ WLP/Hau § 305c paras 11-17.

⁶¹⁰⁰ BGH *NJW* 1993, 779 (780).

⁶¹⁰¹ BAG *NJW* 1996, 2117.

⁶¹⁰² Locher *Recht der AGB* 57.

⁶¹⁰³ In cases where a clause obviously infringes § 307, the BGH sometimes leaves the question of incorporation open and directly assesses § 307 for reasons of procedural economy (e.g., BGH *NJW* 1989, 222 (223)), or it bases its decision both on § 305c and § 307 (e.g., BGH *NJW* 1995, 2553). It is submitted that this approach should however not be applied by other practitioners in order to allow for a proper content control.

provision treating more formal aspects, should not be applied too strictly because otherwise an 'open' content control treating more material questions could not be performed anymore.⁶¹⁰⁴

As already discussed,⁶¹⁰⁵ § 305c must be distinguished from the transparency requirement set out in § 307(1) 2nd sent. (existence of an 'unreasonable disadvantage' because of a 'provision not being clear and comprehensible'). This is because both provisions have a different protective function,⁶¹⁰⁶ which leads to different fields of application. A clearly visible, not surprising clause that therefore has been incorporated properly in terms of § 305c can nonetheless infringe the transparency requirement of § 307(1) 2nd sent. because it falsely sets out the legal situation between the parties.⁶¹⁰⁷ On the other hand, a clause with an utterly unusual content may lose its surprising effect if the user explicitly draws the other party's attention to it.⁶¹⁰⁸

It can therefore be said that the Consumer Protection Act only achieves similar protection in terms of surprising terms where the plain language requirement is not respected. This does not necessarily lead to the voidness of the given clause however as the plain language requirement is merely a factor among others that the court may consider under section 52(2).

As already discussed above,⁶¹⁰⁹ the Consumer Protection Act applies irrespective of whether or not the applicable terms and conditions have been individually agreed between the parties. In German law, individually agreed terms take priority over standard business terms (§ 305b) since they mirror the parties' will better than pre-formulated terms.⁶¹¹⁰ In other words, individually agreed terms are not considered standard business terms. § 305b does not aim at consumer protection. Instead, it aims to resolve the contradiction between standard and individually agreed terms. The latter may thus be in the supplier's favour.⁶¹¹¹

4. Legal consequences in the event of non-compliance with incorporation requirements

The South African legislation distinguishes between non-compliance with the incorporation requirements set out in section 49 and those provided for in section 50 of the Act.

⁶¹⁰⁴ MüKo/Kötz 3rd ed § 3 AGBG para 2.

⁶¹⁰⁵ See Part II ch 3 para 2.3.

⁶¹⁰⁶ WLP/Pfeiffer § 307 para 239.

⁶¹⁰⁷ WLP/Pfeiffer § 307 para 240.

⁶¹⁰⁸ Faust *BGB-AT* 110.

⁶¹⁰⁹ See Part III ch 2 para 2.1.

⁶¹¹⁰ BGH *NJW* 2013, 2745 (2747), PWW/Berger § 305b para 1.

⁶¹¹¹ See Part II ch 3 para 3.2 b).

Under section 49(2)(d), a term, agreement, condition or notice that was subject to a term, condition or notice to a consumer contemplated in section 49(1) is unfair if the term, condition or notice is unfair, unreasonable or unjust. The same applies if the fact, nature and effect of that term, condition or notice were not drawn to the attention of the consumer according to section 49. The court may therefore sever any part of the relevant agreement, provision or notice. It may also alter it to the extent required to render it lawful if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole (section 52(4)(a)(i)(aa)). Alternatively, the court may declare the entire agreement, provision or notice void as from the date that it purportedly took effect (section 52(4)(a)(i)(bb)). In the case of a provision or notice that fails to satisfy any provision of section 49, the court may sever the provision or notice from the agreement, or declare it to have no force or effect with respect to the transaction (section 52(4)(a)(ii)).⁶¹¹²

As discussed in Part I, in the case of non-compliance with the written-form requirements set out in section 50, the agreement is not void since the written form is not constitutive.⁶¹¹³ The same applies to non-compliance with the plain-language requirement set out in section 50(2)(b)(i) as this is merely a factor the court has to take into account under section 52. Since nullity of a non-written agreement for which the supplier did not keep a record of transactions in terms of section 50(3) would be unfair *vis-à-vis* the consumer who did not influence the supplier's conduct, the contract should not be declared void in these cases either.⁶¹¹⁴

According to § 125, a legal transaction that lacks the form prescribed by statute is void. In case of doubt, lack of the form specified by legal transaction also results in voidness. The German provisions are therefore stricter than the South African legislation in this regard.

In terms of § 306(1), if standard terms that have not been validly incorporated into the agreement, the remainder of the contract remains in effect so that only the ineffective terms are 'erased'.⁶¹¹⁵ Ineffective terms are replaced by statutory provisions. Where the given contract type is not regulated by law, an analogous application of the *ius dispositivum* is possible. Unwritten principles, case law and customary law may also be drawn upon in this case. Only where a clause is irrelevant for the contract (e.g., a penalty clause), there is no need for such a

⁶¹¹² See Part I ch 2 paras 3.3 and 4.3.

⁶¹¹³ Generally, only alienation of land, suretyship and executory donations require the written form in order to be valid and enforceable. See Hutchison *et al Law of Contract* 115 and 161 *et seq.*, Christie and Bradfield *Law of Contract* (2011) 134

⁶¹¹⁴ See Part I ch 2 para 4.3. Naudé 'Section 50' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

⁶¹¹⁵ Stoffels *AGB-Recht* 249.

replacement under § 306(2).⁶¹¹⁶ Finally, when after a weighing of the parties' interests upholding the contract would be an unreasonable hardship for one party, the entire agreement is ineffective.⁶¹¹⁷

For non-regulated contracts that are entirely regulated by standard terms (e.g., time-sharing agreements), the non-consideration of a single (invalid) clause could give an entirely new meaning to the agreement that the parties did not intend. Such an agreement would therefore be void as it is not the courts' role to remodel such a partly invalid agreement.⁶¹¹⁸

In terms of section 52(4)(a)(i)(aa), South African courts are entitled to alter the agreement to the extent required to render it lawful. This provision does not specify whether such an alteration has to be undertaken by replacing the invalid clauses with statutory provisions or by interpretation. The court has merely take into consideration the transaction, agreement, provision or notice as a whole. It is thus suggested that due to the broad wording of this provision, the courts are free to alter the agreement both by replacing invalid clauses with statutory provisions or by a consumer-friendly interpretation. Hence, the Consumer Protection Act seems to enable the courts to take the parties' position, unlike German courts.

Under subsection (aa), South African courts may also sever any part of the relevant agreement, provision or notice. This is also the case for German courts because if the contract shall be maintained, it must be able to be split up into a valid and an invalid part.

The difference between the German and South African legislation lies thus above all in the fact that German courts are not allowed to take the parties' position and alter the agreement in the case of invalid clauses. Both regimes aim to maintain the agreement, however. In the case of non-compliance with written-form requirements such as text form, the German legislator provided for a stricter legal consequence than South African literature: non-compliance leads to voidness in Germany, whereas in South Africa, this form requirement is not constitutive.

Section 52 seems to allow for partial retention of a clause, i.e., the preservation of the invalid clause with the content that is still permissible. This is not the BGH's position.⁶¹¹⁹ The fact that South African courts may alter invalid provisions to render them lawful dilutes the deterrent effect for suppliers to draft clauses that withstand incorporation control (and, of course, content

⁶¹¹⁶ *Wendland* in: Staudinger/Eckpfeiler E para 71.

⁶¹¹⁷ *Stoffels AGB-Recht* 250.

⁶¹¹⁸ See above all BGH *NJW* 1969, 230 (231 *et seq*); 1983, 159 (162).

⁶¹¹⁹ *Geltungserhaltende Reduktion*. BGH *BB* 2017, 2254; *NJW* 2016, 560.

control). South African suppliers might hence hope that their invalid clauses might be reformulated by the courts so that the given provisions are still applicable, only with a different content (which might still be in the supplier's interest).

5. Conclusion

The incorporation requirements for terms and conditions set out in section 49 of the Consumer Protection Act merely concern notices to consumers or provisions with regard to certain risks or liability. The incorporation requirements of the South African common law still apply insofar as they have not been amended by section 49. They are laxer than those set out in the Act as reasonable reliance on the part of the supplier that the consumer had accepted the terms is sufficient. For electronically concluded transactions in terms of the ECTA, additional incorporation requirements must be met, e.g., the information of a cooling-off period or the opportunity to review the entire agreement before finally entering into the contract. The ECTA is thus stricter in respect of incorporation than the Consumer Protection Act.

In contrast, the German legislator chose a more formalistic approach by requiring that for the incorporation of *all* kinds of standard business terms, certain conditions must be met. Exceptions concern only cases where a functional reduction of § 305(2) is necessary, or where other legal provisions contain laxer incorporation rules. In certain cases, the parties can conclude a framework agreement in order to facilitate the incorporation of the terms, which is not possible under the South African regime. The German provision has thus a broader effect than the South African one because it applies to all standard terms.

The level of protection of section 49 is higher than the one offered by the BGB provisions since the consumer must not only be informed of the 'fact', i.e., the existence of the given provision, but also of the 'nature and potential effect' of it. § 305 merely requires that the user refer to its standard terms. This difference is justified because for section 49, a higher standard is necessary with regard to potentially harmful effects. What is more, German standard terms users do not have a similar obligation for standard terms applying to potentially dangerous activities or objects. The level of protection of the South African regime is therefore higher in this regard too.

Even though the South African provision gives more leeway and flexibility to suppliers in that the surrounding circumstances are considered with regard to the conspicuous manner and form in which the consumer's attention must be attracted, this might cause interpretational problems.

The legislature should give more guidance to suppliers in this regard and prescribe at least a minimum standard for the requirement of a 'conspicuous manner and form'.

Similar to both regimes is the fact that the reference to the user's standard terms under § 305(2) and to the notice or provision in terms of section 49 must meet the transparency and plain language requirements.

In the German regime, the other party does not necessarily need to receive a copy of the standard terms. Both regimes are alike in that a granting of an (adequate) opportunity to take notice or to understand the terms and conditions is sufficient; the actual comprehension of the terms is not required.

Except for transactions with significant implications where the agreement has to be drafted in the client's language, the German regime offers less protection for customers who do not understand German and who are confronted with documents written in this language. The Consumer Protection Act provides at least protection under section 40(2) by which the non-existing requirement that documents have to be written in the consumer's language is somewhat counter-balanced.

The requirement of signing or initialling of certain provisions in South African consumer protection legislation is inexistent in the German regime. This requirement is a double-edged sword that entails more disadvantages than advantages, however. The German, more formalistic regime, offers a more balanced solution in this regard.

Both provisions differ in terms of the moment in which the supplier's client must have an 'opportunity to take notice' of the contents of the standard terms (BGB) or an 'adequate opportunity (...) to receive and comprehend the provision or notice' (CPA).

In both regimes, the principle of freedom of form prevails. Specific form requirements have to be fulfilled in the German regime in particular and exhaustively regulated cases, or if the parties agree on a specific form. The written form in terms of section 50(2) is comparable to the text form in § 126b, but the latter is mostly allowed for quasi-contractual acts. In South Africa, such a restriction does not exist, which might create evidential problems.

For the free electronic access to a copy of the (South African) consumer agreement, it seems to be sufficient that the supplier provides the given document on its website. Subsequent changes of the agreement made by the supplier are thus possible. The German regime excludes subsequent modifications by requiring that the declaration must be made on a durable medium.

In this regard, the level of protection of the German provision is higher. The South African regime is also weaker in that only access to the electronic copy is to be granted; a printable copy is not required. Unlike § 126b, there is no requirement that the consumer must be able to retain or store the copy. As long as the requisites of § 126b are met in the form of a data message containing the given document, which can be retained or stored, the German provision is however similar to section 19(1) ECTA which considerably extends the meaning of 'copy' by including data messages.

The financial breakdown required by section 50 would not make sense in the German regime where text form applies mostly to quasi-contractual acts, which typically do not contain financial information. On the other hand, such a financial breakdown assists South African consumers in their understanding of their financial obligations, especially for recurrent payments or those containing ancillary fees. The introduction of such a requirement was thus a wise choice of the South African legislature.

Both the South African and the German regimes restrict the validity of non-variation (written-form) clauses. While in South Africa this restriction serves to ensure the principle of freedom of contract and to avoid harsh and unfair results, the German legislator aims to ascertain that individually agreed stipulations made orally cannot be overturned by written-form clauses.

Unlike § 305c, the Act does not provide for a provision dealing with surprising terms. This principle is recognised by the common law, however. Since surprising terms need not necessarily constitute an unreasonable disadvantage, Naudé's and Lubbe's argument in terms of the 'essential obligations' to be determined in the context of surprising terms – which in the German regime is an element of the general clause – cannot be applied to German incorporation control, but within content control. The Act achieves similar protection with regard to surprising terms where the supplier does not comply with the plain language requirement.

Concerning the legal consequences of infringements of incorporation requirements, both regimes differ in that German courts are not allowed to take the parties' position and alter the agreement in the case of invalid clauses. Both pieces of legislation aim to maintain the agreement though. In the case of non-compliance with written-form requirements such as text form, the German regime entails a stricter legal consequence than South African literature, which considers this form requirement not constitutive.

Section 52 seems to allow for partial retention of a clause. Partial retention is not permitted according to the BGH.

CHAPTER 4 – INTERPRETATIONAL CONTROL

1. Statutory interpretation

a) Purposive interpretation of the Consumer Protection Act

Contrary to the German approach, section 2(1) of the Consumer Protection Act provides that the Act must be interpreted in a manner that gives effect to the purposes of the Act set out in section 3.⁶¹²⁰ This paternalistic attitude towards the consumer can be explained by the fact that the Act primarily is – as its title indicates – a consumer protection statute, unlike §§ 305 *et seq.* BGB. The German provisions primarily do not have the purpose of protecting the weaker party and of mitigating the supplier's stronger bargaining power.⁶¹²¹ Instead, they aim to prevent abuse of freedom of contract-drafting and therefore protect all parties against the misuse of standard terms.⁶¹²² For this reason, §§ 305 *et seq.* cannot be qualified as pure consumer protection provisions, with the exception of § 310(3) (consumer contracts).⁶¹²³

The South African approach of purposive interpretation seeks to look for the purpose of the legislation before interpreting the words contained therein. Other interpretative rules require the courts to apply the literal rule (grammatical interpretation) first and to analyse the wording of a statute. On the other hand, the purposive approach starts with seeking the legislator's purpose or intention. It is a more flexible approach that gives the judge more freedom to develop the law in line with what he or she perceives to be the legislator's intention. For the purposive approach, also extrinsic aids are consulted in order to work out Parliament's intention.⁶¹²⁴

Section 4(3) of the Act fosters the purposive construction by providing that the court or Tribunal must give preference to interpretations that favour vulnerable consumers.⁶¹²⁵ In other words, where a court is confronted with a situation where – after the interpretation of a provision – two outcomes are possible, it must adhere to the interpretational result that favours the consumer. On the other hand, sections 2(1) and 3(1) must be read with section 4(2)(b)(i) in terms of which the Tribunal or court must promote 'the spirit and purposes' of the Act. Kellaway observes that words without a precise (or various) meaning must be interpreted by looking at

⁶¹²⁰ See Part I ch 4 para 2.

⁶¹²¹ Stoffels *AGB-Recht* 29.

⁶¹²² Eith *NJW* 1974, 16, 17.

⁶¹²³ Locher *JuS* 1997, 390. See discussion in Part II ch 1 and in Part I ch 4.

⁶¹²⁴ 'The Purposive Approach to Statutory Interpretation' at <http://e-lawresources.co.uk/Purposive-approach.php>.

⁶¹²⁵ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 13.

the object of the statute in question in order to find the legislature's intention.⁶¹²⁶ In law, the word 'spirit' means 'the real meaning or the intention behind something as opposed to its strict verbal interpretation'.⁶¹²⁷ Therefore, Van Eeden is correct when stating that '[i]t may be inferred that the word "spirit" was employed to indicate a policy that the Act should not be interpreted overly literally'.⁶¹²⁸

This also corresponds to § 133. When a declaration of intent is interpreted, it is necessary to ascertain the real intention rather than adhering to the literal meaning of the declaration. This principle is also valid for the construction of legal provisions.⁶¹²⁹ For the assessment of the legislator's real intention, one has to put the given provision into relation with other provisions and its position within a particular division in the statute. By this so-called 'systematic interpretation', the interpreter can ascertain whether the wording of the provision is too wide, for instance.⁶¹³⁰ An overly literal construction is thus not desirable.⁶¹³¹

For German legislative acts, historical interpretation is applied. This technique concerns the history of a provision or statute in order to assess its intention. For this approach, legislative materials are drawn upon, such as legislative drafts, parliamentary protocols, or even former legislative provisions. Furthermore, the development of a legal provision with its subsequent modifications over time can be significant for interpretation.⁶¹³²

Since the Consumer Protection Act promotes a purposive interpretation for which the use of extrinsic aids, such as legislative material, is necessary in order to assess the legislator's intention, it is suggested that historical interpretation is a necessary technique to carry out purposive construction.

The same applies to teleological interpretation according to which one searches the meaning and the objective of a legal provision, the *ratio legis*. In doing so, one can assess, for instance, whether a provision has to be interpreted widely or narrowly. The search for the *ratio legis* of a norm is also crucial for the search for the purpose of the Act and therefore purposive interpretation.⁶¹³³

⁶¹²⁶ Kellaway *Legal Interpretation* 72.

⁶¹²⁷ Stevenson and Waite *Oxford Dictionary* s.v. 'spirit' (4).

⁶¹²⁸ Van Eeden and Barnard *Consumer Protection Law* 40.

⁶¹²⁹ Brox and Walker *BGB-AT* 35.

⁶¹³⁰ Brox and Walker *BGB-AT* 35.

⁶¹³¹ See Part II ch 4 para 2.1 b) bb).

⁶¹³² See Part II ch 4 para 2.1 b) cc).

⁶¹³³ See Part II ch 4 para 2.1 b) dd).

Even though the Consumer Protection Act must be interpreted by applying a purposive approach first, this approach cannot be undertaken without borrowing techniques that are also necessary for the construction of BGB provisions. These are systematic, historical and teleological interpretation. The first step applied in the German regime, i.e., grammatical interpretation, is applied in the context of the Consumer Protection Act only after the purposive construction of a norm. Even when applying purposive interpretation, it is difficult to imagine though how this can be done without giving a meaning to the words contained in the Act. This shows that the interpretational techniques are overlapping and cannot be undertaken in isolation.

b) Definitions

With some exceptions,⁶¹³⁴ the definitions of the Consumer Protection Act are grouped together in section 1. The pros and cons of this legislative technique have been discussed in Part I.⁶¹³⁵

On the other hand, German statutes define terms within the section they relate to or which deals with a related question. The legal definition might also apply to other sections in the given piece of legislation, however, which makes it sometimes difficult to be aware of its existence.⁶¹³⁶ The BGB itself defines certain terms ('negligently' (*'fahrlässig'*) in § 276(2); 'ought to have known' (*'Kennenmüssen'*) in § 122(2); 'prior approval' or 'consent' (*'Einwilligung'*) in § 183 1st sent.; or 'subsequent approval'/'ratification' (*'Genehmigung'*) in § 184(1)). This approach has the advantage that the meaning of certain terms, such as 'approval' (*'Zustimmung'*), which are not defined, can be concluded by their position in the given statute.⁶¹³⁷

Unfortunately, many terms contained in the Consumer Protection Act are ambiguous and have various meanings.⁶¹³⁸ What is more, as discussed in Part I,⁶¹³⁹ the use of extensive definitions in the Act is not logical. This is because the purpose of enumerative definitions is to enumerate the objects included in the definition conclusively. This objective cannot be achieved where the words 'includes' or 'including' are used. From a terminological point of view, many terms

⁶¹³⁴ See, e.g., s 61(5) for the definition of 'harm'.

⁶¹³⁵ See Part I ch 4 para 2.1.

⁶¹³⁶ For instance, §§ 183 and 184(1) define 'consent' and 'ratification' as prior or subsequent approval, respectively: **§ 183:** 'Prior approval (consent) may be revoked until the legal transaction is undertaken, unless the legal relationship on which this consent is based leads to a different conclusion (...)' **§ 184(1):** 'Subsequent approval (ratification) operates retroactively from the point of time when the legal transaction was undertaken, unless otherwise provided.' These terms operate throughout the BGB and other civil law statutes, however.

⁶¹³⁷ See Part II ch 4 para 2.1. b) aa).

⁶¹³⁸ See ss 3(1) or 4(2)(b)(i) for 'promote', for instance.

⁶¹³⁹ See ch 4 para 2.1.

contained in section 1 of the Act are no definitions at all, but rather precisions. For interpretational purposes and legal certainty, it would have been beneficial to define the terms in section 1 neatly. Furthermore, the definitions scattered elsewhere in the Act should be inserted into section 1 by honouring the applicable techniques in this field. This way, all definitions would be integrated into section 1, which would be a more coherent approach considering that the Act contains an entire section dedicated to definitions.

In other words, the two different approaches applied by the two regimes have both their pros and cons. The potential of the approach applied by the Act, which consists of grouping together most definitions in section 1 has not reached its full potential though. The legislator should thus reconsider certain definitions in section 1, especially the extensional definitions, and insert the definitions that can be found elsewhere in the Act in section 1.

c) Signatures

Section 2(3) provides that if a provision of the Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including the use of an advanced electronic signature, or an electronic signature. Electronic and advanced electronic signatures are both defined in the Electronic Communications and Transactions Act (ECTA).⁶¹⁴⁰

The BGB does not contain a specific provision dealing with signatures. Instead, it provides in §§ 125 to 129 for form requirements that apply to contracts. If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials (§ 126). In cases where electronic form replaces the written form prescribed by statute, the issuer of the declaration must add his or her name to it and provide the electronic document with a qualified electronic signature (§ 126a).⁶¹⁴¹ If text form is

⁶¹⁴⁰ 25 of 2002. See also discussion in Part I ch 4 para 3.1.

⁶¹⁴¹ 'Electronic signature' is defined in art 3 of the Regulation (EU) No 910/2014 of the European Parliament and the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC as data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign. This Regulation is complemented by the German Vertrauensdienstegesetz (VDG) which has repealed the former Signaturgesetz (SigG) on 29 July 2017. Under art 25 of the Regulation, '1. [a]n electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures. 2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature. 3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States.' Article 26 sets out the requirements for advanced electronic signatures: 'An advanced electronic signature shall meet the following requirements: (a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and (d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.'

prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium (§ 126b). The provisions under §§ 126, 126a or 126b also apply, in case of doubt, to the form specified by legal transaction (§ 127). If the notarial recording of a contract is prescribed by statute, it suffices if first the offer and then the acceptance of the offer is recorded by a notary (§ 128). Where the official certification of a declaration is prescribed by law, the declaration must be put in writing and the signature of the person declaring be certified by a notary. If the declaration is signed by the issuer making his mark, the certification of the initials provided for in § 126(1) is necessary and sufficient (§ 129). Finally, § 125 provides that a legal transaction that lacks the form prescribed by statute is void. In case of doubt, lack of the form specified by legal transaction also results in voidness.

Both South African and the German legislation provide for a regime where specific formal requirements have to be met. The formulation 'in any manner recognised by law' in section 2(3) indicates however that provisions in terms of the Consumer Protection Act may be signed or initialled in various ways, including by the use of electronic signatures. On the other hand, §§ 125 to 129 BGB provide that if a certain type of formality is prescribed by statute or agreement, the parties have to adhere to the given conditions for the given form (written, text, notarial form, electronic signature etc.). The Act thus permits more ways in which a document may be signed or initialled, whereas the BGB requires that the specific formal conditions prescribed by the applicable provisions must be met. In this regard, the Act is thus more flexible than the BGB.

d) Business days

Section 2(6) sets out how time periods measured in business days between two events are calculated.⁶¹⁴² According to this provision, when a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by (a) excluding the day on which the first such event occurs, (b) including the day on or by which the second event is to occur, and (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.⁶¹⁴³

⁶¹⁴² This provision correlates with s 2(5) NCA.

⁶¹⁴³ See Part I ch 4 para 3.2.

This differs from section 4 of the Interpretation Act,⁶¹⁴⁴ which applies to the calculation of a number of days in general, and not only of business days. The calculation itself is also different in that the Consumer Protection Act excludes any public holiday and Sunday during the entire period of time but also any Saturday. The Interpretation Act, on the other hand, only refers to public holidays and Sundays and excludes only public holidays and Sundays that happen to fall *at the end* of the given period, and not in-between. Hence, the Consumer Protection Act excludes more days from the calculation than the Interpretation Act.

§§ 187 and 188 contain similar provisions. Similar to the South African Interpretation Act, the German provisions concern the calculation of periods of time in general and not merely of business days.

§ 187 concerns the calculation of the beginning of a period of time. If a period commences on the occurrence of an event or at a point of time falling in the course of a day, then the day on which the event or point of time occurs is not included in the calculation of the period. This is the case, for example, where a contract provides that a period of time starts to run from the moment in which the supplier delivers the item. If the beginning of a day is the determining point of time for the commencement of a period, then this day is included in the calculation of the period. An example of this type of calculation is a provision in a lease agreement in which the first rent has to be paid on 1st of January of a given year. The same applies to the date of birth when the age of a person is calculated.⁶¹⁴⁵

§ 188 deals with the calculation of the end of a period of time. According to this provision, a period of time specified by days ends on the expiry of the last day of the period. A period of time specified by weeks, by months or by a duration of time comprising more than one month — year, half-year, quarter — ends, in the case of § 187(1), on the expiry of the day of the last week or of the last month which, in its designation or its number, corresponds to the day on which the event or the point of time occurs, or in the case of § 187(2), on the expiry of the day of the last week or of the last month that precedes the day which corresponds in designation or number to the first day of the period of time. If in the case of a period of time determined by

⁶¹⁴⁴ 33 of 1957. **Section 4 of the Interpretation Act:** 'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

⁶¹⁴⁵ Brox and Walker *BGB-AT* 360.

months, the day on which it is due to expire does not occur in the last month, the period ends on the expiry of the last day of this month.

Section 2(6) and §§ 187 and 188 differ hence in that the South African provision only concerns the calculation of business days, whereas the German norms apply for periods of time in general. On the other hand, the South African Interpretation Act too applies periods of time in general. Besides, for the beginning of a period of time, § 188 distinguishes between two cases, namely whether a period commences on the occurrence of an event or at a point of time falling in the course of a day, on the one hand, or whether the beginning of a day is the determining point of time for the commencement of a period, on the other. In contrast, section 2(6) excludes the day on which the first such event occurs in any event. Moreover, for the end of a specific period of time, § 188 distinguishes between periods specified by weeks, months and durations such as years, a half-year and a quarter of a year. The calculation of a given number of days according to the Interpretation Act differs from the Consumer Protection Act in terms of the days excluded.

In practice, these differences in the calculation methods should have no major impact, however. They are clear enough in all three pieces of legislation to determine a specific period of time so that legal certainty is achieved.

2. Interpretation of agreements

a) Primary rules of interpretation — Determination of the parties' intention

The primary purpose of the classical approach in the field of interpretation of contracts is to determine the parties' common intention and give effect to it, and not what only one or the other had in mind.⁶¹⁴⁶ The parties' intention is relevant because of the principle of freedom of contract.⁶¹⁴⁷ The courts assess the parties' common intention by applying the so-called 'primary rules of interpretation' in order to construe the meaning of the words used in the given agreement.⁶¹⁴⁸

In terms of § 133, for the construction of declarations of intent, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration. Therefore, interpretation serves the enquiry of the intention of a party. In order to be relevant in legal

⁶¹⁴⁶ Hutchison *et al* *Law of Contract* 255, *Joubert v Enslin* 1910 AD 6 at 37.

⁶¹⁴⁷ Brox and Walker *BGB-AT* 60.

⁶¹⁴⁸ Christie and Bradfield *Law of Contract* 199. See also Part I ch 4 para 4.

transactions, this (interior) intention must be 'expressed' in the form of a declaration. Thus, the mere intention of a party can be neither the object nor the objective of interpretation.⁶¹⁴⁹

Taking into consideration merely the wording of a party's declaration is not sufficient though, which is why § 133 sets out that it 'is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.' However, the assessment of a party's true intention does not suffice because it is important to ascertain the sense of a declaration by interpretation, and not – contrary to the wording of § 133 – the unilateral intention of the declarant. Hence, the interpretation must take into consideration the interests of the recipient of the declaration.⁶¹⁵⁰ By doing so, all circumstances beyond the declaration have to be considered, such as linguistic characteristics of the person, as well as prospects, contractual negotiations and customary practice.⁶¹⁵¹ Seemingly 'unambiguous' declarations must be interpreted too by taking into account all surrounding circumstances. Furthermore, it will show if a contract has been established, i.e., if the offer and the acceptance of the offer are congruent.⁶¹⁵² Finally, it serves to establish the legal consequences of an agreement.⁶¹⁵³

There is however a tension between the subjective standard of § 133 (true intention) and the objective standard of § 157 which requires the consideration of good faith and which seems to apply only to contracts, whereas § 133 applies to all declarations of intent. The scope of application of §§ 133 and 157 is overlapping though and cannot be separated in most cases.⁶¹⁵⁴ In practice, the controversy whether § 133 or § 157 takes priority over the other norm and the functional relation between these two norms are irrelevant since the courts have developed a 'canon of interpretative principles' or 'canon of construction'.⁶¹⁵⁵

In this context, German law distinguishes between natural and normative interpretation. Natural interpretation takes into consideration only the real intention of the party issuing a declaration of intent. It applies where the recipient's interests are not worthy of protection, e.g., for last wills. In contrast, normative interpretation also considers the interests of the recipient of the declaration.⁶¹⁵⁶ Where the contract contains an unintentional gap (*lacuna*), an objective-

⁶¹⁴⁹ *Schiemann* in: Staudinger/Eckpfeiler C para 41. See also Part II ch 4 para 3.

⁶¹⁵⁰ *Schiemann* in: Staudinger/Eckpfeiler C para 42.

⁶¹⁵¹ Brox and Walker *BGB-AT* 60.

⁶¹⁵² This is not the case if both parties had a different currency for payment in mind, for instance.

⁶¹⁵³ Interpretation will come to the result that the tenant who writes to his landlord that he has found a better and cheaper apartment and therefore will move out by the end of the month means that he gives notice by the end of the month. Example from Brox and Walker *BGB-AT* 61.

⁶¹⁵⁴ Palandt/*Ellenberger* § 133 para 2.

⁶¹⁵⁵ *Kanon von Auslegungsgrundsätzen*. Palandt/*Ellenberger* § 133 para 1.

⁶¹⁵⁶ Brox and Walker *BGB-AT* 62.

generalising standard that considers the parties' hypothetical intention applies (complementary interpretation).⁶¹⁵⁷

As in South African law, the wording of the given declaration (provision in a contract) is the starting point for the interpretation of agreements. This also applies to declarations that are assumingly unambiguous and clear. This is because only by interpretation one can ascertain that the declaration and the intention behind it are congruent. If this is not the case, the *falsa demonstratio non nocet* principle applies.⁶¹⁵⁸

The objective of grammatical interpretation is to find out the grammatical and ordinary meaning of the words of the contract.⁶¹⁵⁹ Difficulties arise where the parties attribute different meanings to the same word or phrase.⁶¹⁶⁰ In addition, the meaning of words changes over time or in different circumstances. The 'ordinary meaning' therefore describes the meaning of a word or phrase in the given contractual context. When reading the contract as a whole, this might be the everyday meaning, or a more unusual, technical one.⁶¹⁶¹

Words have to be seen in their context and use of the parties in question⁶¹⁶² and never in isolation (*in vacuo*).⁶¹⁶³ If the recipient of a declaration of intent is someone familiar with legal terminology, it can be assumed that he or she understands the terminology with the meaning that the courts and legal literature attach to it. Also laypersons must research legal terminology to a certain extent though (contrary to, e.g., medical terminology) because by concluding a

⁶¹⁵⁷ Stoffels *AGB-Recht* 132. See Part II ch 4 paras 3.3 a) bb) (i) and (ii).

⁶¹⁵⁸ Schiemann in: Staudinger/Eckpfeiler C para 45.

⁶¹⁵⁹ In South African common law, Lord Wensleydale's golden rule from *Grey v Pearson* (1857) 10 ER 1216 at 1236 applies: '(...) [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.' In this regard, see *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947 (4) SA 521 (A) at 543; *N&B Clothing Manufacturers (Pty) Ltd v British Trading Insurance Co Ltd* 1966 (2) SA 522 (W) at 525C; *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 556D; *Western Credit Bank Ltd v Van der Merwe* 1970 (3) SA 461 (C) at 463H.

⁶¹⁶⁰ This is the case, for instance, where the parties usually use the same word in different circumstances or domains. One party might use a term in its all-day meaning, whereas the other uses it in its meaning that it has acquired by trade usage or law. For instance, in every-day language 'owner' and 'possessor' have the same meaning, whereas their meaning is different in legal terminology.

⁶¹⁶¹ Christie and Bradfield *Law of Contract* 216. Jansen JA's statement in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B, in words adopted in *List v Jungers* 1979 (3) 106 (A) 119A-B are very instructive in this regard.

⁶¹⁶² Palandt/Ellenberger § 133 para 14. See also *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646; *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-727A; *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) 196E-F.

⁶¹⁶³ See Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

contract, they participate in a legal transaction (and not in a medical conversation) that by its mere nature involves legal terminology.⁶¹⁶⁴

Hence, similar to statutory interpretation, in German law, the context of the declaration has to be taken into consideration (systematic interpretation).⁶¹⁶⁵ This is 'the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract.'⁶¹⁶⁶ Grammatical and systematic interpretation cannot be separated however since the grammatical or literal meaning of words can only be assessed in their context.⁶¹⁶⁷

The recipient has to interpret the declaration in order to find out the actual intention of the other party (§ 133) and use all accessible material, such as negotiations, correspondence, preliminary information and even the *invitatio ad offerendum*.⁶¹⁶⁸ Where the recipient of the declaration of intent cannot assess the other party's real intention for lack of other indications outside the declaration, it is justified that the recipient's interests take precedence. This is because the deviation of the declaration and the actual intention of the other party originated in the other party's sphere.⁶¹⁶⁹ In this case, it is not relevant what the party who issued the declaration of intent actually meant, but how the recipient had to understand the declaration (interpretation from the standpoint of the recipient of the declaration).⁶¹⁷⁰ This result is supported by §§ 157 and 119(1) as '[c]ontracts are to be interpreted as required by good faith, taking the customary practice into consideration', and the fact that the party issuing the declaration can void its declaration under § 119(1).⁶¹⁷¹ Then, the contract is void from the outset under § 142(1).⁶¹⁷²

Other surrounding circumstances must be taken into account too when assessing the true intention, such as the genesis of the contract (pre-negotiation),⁶¹⁷³ or the fact that the given parties have developed certain practices over time from former business relations.⁶¹⁷⁴

⁶¹⁶⁴ Staudinger/*Singer* § 133 para 52, with further references, *Schiemann* in: Staudinger/Eckpfeiler C para 46.

⁶¹⁶⁵ Palandt/*Ellenberger* § 133 para 14. See also *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

⁶¹⁶⁶ *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768. Schreiner JA referred to this as 'linguistic treatment' in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454-455.

⁶¹⁶⁷ See also discussion in Part I ch 4 para 4.1 a).

⁶¹⁶⁸ See BGH NJW 2003, 1317.

⁶¹⁶⁹ Brox and Walker *BGB-AT* 64.

⁶¹⁷⁰ *Auslegung nach dem Empfängerhorizont*. See BGH NJW 2013, 598 (599); 2008, 2702 (2704); 1984, 721.

⁶¹⁷¹ § 119(1): 'A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.'

⁶¹⁷² § 142(1): 'If a voidable legal transaction is avoided, it is to be regarded as having been void from the outset.'

⁶¹⁷³ Palandt/*Ellenberger* § 133 para 16.

⁶¹⁷⁴ Palandt/*Ellenberger* § 133 para 17. See discussion in Part II ch 4 para 3.3.

The South African approach⁶¹⁷⁵ also includes extra-textual elements, i.e., the extended context of a contract, or the background circumstances so that useful conclusions with regard to the intended meaning from the nature of the contract, its purpose and background can be drawn.⁶¹⁷⁶

The consideration of extra-textual elements is restricted by the parol evidence rule, however. This rule provides that where the parties intended to lay down their agreement fully and finally in writing, evidence to contradict, vary, add to or subtract from the terms of the writing is inadmissible.⁶¹⁷⁷

South African courts do no longer apply the distinction between background and surrounding circumstances.⁶¹⁷⁸ Instead, they tend to allow all evidence in order to determine the meaning of a word or phrase. This is because the relevance of evidence cannot be determined before the end of a case, which of course defies the purpose of the parol evidence rule.⁶¹⁷⁹ What is more, the imprecise definition of background and surrounding circumstances made it difficult for a judge not to consider also extrinsic evidence, such as previous negotiations and correspondence between the parties, their subsequent conduct, or direct evidence of their own intentions.⁶¹⁸⁰

For the interpretation of agreements, both regimes start with the construction of the words of a provision. This grammatical interpretation is inseparably linked with the context in which the given words have been used though so that also the systematic interpretation is applied in tandem. The abolition of the distinction between background and surrounding circumstances

⁶¹⁷⁵ See the discussion in Part I ch 4.

⁶¹⁷⁶ Hutchison *et al* *Law of Contract* 257.

⁶¹⁷⁷ *Union Government v Vianini Ferr Concrete Pipes (Pty) Ltd* 1941 AD 47; *Johnston v Leal* 1980 (3) SA 927 (A) 938; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA); *Auckland Park Theological Seminary v University of Johannesburg* (1160/2018) [2020] ZASCA 24 (25 March 2020); *Kooij and Others v Middleground Trading 251 CC and Another* (1249/18) [2020] ZASCA 45 (23 April 2020).

⁶¹⁷⁸ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165. See also *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Boerne v Harris* 1949 (1) SA 793 (A); *Johnston v Leal* 1980 (3) SA 927 (A). In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, Wallis JA summarises the development as follows at para [12]: 'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. *The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'*. Accordingly it is no longer helpful to refer to the earlier approach'. In the summary, one can concisely read: '[I]nterpretation a unitary process commencing with the words and construing them in the light of all relevant circumstances – no distinction to be drawn between background and surrounding circumstances.' Emphasis added.

⁶¹⁷⁹ Hutchison *et al* *Law of Contract* 260.

⁶¹⁸⁰ Hutchison *et al* *Law of Contract* 261, *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767-768.

in South African legislation and the permission of all evidence in order to determine the meaning of a word or phrase approaches both regimes. The permission of all available evidence enhances greatly the determination of the parties' intention, which is the primary objective of the construction of agreements.

b) Secondary rules of interpretation

Both regimes apply rules that in Germany are referred to as 'general principles of interpretation',⁶¹⁸¹ and in South Africa as 'secondary rules of interpretation'.⁶¹⁸² These are guidelines that come into play where the primary rules of interpretation (grammatical, systematical, teleological and historical interpretation) do not lead to a satisfactory result. For secondary rules of interpretation, no specific order or limitation exists. They overlap with the primary rule of interpretation that words must be interpreted in the context of the agreement in question as a whole, however.

Examples in South African legislation are the *eiusdem generis*, the *noscitur ad sociis* or the *ut res magis valeat quam pereat* rules. Another rule states, for instance, that handwritten words prevail over printed words.⁶¹⁸³

In certain cases, the BGB provisions set out how a contractual provision must be interpreted in case of doubt. This is usually expressed by the term 'unless'.⁶¹⁸⁴ This is also the case for the

⁶¹⁸¹ See Part II ch 4 para 3.3 c).

⁶¹⁸² See Part I ch 4 para 4.1 b).

⁶¹⁸³ Hutchison *et al Law of Contract* 267.

⁶¹⁸⁴ § 139: 'If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part.' ('*wenn nicht*'); § 145: 'Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it' ('*es sei denn*'); § 149: 'If a declaration of acceptance received late by the offeror was sent in such a way that it would have reached him in time if it had been forwarded in the usual way, and if the offeror ought to have recognised this, he must notify the acceptor of the delay after receipt of the declaration without undue delay, unless this has already been done. If he delays the sending of the notification, the acceptance is deemed not to be late' ('*sofern*'), to mention but a few.

Consumer Protection Act, which also uses the term 'unless'.⁶¹⁸⁵ Other provisions that prescribe a certain interpretation are §§ 311c,⁶¹⁸⁶ 328(2)⁶¹⁸⁷ and 364(2).⁶¹⁸⁸

Moreover, jurisprudence has developed some interpretational maxims, such as the *falsa demonstratio non nocet* principle, according to which an erroneous declaration is irrelevant if the declarant's real intention was visible or could be ascertained by the other.⁶¹⁸⁹ According to the *protestatio facto contraria* maxim, a declaration cannot be restricted by a reservation that has not been expressly declared.⁶¹⁹⁰ Conversely, a party that impliedly conducts unambiguously cannot destroy its declaration by a verbal counter-declaration.⁶¹⁹¹

In terms of another interpretational principle, where declarations are set out in a contract or another agreement, only the written declarations apply.⁶¹⁹² For individuals that are not business people, evidence of the contrary, i.e., a differing intention is permitted, however.⁶¹⁹³ Where the law requires a specific form, the principle of the 'entirety of authentication'⁶¹⁹⁴ applies.⁶¹⁹⁵ Therefore, agreements that are not contained in the contracts are ineffective, with some exceptions, such as the cure set out in § 311b(1) 2nd sent.⁶¹⁹⁶

The rule that any doubts in the interpretation of standard business terms are resolved against the user (§ 305c) applies by analogy where a declaration of intent is transmitted by modern

⁶¹⁸⁵ See the definition of 'consumer' in s 1 (b), or ss 2(7), 4(5)(c), 5(1)(a) and (b), 9(1)(b) or 42(3)(b), for instance.

⁶¹⁸⁶ § 311c: 'If a person agrees to dispose of or charge a thing, that duty, in case of doubt, also applies to accessories of the thing.'

⁶¹⁸⁷ § 328: '(1) Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly. (2) In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.'

⁶¹⁸⁸ § 364: '(1) The obligation expires if the obligee accepts, in lieu of performance of contract, performance other than that owed. (2) If the obligor assumes a new obligation to the obligee for the purpose of satisfying the latter, it is not to be assumed, in case of doubt, that he is assuming the obligation in lieu of performance of contract.'

⁶¹⁸⁹ Creifelds *Rechtswörterbuch* s.v. 'falsa demonstratio non nocet'. See also Schiemann in: Staudinger/Eckpfeiler C para 56.

⁶¹⁹⁰ See Creifelds *Rechtswörterbuch* s.v. 'protestatio facto contraria', which refers to 'Willenserklärung' (1b bb).

⁶¹⁹¹ Schiemann in: Staudinger/Eckpfeiler C para 57.

⁶¹⁹² See the discussion on the parol evidence rule above, as well as in Part I ch 4 para 4.1 a).

⁶¹⁹³ Schiemann in: Staudinger/Eckpfeiler C para 58.

⁶¹⁹⁴ *Grundsatz der Gesamtbeurkundung*.

⁶¹⁹⁵ Staudinger/Hertel § 125 para 58.

⁶¹⁹⁶ § 311b(1): 'A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary. A contract not entered into in this form becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected.' In this regard, see the discussion on the parol evidence rule above, as well as in Part I ch 4 para 4.1. a).

communication methods or where the text of the contract has been drafted by the party who is intellectually and economically superior to the other.⁶¹⁹⁷

In case of doubt, the interpretation that avoids the contract to be ineffective is to be preferred, or⁶¹⁹⁸ that the parties aimed to stipulate legally relevant provisions without contradictions⁶¹⁹⁹ that they wanted to abide by the law and did not strive to agree to unlawful conduct.⁶²⁰⁰

Both regimes have developed maxims to guide the courts where the primary rules of interpretation fail. Even though some of these rules might not be applicable in one or the other legislation, they assist the courts tremendously.

c) Tertiary rules of interpretation

In the South African context, tertiary rules of interpretation apply as a last resort. These do not attempt to find the actual or presumed intention of the parties but aim to provide a fair outcome.⁶²⁰¹ The *contra proferentem* and the *quod minimum* rules belong to this category.⁶²⁰² According to the *contra proferentem* rule, ambiguous terms must be interpreted against the party who proposed them.⁶²⁰³ In contrast, the *quod minimum* rule provides that words that have different meanings must be narrowly interpreted in order to encumber the debtor or promisor as little as possible.⁶²⁰⁴

A term may however not be construed *contra proferentem* if it is clear and unambiguous. In the event where a term, e.g., an exemption clause, is ambiguous, the courts will try to minimise its effect by reducing its scope or the exempted legal grounds for responsibility for the damaged caused.⁶²⁰⁵ In any event, the court must not adopt a meaning that would be strained or forced, in order to import some kind of ambiguity into the given clause.⁶²⁰⁶ Where a clause is unambiguous, the court must give effect to it, even if the consequences are harsh,⁶²⁰⁷ except in

⁶¹⁹⁷ Palandt/*Ellenberger* § 133 para 23 and 26a.

⁶¹⁹⁸ Hutchison *et al* *Law of Contract* 267.

⁶¹⁹⁹ See, for instance, *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at 429-430.

⁶²⁰⁰ Palandt/*Ellenberger* § 133 para 26.

⁶²⁰¹ Van der Merwe *et al* *Contract General Principles* 304.

⁶²⁰² Hutchison *et al* *Law of Contract* 268.

⁶²⁰³ Hutchison *et al* *Law of Contract* 268. This will be often an insurance company or a public utility. See *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38E. In *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA), e.g., the court interpreted the term 'driving' narrowly, stating that although the terms and conditions of the adventure tour company expressly excluded Drifter's liability from time of departure to time of return, due to the nature of tours offered by the company (adventure tours), this exclusion could hardly cover driving on a public road, but rather in 'exciting terrain' (at 88J-89A).

⁶²⁰⁴ Hutchison *et al* *Law of Contract* 268.

⁶²⁰⁵ *ER24 Holdings v Smith* 2007 (6) SA 147 (SCA).

⁶²⁰⁶ *Walker v Redhouse* 2007 (3) SA 514 (SCA).

⁶²⁰⁷ Hutchison *et al* *Law of Contract* 271.

cases where the 'provision is so gratuitously harsh and oppressive that public policy could not tolerate it.'⁶²⁰⁸

If the court cannot find the true meaning of the contract, it will declare the agreement void for vagueness, however.⁶²⁰⁹

In the German regime, if the declaration of intent remains unclear in crucial points after the interpretational enquiry and is thus not sufficiently definite or unambiguousness, it is void.⁶²¹⁰

On the other hand, if the result of the interpretation differs from the real intention of the declarant, the declaration is voidable for mistake in terms of § 119(1). Then, the person declaring voidability might be liable in damages under § 122. The principle that interpretation takes precedence over voidability⁶²¹¹ applies though.⁶²¹²

It seems that German courts do not have to apply tertiary rules of interpretation because they can fill gaps by means of complementary interpretation. This approach does not consider the parties' actual intention either. Complementary interpretation requires an unintentional loophole to be filled by the court, especially where the *ius dispositivum* does not provide for provisions that could apply.⁶²¹³

An unintentional lacuna only exists where the party issuing the declaration of intent did not consider — or considered wrongly — certain circumstances.⁶²¹⁴ It is not relevant whether a party did not take into account certain circumstances which existed at the time of the conclusion of the contract (primary lacuna) or which came into being afterwards (secondary lacuna).⁶²¹⁵

If the judge has established that the transaction contains an unintentional lacuna, he or she has to fill the gap by assessing what the parties would have agreed if they had considered the particular circumstance by applying the principles of good faith and customary practice in terms of § 157. Therefore, not the parties' actual intention is relevant, but what they would have reasonably stipulated if they had known of the loophole in their contract.⁶²¹⁶ In doing so, the

⁶²⁰⁸ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 286F-G, *Swinsburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD) at 312 (*obiter*).

⁶²⁰⁹ Christie and Bradfield *Law of Contract* 227, Hutchison *et al Law of Contract* 269.

⁶²¹⁰ Staudinger/Singer § 133 para 23.

⁶²¹¹ 'Auslegung geht vor Anfechtung'.

⁶²¹² Schiemann in: Staudinger/Eckpfeiler C para 59.

⁶²¹³ Brox and Walker *BGB-AT* 67.

⁶²¹⁴ See BGH *NJW* 2002, 2310, BGHZ 127, 138 (142) = BGH *NJW* 1994, 3287, for example.

⁶²¹⁵ Brox and Walker *BGB-AT* 67.

⁶²¹⁶ BGH *NJW* 2013, 678 (679).

court has to take into consideration the particular circumstances of the case, such as the parties' reasons to enter into the contract, their interests as well as the customary practice.⁶²¹⁷

In reality, gap-filling by interpretation is very far from finding this intention because the 'explanatory value' of the party's conduct – and not its intention – must be found.⁶²¹⁸ The same applies to statutory interpretation, where the analogous application of legal norms has nothing to do with the intention of the historical legislator. Both the interpretation of agreements and statutory interpretation consist of a legal assessment and not fact-finding.⁶²¹⁹

Although in both regimes, the parties' *actual* intention is not considered, the German approach of complementary interpretation takes into account their *presumed* intention. This is done by applying the good faith principle and customary practice. Hence, it can be said that the German judge has to undertake an interpretational effort in order to find out the parties' presumed intention, whereas South African courts can rely on a ready-made scheme in the form of the rules mentioned above. The South African approach is thus more paternalistic. It should be noted that tertiary rules of interpretation play a minor role in South Africa since the Supreme Court of Appeal has adopted a new contextual approach to interpretation in which all evidence in order to determine the meaning of a word or phrase is permitted.

3. The interpretation of standard business terms

a) Modified interpretational standard

For the interpretation of German standard terms, the recipient's standpoint is irrelevant.⁶²²⁰ Instead, one has to consider the standpoint of an average customer without legal knowledge, and under consideration of the relevant public which is generally confronted with the terms and conditions in question.⁶²²¹ This means that the interpretation does not take into account the circumstances of an individual case or the individual understanding of a party.⁶²²² In other words, certain means for the interpretation of standard terms are not applicable, such as the history of the instrument. Therefore, the wording of a clause becomes more critical.⁶²²³

⁶²¹⁷ Brox and Walker *BGB-AT* 68. See BGHZ 16, 71 (77 *et seq*) = BGH *NJW* 1955, 337.

⁶²¹⁸ Palandt/Ellenberger § 133 para 9, *Schiemann* in: Staudinger/Eckpfeiler C para 51.

⁶²¹⁹ *Schiemann* in: Staudinger/Eckpfeiler C para 51.

⁶²²⁰ See discussion in Part II ch 4 para 3.4.

⁶²²¹ BGH *NJW* 2002, 285 (286); 2007, 504 (505); 2008, 2172 (2173).

⁶²²² BGHZ 33, 216 (218); 84, 268 (272), BGH *NJW* 1992, 2629; 2001, 2165 (2166), BAG *NZA* 2006, 324 (327), UBH/*Ulmer and Schäfer* § 305c para 73 *et seq*, Roth *WM* 1991, 2126.

⁶²²³ UBH/*Ulmer and Schäfer* § 305c para 73. The courts have different views on this point, though. For an objective interpretation oriented towards the wording of a clause: BGH *NJW* 1988, 3149 (3150); 2002, 441. Standard terms of insurance companies have to be interpreted in line with the understanding of an average insured

As they are designed for a significant number of customers, the use of standard terms is characterised by the lack of individual particularities.⁶²²⁴ This becomes clear in institutional actions where no reference to individual circumstances exists. In the context of individual proceedings too, usually, individual circumstances do not have to be taken into consideration for interpretational purposes.⁶²²⁵ There are good reasons for the modification of the interpretational standard for standard contracts. The lack of individual particularities characterises the use of pre-formulated clauses as they serve for a significant number of customers.⁶²²⁶ In addition, the rationalising effect of standard provisions would be jeopardised if suppliers had to fear that their terms and conditions would not be applied in a unified manner because of differing interpretations.⁶²²⁷

It is arguable whether the objective standard of interpretation must also be applied to consumer contracts under § 310(3) no. 3 where 'in judging an unreasonable disadvantage under section 307(1) and (2), the other circumstances attending the entering into of the contract must also be taken into account.' As discussed,⁶²²⁸ the wording and the position of this provision do not support the view that the objective standard is inapplicable in this case. Furthermore, § 310(3) no. 3 is a provision in the context of content control and not interpretational control. Interpretational and content controls have to be carried out separately, though. This means that the consideration of 'other circumstances' belongs to content control.

The Consumer Protection Act also modifies the interpretational standard for terms and conditions. Section 4(4) prescribes an interpretation to the benefit of the consumer.

Both pieces of legislation thus apply a different standard for terms and conditions compared to other agreements. The German approach is more objective in that the perspective of an average customer without legal knowledge is applied. In contrast, the Consumer Protection Act applies a more paternalistic attitude by applying a construction to the consumer's benefit. The reason for this difference is that §§ 305 *et seq.* are no consumer protection provisions (with the exception of consumer contracts) and therefore apply an abstract-universal approach, whereas the Act's objective is consumer protection.

applying reasonable care when reading carefully the terms, taking into account how he or she had to understand them in their context: BGH *NJW* 1993, 2368; 1999, 1633, 1634; *NJW* 2001, 3406.

⁶²²⁴ Roth *WM* 1991, 2126.

⁶²²⁵ Stoffels *AGB-Recht* 134.

⁶²²⁶ Roth *WM* 1991, 2126.

⁶²²⁷ UBH/*Ulmer and Schäfer* § 306c para 75.

⁶²²⁸ See Part II ch 4 para 4.

b) Order of the interpretational and content controls

Naudé is of the opinion that interpretational control takes place after content control.⁶²²⁹ It is arguable though if the opposite approach where interpretational control takes place before content control would not be more efficient.⁶²³⁰

Before assessing whether a clause in a standard contract bears up against the catalogue of forbidden or 'sensitive' clauses in terms of section 51, regulation 44, or the general clause of section 48, it is reasonable to ascertain its actual meaning first. If this order is reversed, one risks either to undertake a lengthy discussion on whether or not and why a clause is unfair, before even knowing its exact meaning. In most cases, the interpretation will cause no problems because many clauses are unambiguously formulated. Even though standard terms are generally sophisticated provisions that have been formulated by experts, formulations contained therein might be not clear or ambiguous, or the contract concluded on the basis of standard business terms is incomplete.⁶²³¹ Apparently unambiguous declarations must be interpreted too by taking into consideration all surrounding circumstances, i.e., the context. Therefore, the statement that construction is superfluous where both parties' true intentions are concordant is mistakable because the assessment of the parties (concordant) intention inevitably requires an interpretation.⁶²³²

Furthermore, it is recommended that the interpretation of a term and the control of its contents are strictly separated so that one cannot be undertaken within the other. Otherwise, one risks assessing whether a term is unfair or not, without having precisely determined what a word or phrase means. Moreover, this approach is 'economic' because it saves unnecessary and unstructured arguments. Hence, interpretation control 'prepares' content control.⁶²³³

This is also the approach of the German legislature who was in favour of an 'open content control', which means that the reasons of the inadequacy of standard terms must be unfolded within the content control, and not 'concealed' within the interpretational control, which then would serve as a 'correction' of standard terms.⁶²³⁴

⁶²²⁹ Naudé 2009 *SALJ* 506

⁶²³⁰ See Part I ch 4 para 4.2 and Part II ch 4 para 3.2.

⁶²³¹ Stoffels *AGB-Recht* 131.

⁶²³² Palandt/*Ellenberger* § 133 para 8, *Schiemann* in: Staudinger/*Eckpfeiler* C para 45.

⁶²³³ See Stoffels *AGB-Recht* 131. See also BGH *NJW* 1999, 1108; 1633 (1634).

⁶²³⁴ BGH *NJW* 1999, 1633 (1634).

For these reasons, Naudé's view that the content control comes before the interpretation control has to be rejected. Interpretational control should thus always take place before content control. Furthermore, interpretational and content control must be strictly separated.

c) Individual *versus* abstract approach

It is submitted that section 4(4)(b) introduces a different standard of consumer protection. At first sight, it is not clear what a 'reasonable person' means and what this person 'would ordinarily contemplate or expect'. As suggested in Part I,⁶²³⁵ a reasonable person in terms of this provision cannot be a vulnerable consumer under section 3(1)(b). Vulnerable are those consumers who are inexperienced and do not know what to expect or not to expect in a standard form contract. For the determination of a person's reasonableness, a more objective standard should thus be applied, such as a bystander or an average consumer.

Also in German law, such an approach is applied. When interpreting standard terms, the recipient's perspective is irrelevant, i.e., how he or she had to interpret a clause or a contract while applying reasonable care. Instead, the standpoint of an average customer without legal knowledge, and under consideration of the relevant public which is usually concerned with these terms and conditions, is considered.⁶²³⁶ This means that the interpretation does not take into account the circumstances of an individual case or the individual understanding of a party.⁶²³⁷ Therefore, the BGH decided, for instance, that the standard terms of an investment company must be interpreted equally for someone who has no experience in investing and for a shrewd investor.⁶²³⁸

Unlike sections 48 and 49, which only consider the parties involved, section 4(4)(b) therefore widens the perspective in terms of what a *reasonable* person can or cannot expect. It would go too far though to qualify this approach as abstract-universal according to the BGB, where the circumstances of the parties involved in a particular transaction are not taken into account but rather the transactions of the type and classes of the participants.⁶²³⁹ After all, the circumstances of the agreement or transaction as well as the manner and form in which the document was presented have to be considered under section 4(4)(b). For example, if it is not clear whether a price expressed in 'Dollars' means U.S.-American, Australian or Canadian Dollars, and the

⁶²³⁵ See Part I ch 4 para 4.2.

⁶²³⁶ BGH *NJW* 2002, 285 (286); 2007, 504 (505); 2008, 2172 (2173).

⁶²³⁷ BGHZ 33, 216 (218); 84, 268 (272), BGH *NJW* 1992, 2629; 2001, 2165 (2166), BAG *NZA* 2006, 324 (327), UBH/*Ulmer and Schäfer* § 305c para 73 *et seq.*, Roth *WM* 1991, 2126.

⁶²³⁸ BGH *NJW* 1980, 1947.

⁶²³⁹ BGHZ 22, 91 (98); 17, 1 (3).

seller acquired the items in Canada, one can conclude that the stipulated price is expressed in Canadian Dollars.⁶²⁴⁰

d) Construction in favour of the consumer

Section 4(4) of the Act provides that any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by the Act to be produced by a supplier must be interpreted *to the benefit of the consumer* so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved *to the benefit of the consumer*.⁶²⁴¹

Although section 4 provides that 'any standard form, contract or other document' must be construed in the manner set out in this section, it is submitted that the Tribunal or court has to interpret the individual clauses of the given agreement rather than the contract as a whole. This must be done in the light of the contract as a whole, i.e., its object, as well as the interaction between individual clauses. Section 4 expresses this indirectly by the phrases 'interpretation of a part of such a document' (subsection (a)) and 'any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document' (subsection (b)). The latter can only be set out in individual clauses, not in an agreement as a whole.⁶²⁴²

Section 4(4)(a) must be read against the backdrop of the *contra proferentem* rule.⁶²⁴³ The rationale of this rule is that the party who formulated or imposed the provision should suffer from an adverse construction as it had the opportunity to articulate the terms clearly.⁶²⁴⁴ The same rationale can be found in the *quod minimum* rule.⁶²⁴⁵ These maxims normally serve as a last resort⁶²⁴⁶ since they do not take into consideration the parties' actual intentions. In standard form contracts, this consideration is of no importance because the terms included in such agreements are rarely negotiated or even read by the consumer.⁶²⁴⁷

⁶²⁴⁰ Example from Brox and Walker *BGB-AT* 60.

⁶²⁴¹ See Part I ch 4 para 4.2.

⁶²⁴² This is expressed in the heading of § 305c 'Surprising and ambiguous clauses'.

⁶²⁴³ Hutchison *et al Law of Contract* 268.

⁶²⁴⁴ Hutchison *et al Law of Contract* 268, De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17. See also *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38E and *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA).

⁶²⁴⁵ Hutchison *et al Law of Contract* 268.

⁶²⁴⁶ According to the ordinary classification of interpretational rules, these rules are tertiary rules of interpretation 'which are applied as a last resort, without any pretence at attempting to find the real intention of the parties'. See Van der Merwe *et al Contract General Principles* (2007) 304.

⁶²⁴⁷ De Stadler 'Section 4' in Naudé and Eiselen (eds) *CPA Commentary* para 17.

The same approach can be found in the so-called 'rule of ambiguity' of § 305c(2), according to which any doubts in the interpretation of standard business terms are resolved against the user (supplier).⁶²⁴⁸ If the content of a clause cannot be clearly determined, the supplier bears the risk. This means that the supplier has the responsibility for the content of its standard terms.⁶²⁴⁹ § 305c(2) sets out an interpretational rule which prepares the content control, but which cannot serve as a standard for the content control.⁶²⁵⁰

German courts tend to restrict the application of the ambiguity rule⁶²⁵¹ of § 305c(2) as otherwise too many problematic clauses would already be mitigated at this stage in favour of the consumer, without the possibility to assess their adverse effect within the content control.⁶²⁵² The courts apply § 305c(2) only where despite the application of all other interpretational methods, an irremovable doubt and at least two legally justifiable interpretational possibilities remain.⁶²⁵³ The South African legislator rightly expressed this idea in section 4(4)(a) in that 'any ambiguity that allows for *more than one reasonable interpretation* (...) is resolved to the benefit of the consumer.'⁶²⁵⁴

Even though the practical relevance of the ambiguity rule of § 305c(2) is high,⁶²⁵⁵ the courts tend to circumvent it by the application of the 'transparency requirement'⁶²⁵⁶ of § 305c(1).⁶²⁵⁷ Where an inadequate disadvantage arises from an ambiguous term, there is no need to construe this term according to § 305c(2). Hence, the scope of application of the rule of ambiguity in terms of § 305c(2) is limited to cases in which an objective ambiguity of a clause does not also infringe the transparency requirement.⁶²⁵⁸

⁶²⁴⁸ This provision corresponds to art 5 2nd sent. of the Unfair Terms Directive.

⁶²⁴⁹ Stoffels *AGB-Recht* 136.

⁶²⁵⁰ Report of the Law Commission BT-Drs. 7/5422 at 5, Roth *WM* 1991, 2086. Therefore, the BGH wrongly states in BGH *NJW* 1985, 53 that a certain clause 'infringes' § 305c(2).

⁶²⁵¹ *Unklarheitenregel*.

⁶²⁵² This problem had already be seen by Raiser (*Recht der allgemeinen Geschäftsbedingungen* at 264 *et seq*) and later in BT-Drs. 7/3919 at 15 and 60.

⁶²⁵³ BGH *NJW-RR* 1995, 1303 (1304), BGH *NJW* 1997, 3434 (3435); 2002, 3232 (3233); 2007, 504 (506), BAG *NZA* 2006, 923 (926). See also Palandt/*Heinrichs* § 305c para 18.

⁶²⁵⁴ Emphasis added.

⁶²⁵⁵ Roth *WM* 1991, 2086, Stoffels *AGB-Recht* 136.

⁶²⁵⁶ *Transparenzgebot*.

⁶²⁵⁷ Thamm/Pilger *ABGB* § 5 para 4.

⁶²⁵⁸ Stoffels *AGB-Recht* 137, BGH *NJW* 1994, 1060 (1062) where the rule of ambiguity was applied and an infringement of the transparency requirement negated.

§ 305c(2) cannot be waived or circumvented by standard terms, which is made clear in § 307(2) no. 1.⁶²⁵⁹ The ambiguity rule applies without restrictions to B2B agreements,⁶²⁶⁰ and the Bundesarbeitsgericht consequently applies this rule to employment contracts.⁶²⁶¹

Interpretation in favour of the other party or the consumer takes thus place in both regimes. German courts apply § 305c(2) rather to cases where an objective ambiguity does not also affect the transparency requirement in terms of § 305c(1) though. Therefore, the construction in favour of the other party is more restricted in Germany than in South Africa. In practice, this different scope of application should not lead to different results, though, as in most cases, a clause will be struck down either in terms of the transparency requirement or under the ambiguity rule.

e) Consideration of foreign law

As discussed in Part I,⁶²⁶² section 2(2) provides that when interpreting or applying the Act, a person, court or Tribunal or the Commission may consider appropriate foreign and international law. These bodies can also consider any precedents of a consumer court, ombud or arbitrator in terms of the Act, to the extent that such decision has not been set aside, reversed or overruled by a higher court.⁶²⁶³ This provision is not mandatory ('may').⁶²⁶⁴ As we have seen, the law of the EU and the rulings of the European Court of Justice fall under this provision.

The BGB does not contain a similar provision. However, a norm adopted in execution of an EU Directive must always be interpreted in conformity with the Directive, i.e., in case of doubt, in accordance with the EU Directive. The principle that an interpretation must be undertaken in favour of European law prevents the courts from disregarding decisions of the ECJ. EU law must be interpreted in such a way that it is fully effective.⁶²⁶⁵

The two regimes are not comparable, though. EU Directives must be transposed into national law, whereas 'foreign law' in the sense of section 2(2) of the Consumer Protection Act has no direct or indirect connection with South African law. The South African regime is an original approach which probably has its reason in the fact that the country does not have an extensive body of appropriate decisions in terms of consumer protection yet. This must be seen against

⁶²⁵⁹ BGH *NJW* 1999, 1865 (1866 *et seq.*).

⁶²⁶⁰ BGH *NJW-RR* 1988, 113 (114).

⁶²⁶¹ See, for example, BAG *DB* 1992, 383 (384).

⁶²⁶² Chapter 4 para 2.2.

⁶²⁶³ Interestingly, the National Credit Act 34 of 2005 restricts the considerations of the court to appropriate foreign and international law and does not contain provisions similar to paras (b) and (c) of s 2 CPA.

⁶²⁶⁴ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 14.

⁶²⁶⁵ Creifelds *Rechtswörterbuch* s.v. 'Auslegung' f) and g).

the backdrop of the consideration that foreign and international law may influence not only the interpretation of the Act but also its application, however.⁶²⁶⁶ With regard to language barriers, the consideration of foreign laws will most likely be limited to legal orders where English or Dutch (which has similarities with Afrikaans) are official languages (including the EU). In any event, section 2(2) should be applied with precaution. Nonetheless, it is hard to imagine, even if applied with precaution, how considerations developed in the context of a supra-individual and generalising approach – which is an international standard – can be applied within a framework applying a particular-individualised approach.

4. Conclusion

For the interpretation of the provisions of the Act, a purposive approach must be applied. This paternalistic and flexible approach is alien to German construction because §§ 305 *et seq.* generally cannot be qualified as pure consumer protection provisions. Purposive construction must also apply other techniques though in order to assess the purpose of a norm. These are systematic, historical and teleological interpretation. Grammatical interpretation is applied to the Act only after the purposive construction of the given norm. However, the constructional techniques cannot be separated from each other and are overlapping to a certain degree.

The South African and the German regimes apply different legislative techniques as regards the definitions contained in the Act and the BGB. Both approaches have pros and cons. The grouping together of definitions in section 1 of the Act has not been performed properly. The legislator should therefore revise certain definitions and insert all definitions in section 1.

A specific provision like section 2(3) does not exist in the BGB. However, the BGB provides in §§ 125 to 129 for a form requirements regime. It seems that provisions falling under the Act may be signed or initialled in various ways, including by the use of electronic signatures. In contrast, the BGB provisions provide that if a specific formality is prescribed by statute or agreement, the parties have to adhere to the given conditions for the given form (written, text, notarial form, electronic signature etc.). The Act is thus more flexible in this regard.

Section 2(6) of the Act contains a provision for the calculation of business days. In contrast, the German BGB provisions have a vaster scope of application because they concern the calculation of periods of time in general, which is similar to the South African Interpretation

⁶²⁶⁶ De Stadler ‘Section 2’ in Naudé and Eiselen (eds) *CPA Commentary* para 14.

Act. What is more, for the calculation of the beginning and the end of a time-period, §§ 187 and 188 are more complex than their South African counterparts as they distinguish between two scenarios and specific periods of time. The different calculation methods in both regimes are however clear enough to achieve legal certainty.

For the interpretation of agreements and the enquiry of the parties' intention, both regimes start with the construction of the words of a provision. Grammatical interpretation is inseparably linked with the context in which the given words have been used, however. Thus, systematic and grammatical interpretation applies in tandem in both regimes. The abolition of the distinction between background and surrounding circumstances in South African legislation and the permission of all evidence (e.g., extra-textual elements) in order to determine the meaning of a word or phrase approaches both regimes and enhances the determination of the parties' intention.

Both pieces of legislation apply secondary rules of interpretation (general principles of interpretation) where the primary rules of interpretation do not lead to a satisfactory result. The respective statutes contain words, such as 'unless' that point out how a provision must be construed in case of doubt. Furthermore, the courts of both countries have developed interpretational maxims, such as the *protestatio facto contraria* maxim. Even though certain of these rules might not be applicable in one or the other legislation, they assist the courts to a great extent.

In South African legislation, tertiary rules of interpretation apply as a last resort. The objective of these rules is not the finding of the parties' intention, but a fair outcome. German courts fill unintentional gaps by performing complementary interpretation instead. Although in both regimes, the parties' *actual* intention is not considered, the German approach of complementary interpretation takes into account their *presumed* intention. German judges thus must undertake an 'interpretational effort' in order to find out the parties' presumed intention. In contrast, South African courts can rely on a ready-made scheme of tertiary rules. Hence, the South African mechanism is more paternalistic.

The Consumer Protection Act and the BGB apply different interpretational standards for terms and conditions in relation to other agreements. The German approach takes the perspective of an average customer without legal knowledge. It is thus more objective than the more

paternalistic attitude of the South African regime. The reason for this discrepancy lies in the different objectives of both pieces of legislation.

Interpretational control should take place before content control. This is an economic approach because long discussions on whether or not a clause is unfair before knowing its meaning are avoided beforehand. What is more, the interpretational and content controls must be strictly separated and cannot be performed within one another.

It is suggested that section 4(4)(b) introduces a different standard of consumer protection in relation to other provisions of the Act by taking into consideration a more objective standard like in the German regime. Hence, this provision of the Act widens the perspective as to what a reasonable person can or cannot expect. This approach cannot be qualified as abstract-universal in terms of §§ 305 *et seq.* though.

Both the South African and the German regimes apply interpretation in favour of the other party/consumer. German courts apply § 305c(2) rather to cases where the objective ambiguity of a standard provision does not also affect the transparency requirement under § 305c(1). Hence, the construction in favour of the other party is more restricted in Germany than in South Africa. In practice, this different scope of application should not be relevant though since because in the majority of cases, a clause will be struck down either for transparency reasons or under the ambiguity rule.

The South African regime provides for an original approach according to which foreign law can be taken into consideration when interpreting or applying the Act. This provision must be seen against the backdrop of the consideration that foreign and international law may influence the interpretation as well as the application of the Act. Even though EU law must be considered in German law, the two regimes are not comparable. EU Directives must be transposed into national law, whereas 'foreign law' in the sense of section 2(2) of the Act has no direct or indirect connection with South African law. In any event, section 2(2) should be applied with precaution. With regard to language barriers, the consideration of foreign laws will most likely be limited to legal orders of which English or Dutch are official languages (including the EU). However, the different approaches of the Act and other regimes (individual-personalised *vs* abstract-general) could be an obstacle for the application of foreign concepts in South African law.

CHAPTER 5 – CONTENT CONTROL

INTRODUCTION

The use of a general clause, as well as lists of outright prohibited terms and those that are unfair under certain circumstances has been legislated in both countries (sections 48 and 51 as well as regulation 44(3) CPA, and §§ 307 to 309 BGB, respectively). This corresponds to international standards and has proven the most effective measure against unfair standard provisions. The advantages of black- and greylists, supplemented with a general clause, have been discussed in detail above.⁶²⁶⁷ There are some differences between the two regimes, however. These differences concern the general rationale of content control in the two countries (1.), but also the items contained in the blacklists (2.), the greylists (3.) as well as the general clauses (4.).

1. Differences concerning the rationale of content control

In Germany, content control is legal control, i.e., the courts exercise this kind of control *ex officio* as an incidental control. In other words, the judge decides whether a standard business clause is valid within the given proceedings (individual action).⁶²⁶⁸

This is not the case in the South African regime. Section 52(1), for instance, provides that the court may only make an order contemplated in this provision if 'a person alleges' contravention of the general clause. Since section 51 and regulation 44(3) are merely concretisations of the general clause of section 48 of the Act, this also applies to the black- and greylists.

Content control in South Africa is equity control,⁶²⁶⁹ whereas in Germany equity considerations do not form part of content control. Content control in terms of §§ 307 *et seq.* applies a supra-individual and generalising approach. In contrast, equity control provides for fairness in individual cases, which is not a suitable standard for mass contracts.⁶²⁷⁰ The Act and the enforcement procedures created by the South African legislator focus on individual consumers and their protection. In contrast, German content control does not primarily aim to protect the weaker party and its inferior bargaining power.⁶²⁷¹ German standard business terms legislation is oriented towards general contract law and is therefore not limited to consumer protection. Its purpose is to prevent abuse of freedom of contract-drafting. It thus protects all parties against

⁶²⁶⁷ See Part I ch 3 para 1.2.

⁶²⁶⁸ See Part II ch 6 para 1.1.

⁶²⁶⁹ See, e.g., regulation 44(3)(q) where the court has to consider equity. See discussion of this item in Part I ch 3.

⁶²⁷⁰ Staudinger/Rieble § 315 para 305. See Part II ch 5 para 1.1.1 b) cc).

⁶²⁷¹ Stöffels *AGB-Recht* 29.

the misuse of standard terms.⁶²⁷² Equity control in the context of §§ 307 *et seq.* is possible though where standard business terms grant a right of specification of performance to one of the parties. Then, the specification must be determined by taking into account equity considerations in terms of § 315.⁶²⁷³ This is the case for companies providing public services (utilities) on a contractual basis.⁶²⁷⁴ As discussed earlier,⁶²⁷⁵ in German standard business law, equity control is unsystematic with respect to content control because of the supra-individual and generalising (abstract) approach of content control. What is more, § 315 provides for judicial correction of the given contract clause ('contractual assistance'),⁶²⁷⁶ whereas §§ 307 *et seq.* already provides for the legal consequences that cannot be deviated from.⁶²⁷⁷

Equity control as applied in the South African regime is thus a consequence of the individualised approach. German legislation takes an abstract stance when assessing the fairness of standard terms, which does not allow for equity considerations.

Section 2(10) of the Act provides that no provision of the Act must be interpreted so as to preclude a consumer from exercising common-law rules. This means that contracts that are contrary to public policy are void under the common law.⁶²⁷⁸

In German legislation, the principle of public policy is codified in § 138. As discussed earlier, a parallel application of §§ 305 *et seq.* and 138 is possible because both have different evaluative standards. The threshold for § 138 is higher than for §§ 305 *et seq.*, and the legal consequence is voidness in terms of § 139, i.e., the remainder of the contract does not remain in effect unlike in § 306. What is more, for § 138, all circumstances are taken into account. This means that an abstract-general approach is not applied as in §§ 305 *et seq.*⁶²⁷⁹

The same applies to good faith, a common-law principle in South Africa. In Germany, § 242 provides that '[a]n obligor has a duty to perform according to the requirements of good faith [*Treu und Glauben*]', taking customary practice into consideration'. § 242 is more specific than

⁶²⁷² Eith *NJW* 1974, 16, 17. See Part II ch 1 para 2.3.

⁶²⁷³ **§ 315:** '(1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it. (2) The specification is made by declaration to the other party. (3) Where the specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.'

⁶²⁷⁴ BGH *NJW-RR* 2006, 133 (134).

⁶²⁷⁵ See Part II ch 5 para 1.1.1 b) cc).

⁶²⁷⁶ *Vertragshilfe*. Staudinger/*Coester* § 307 para 41.

⁶²⁷⁷ See § 306.

⁶²⁷⁸ See Part I ch 3 para 1.3.

⁶²⁷⁹ See Part II ch 5 para 1.1.1 b) aa).

§ 305 *et seq.* and plays a role for areas that are excluded by § 310(4), such as company law, the law of succession or family law.⁶²⁸⁰

Recently, the South African Constitutional Court decided in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*⁶²⁸¹ on the constitutional approach to the judicial enforcement of contractual terms and the public policy grounds upon which a court may refuse to enforce these terms.⁶²⁸²

In the majority judgment, Theron J confirmed *Barkhuizen*⁶²⁸³ in that the determination of public policy is now rooted in the Constitution and the objective, normative values it embodies.⁶²⁸⁴ According to the Constitutional Court, public policy imports values of fairness, reasonableness and justice. What is more, *Ubuntu*,⁶²⁸⁵ which comprises these values, is now also recognised as a constitutional value that inspires the constitutional compact, which in turn informs public policy.⁶²⁸⁶ These values play a crucial role for the notion of public policy, and they perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract. In fact, many established contract law doctrines are the embodiment of these values, such as the rules as regards fraud, duress, misrepresentation, estoppel, implied terms and rectification.⁶²⁸⁷ According to the court, they play a fundamental role in the application and development of rules in this field of law and give effect to the spirit, purport and objects

⁶²⁸⁰ See Part II ch 5 para 1.1.1 b) bb).

⁶²⁸¹ [2020] ZACC 13 (17 June 2020). In this case, the applicants, all franchisees who had acquired their businesses in terms of a black economic empowerment initiative, and had rented premises from Sale's Hire CC, the second respondent, argued that the strict enforcement of the renewal clause of their lease agreements would be contrary to public policy, or unconscionable in the circumstances of this case. The enforcement of the renewal clause would be inimical to the right of equality contained in section 9(2) of the Constitution (at paras [10] and [13]). See also *Beadica 231 CC v Trustees, Oregon Unit Trust* 2018 (1) SA 549 (WCC) and *Trustees of the Oregon Trust v Beadica 231 CC* 2019 (4) SA 517 (SCA).

⁶²⁸² In this context, see also *Beadica 231 CC v Sale's Hire CC* (1191/2018) [2020] ZASCA 76 (30 June 2020) where the SCA had to decide whether a party to a contract freely and voluntarily concluded can deny the other party to that contract its entitlement to enforce contractual obligations freely and seriously undertaken by the former on the grounds that the latter, in asserting contractual rights, in truth seeks to achieve an illegitimate purpose, namely to gain access to sensitive confidential information under the guise of exercising the inspection rights that are explicitly provided for in the agreement in order to conduct in an anti-competitive manner designed to deliberately restrict or prevent the commercial viability of Beadica's business.

⁶²⁸³ *Barkhuizen v Napier* (2007) (5) SA 323 (CC) at para [28].

⁶²⁸⁴ *Beadica* at para [71].

⁶²⁸⁵ In the second minority judgement, Victor AJ stresses the importance of *Ubuntu* in the South African law of contract. According to Victor AJ, *Ubuntu* is a constitutional value that adds a value of substance, and together with other values, forms a transformative basis in the adjudicative process when deciding whether an unfair contract term has to be enforced or not. *Ubuntu* has a greater and context-sensitive reach, especially where there is inequality in the bargaining power between the parties. This concept is wider than fairness. Victor AJ is of the view that adjudicating fairness cannot be done within a set of neutral legal principles, but in a manner that ensures objective, reasonable practicality and certainty. *Ubuntu* thus does not exclude or undermine certainty in contract, but remains a central consideration in harmony with the other values. See *Beadica* at paras [206]-[216].

⁶²⁸⁶ *Beadica* at para [72], with further references.

⁶²⁸⁷ *Beadica* at para [73].

of the Bill of Rights. In fact, courts must consider the transformative mandate of the Constitution.⁶²⁸⁸ The courts' power to develop the common law must nonetheless be exercised incrementally with regard to the facts of each case, and the development of new doctrines must be able of a generalised application beyond the particular facts of a given case.⁶²⁸⁹

It should be noted that the concept of *Ubuntu* has been critically analysed in Part I and considered as too vague and not helpful.⁶²⁹⁰

The Constitutional Court went on by analysing the perceived divergence between the Constitutional Court and the Supreme Court of Appeal regarding the role of abstract values in the law of contract and whether these values can be directly applied in order to invalidate, or refuse to enforce, the terms of a contract. The 'divergence' in this matter does however not exist anymore after the clarification expressed by the Constitutional Court in *Barkhuizen* and *Botha*.⁶²⁹¹ Both jurisdictions agree that abstract values are not a free-standing foundation upon which courts may interfere in contractual relationships, but they rather perform creative, informative and controlling functions.⁶²⁹² The Constitutional Court thus comes to the conclusion that the 'divergence' between the SCA and the CC is more perceived than real. The courts can thus not refuse to enforce contract terms for equity considerations, such as good faith, fairness and reasonableness because these values have no self-standing status. Only where contractual terms or their enforcement would be so unfair, unreasonable or unjust that they are contrary to public policy, a court has the right to refuse to enforce them.⁶²⁹³

Theron J went on by saying that the rule of law requires that courts, in developing the common law, must establish clear and ascertainable rules and doctrines in order to ascertain that the law of contract is substantively fair, and that the outcomes are predictable for the parties. This is stressed by the fact that the enforcement of contract terms does not depend on an individual judge's sense of what is fair, reasonable and just.⁶²⁹⁴ In *Pridwin*,⁶²⁹⁵ the Supreme Court of Appeal laid out the most important principles governing the judicial control of contract terms through public policy. One of these principles is that public policy demands that contracts freely and consciously entered into must be honoured. The *pacta sunt servanda* principle

⁶²⁸⁸ *Beadica* at para [74].

⁶²⁸⁹ *Beadica* at para [76].

⁶²⁹⁰ See Part I ch 3 para 4.1.4 c).

⁶²⁹¹ *Botha v Rich N.O.* 2014 (4) SA 124 (CC).

⁶²⁹² *Beadica* at para [79].

⁶²⁹³ *Beadica* at para [80].

⁶²⁹⁴ *Beadica* at para [81].

⁶²⁹⁵ *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA) at para [27].

therefore still plays a crucial role in the context of the control of contracts by the courts through the principle of public policy. The *pacta sunt servanda* principle ensures that the parties can trust that the other party will be bound by its obligations. The protection of this maxim is therefore indispensable for the achievement of the objectives set out in the Constitution.⁶²⁹⁶ This principle is not absolute, though, and there is no basis for privileging *pacta sunt servanda* over other constitutional values. In instances where several constitutional rights and values must be considered, for the determination of whether enforcement of the terms would be contrary to public policy in the given case, these must be carefully balanced against each other.⁶²⁹⁷

The Constitutional Court also analysed the principle of 'perceptive restraint' in terms of which a 'court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases'.⁶²⁹⁸ In *Beadica*, the Constitutional Court specifies that this principle must not hinder the courts from shying away from their constitutional duty to infuse public policy with constitutional values. Hence, the degree of necessary restraint must be balanced against the backdrop of the constitutional rights and values. What is more, 'harm to the public' as a prerequisite for the notion of public policy is alien to the South African law of contract.⁶²⁹⁹

In other words, in the South African and German regimes, the principles of public policy and good faith are applied concurrently with the standard business terms legislation. It should not remain unmentioned in this regard that in his minority judgment of *Beadica*, Froneman J, citing Lubbe, contends that South Africa could learn much from the German approach of the *Fallgruppen* methodology, consisting of typified categories, which has served to translate § 242 (good faith) into a set of perceptible legal rules.⁶³⁰⁰ These *Fallgruppen* are: dishonest acquisition of one's own legal position, breach of one's own obligations, absence of a legitimate personal interest, minor infringement of interests/disproportionality and contradictory conduct (*venire contra factum proprium*).⁶³⁰¹ Indeed, as Theron J points out by citing Du Plessis, '[The] application [of the German good faith clause] rather requires a careful weighing up of relevant interests, which enables specific new legal instruments to be developed. (...) [T]he good faith clause works because specific rules give effect to it. Those rules were hammered out on the

⁶²⁹⁶ *Beadica* at paras [83]-[85].

⁶²⁹⁷ *Beadica* at para [87].

⁶²⁹⁸ *Beadica* at para [88]. This principle has been set out in a number of cases, e.g., *Pridwin* at para [27].

⁶²⁹⁹ *Beadica* at para [90].

⁶³⁰⁰ *Beadica* at para [179]. See Palandt/*Grüneberg* § 242 para 2.

⁶³⁰¹ See Palandt/*Grüneberg* § 242 paras 42-59.

anvil of concrete cases and incremental scholarly analysis.⁶³⁰² The development of such *Fallgruppen* by the courts would thus assist them in the development of the common law and prevent 'piecemeal solutions'. As already discussed in Part I, it is submitted that the concept of *Ubuntu* is not helpful in this regard.⁶³⁰³ The development of *Fallgruppen* should lead to better results.

In both countries, specific pieces of legislation containing consumer protection provisions are applicable concurrently with sections 48 *et seq.* and §§ 305 *et seq.* respectively. In South Africa,⁶³⁰⁴ these are the Rental Housing Act⁶³⁰⁵ or the Conventional Penalties Act,⁶³⁰⁶ for example. The National Credit Act, another consumer protection statute, is also applicable concurrently with the Consumer Protection Act.⁶³⁰⁷ As §§ 305 *et seq.* do not primarily aim at consumer protection, except for § 310(3) (consumer contracts),⁶³⁰⁸ §§ 305 *et seq.* cannot be qualified as pure consumer protection provisions.⁶³⁰⁹ Nonetheless, the BGB also contains consumer protection provisions, such as §§ 475⁶³¹⁰ or 312a.⁶³¹¹ These are specific legislative interventions that are applicable in addition to §§ 305 *et seq.*⁶³¹²

The legislative interventions concerning standard business terms legislation in both countries can therefore not be seen *in vacuo*. The Consumer Protection Act as well as §§ 305 *et seq.* are thus not stand-alone provisions but must be seen in synergy with other provisions and, especially in the case of the Act, with the common law.

Under § 307(3) BGB, the general clause as well as §§ 308 and 309 apply only to provisions in standard terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Hence, for the application of §§ 305 *et seq.*, a derogation from legal provisions is necessary. There is thus no content control for performance specifications, price agreements and declaratory clauses.⁶³¹³

⁶³⁰² *Beadica* at para [62], Du Plessis 2018 *Stell LR* 383.

⁶³⁰³ See Part I ch 3 para 4.1.4 c).

⁶³⁰⁴ See Part I ch 3 para 1.3.

⁶³⁰⁵ 50 of 1999.

⁶³⁰⁶ 15 of 1962.

⁶³⁰⁷ See s 121, read with Schedule 1, and s 5(2)(d) CPA.

⁶³⁰⁸ Eith *NJW* 1974, 16, 17.

⁶³⁰⁹ Locher *JuS* 1997, 390. See Part II ch 1 para 2.3.

⁶³¹⁰ Concerning deviating agreements.

⁶³¹¹ Concerning the restriction of certain payment clauses as regards the means of payment.

⁶³¹² See Part II ch 5 para 1.1.1 b) ee).

⁶³¹³ BGH *NJW* 1998, 383, UBH/*Fuchs* § 307 para 14, Soergel/*Stein* (1987) § 8 AGBG para 1, Palandt/*Grüneberg* § 307 para 41, Locher *Recht der AGB* 85. See Part II ch 5 paras 1.2.4 and 1.2.5.

The stipulated price for a good or service as well as the specification of the performance are part of the core terms. Performance specifications concern the main subject matter, as well as the type, volume, quality and quantity of the goods or services in question. Unlike the German legislator, the South African legislator chose to include not only terms contained in so-called standard-term contracts, but also negotiated clauses into the fairness enquiry.⁶³¹⁴ This also concerns the core terms (price, subject matter of the contract, warranty etc.).⁶³¹⁵

The inclusion of negotiated terms as well as the core terms pertaining to the price and the performance can be justified in the South African context to a certain degree with the relative inexperience of consumers. The Act considers this in its purpose (section 3). One must consider though that consumers tend to check the price and performance first. The possibility to overreach consumers in this regard cannot be excluded however, which is why the fairness enquiry of such terms might be justified. The courts must consider all the relevant factors in this enquiry, and the fact that these terms may have been negotiated should be factored in.⁶³¹⁶ In this regard, content control in both regimes should thus come to the same results.

The BGH subjects modifications of the main performance to content control. The court puts forward the protective purpose of §§ 305 *et seq.* since § 307(2) no. 2 makes clear that the other party (consumer) must be protected from clauses that limit essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.⁶³¹⁷

In this regard, both regimes apply content control to the core terms, even though in German legislation this is done in a rather restricted area (modifications of the principal performance).

Stoffels correctly alleges that the BGH's criterion for the demarcation between clauses that are subject to content control and those that are exempt from it, i.e., whether the given clause restricts, modifies or undermines the main subject matter of the contract, is not suitable for the determination of the control-free area of the principal obligations in terms of § 307(3). In his

⁶³¹⁴ The concept of 'non-negotiated terms' is wider than the one of 'standard terms'. Under art 3(2) of the Council Directive 93/13/EEC of 5 April 1993, '[a] term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.' In terms of § 305(1) BGB, '[s]tandard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract.'

⁶³¹⁵ Naudé 2009 *SALJ* 531, Naudé 'Introduction to sections 48-52' in Naudé and Eiselen (eds) *CPA Commentary* para 5, Naudé 2006 *Stell LR* 364.

⁶³¹⁶ See Part I ch 3 para 1.3.

⁶³¹⁷ BGH *NJW* 1987, 1931 (1935).

view, such a criterion does not sufficiently consider the normative purpose of § 307(3).⁶³¹⁸ In order to decide whether such a clause is subject to content control, one therefore has to keep in mind the legislator's objective, i.e., the consumer's protection in areas where the market does not offer sufficient protection against abuse by the user. Where a standard clause is subject to the market's forces and competition in a way that the average client takes notice of it and can include it in its decision, one can assume that the market regularly offers a fair balance of the parties' interests so that any government intervention is superfluous.⁶³¹⁹

South African courts should also consider this point when distinguishing between negotiated and non-negotiated terms. Stoffel's argument must be taken with a pinch of salt though in the South African context because the 'average' South African consumer is more vulnerable than an 'average' German customer.

So-called 'declaratory clauses' that have the same content as legal provisions ('regulatory identity') are also subject to content control in South Africa. This is not the case in Germany. Naudé⁶³²⁰ correctly suggests that control of these clauses should be excluded because it is a constitutional question of whether a legal provision has to be declared void.⁶³²¹

Section 48(1)(a)(i) of the Act provides that unfair prices are forbidden. As discussed in Part I,⁶³²² the courts should not interfere in this field since they have not sufficient expertise in terms of fair pricing. What is more, excessive pricing control falls under the competency of the competition authorities, which are more qualified for empirical market and pricing analysis.⁶³²³ Naudé legitimately maintains that the Act goes too far by including core terms, such as the price, into the fairness review. The stricter common-law and constitutional control mechanisms, such as the requirement of legality and the principles concerning undue influence and misrepresentation as well as section 40 on unconscionable conduct would still provide for sufficient control over unfair core terms.⁶³²⁴ As discussed in Part I,⁶³²⁵ it is however unlikely

⁶³¹⁸ Stoffels *AGB-Recht* 170 and 171.

⁶³¹⁹ Fastrich *Inhaltskontrolle* 265. See also Canaris *NJW* 1987, 613. See Part II ch 5 para 1.2.5 a) bb).

⁶³²⁰ Naudé 2009 *SALJ* 534.

⁶³²¹ See s 167(4)(b) of the Constitution.

⁶³²² See Part I ch 3 para 1.3.

⁶³²³ See s 8(a) of the Competition Act 89 of 1998 which prohibits a dominant firm to charge an excessive price to the detriment of consumers, that is a price for a good or service which bears no reasonable relation to the economic value of that good or service and is higher than that value. This must be determined by empirical analysis. Concerning the elements in order to determine such a price, see *Harmony Gold Mining Company Limited and Another v Mittal Steel South Africa Limited and Another* [2007] CPLR 37 (CT).

⁶³²⁴ Naudé 2009 *SALJ* 534.

⁶³²⁵ See Part I ch 3 para 4.1.1 a).

that the legislator wanted to introduce a direct price-control mechanism in the Act. Price control can thus only take place where also other factors, such as unconscionable conduct, are present.

German courts apply price control in terms of §§ 305 *et seq.* only where a legal price regulation exists and a standard clause differs from it.⁶³²⁶ The threshold for court intervention is very high though and typically requires usury.⁶³²⁷ According to the BGH,⁶³²⁸ ancillary price agreements are subject to content control too. These are agreements on the calculation or modification of the price, payment conditions, the stipulated due date or indexation clauses.⁶³²⁹ Content control is also possible for German courts if a clause passes on charges for the fulfilment of legal obligations to the client.⁶³³⁰

For the application of price control, the thresholds are thus very high in both regimes, and price control is rather the exception than the rule.

Another notable difference between the South African and the German regimes is that the German legislator favours an 'open' content control.⁶³³¹ This means that the reasons for the inadequacy of standard terms must be unfolded within the content control, and not 'concealed' within the interpretational control, which then would serve as a 'correction' of standard terms. Hence, in German law, interpretational control takes place before content control.⁶³³² Otherwise, too many problematic clauses would already be mitigated in the interpretational control in favour of the other party. There would thus be no possibility to assess their disadvantageous effect within the content control.⁶³³³ On the other hand, South African legislation does not know the concept of an 'open' content control. One could argue though that because in the context of the Act, interpretational control usually takes place after content control, the same result is achieved. This is because the interpretational control does not anticipate the result of the content control by excluding too many clauses from it.⁶³³⁴ This argumentation is misleading though. Both controls should be strictly separated, and in order to

⁶³²⁶ Erman/Roloff § 307 para 45.

⁶³²⁷ Under § 138(2), in order to fulfil the conditions of usury, the price must not only be excessive ('disproportionate'), but the other party must also fulfil subjective conditions that are linked to its person.

⁶³²⁸ BGH NJW 2000, 577 (579); NJW-RR 2004, 1206.

⁶³²⁹ See Part II ch 5 para 1.2.5 b) bb).

⁶³³⁰ See Part II ch 5 para 1.2.5 b) cc).

⁶³³¹ *Offene Inhaltskontrolle*.

⁶³³² BGH NJW 1999, 1633 (1634).

⁶³³³ This problem had already been seen by Raiser (*Recht der allgemeinen Geschäftsbedingungen* at 264 *et seq.*) and later by the government in BT-Drs. 7/3919 at 15 and 60. See Part II ch 4 para 3.4.

⁶³³⁴ See Part I ch 4 and Part II ch 4. This point has been discussed more in detail in chapter 4 of Part III.

know the content of the clauses that are subjected to of content control, one must interpret the given standard terms *before* their content is assessed.⁶³³⁵

South African courts should therefore also aim at an open content control in which the interpretational control takes place before the content control.

A further difference between the two regimes is that the question of the validity of German standard business terms is purely a question of law so that fact questions play a negligible role. Therefore, no taking of proof takes place and the assessment can be abstract-general and objective.⁶³³⁶ In the enquiry within the German regime of whether a standard term is 'reasonable', the courts refer to fundamental principles, such as necessity⁶³³⁷ or proportionality instead.⁶³³⁸ The determination of whether a disadvantage is unreasonable is purely a matter of law and allows for no taking of proof.⁶³³⁹

In contrast to the German legislation, the Act applies an individual approach in that the individual circumstances of the case are taken into consideration. The Act therefore allows the taking of proof. This is expressed, for instance, in several factors mentioned in section 52(2) (e.g., the circumstances of the transaction (c), the supplier's conduct (d), or the value of identical goods ((i)) and the fact that the terms listed in regulation 44(3) are *presumed* to be unfair. This means that the supplier has to prove that they are fair.

The possibility of taking of proof is therefore a consequence of the individual approach applied in South Africa, and only consequent.

The items set out in the greylist of regulation 44(3) presume that the given terms are unfair, whereas § 308 requires an evaluation by the court of whether specific terms create an unreasonable disadvantage to the other party. Here again, merely questions of law are taken into account. Regulation 44(2)(a) provides however that the items contained in the greylist are indicative only, so that a term listed therein may be fair *in view of the particular circumstances* of the case. This also shows that the South African regime does not rely purely on questions of law but also considers factual questions. This is in concert with the individual approach and consequent.

⁶³³⁵ See discussion of this topic in Part III ch 4 para 3.4.

⁶³³⁶ Maxeiner 2003 *Yale J. Int. Law* 153, with further references.

⁶³³⁷ *Erforderlichkeit*.

⁶³³⁸ *Verhältnismäßigkeit*.

⁶³³⁹ Maxeiner 2003 *Yale J. Int. Law* 153 and 154.

According to subregulation (2)(b) of regulation 44, the greylist is non-exhaustive, so that other terms may also be unfair under section 48. The South African legislature considered it necessary to insert this provision in order to avoid that non-lawyers consider subregulation 44(3) exhaustive and cast in stone.⁶³⁴⁰ Although § 308 does not have a similar provision, standard clauses that are not invalid in terms of § 308 are still to be assessed under the general clause of § 307. The phrase 'are in particular ineffective' (*'ist insbesondere unwirksam'*) indicates that the enquiry undertaken within § 308 is not finished without considering the general clause. Hence, the result is the same in the two regimes.

Only consumer agreements (B2C contracts) fall into the ambit of regulation 44. Its scope of application is thus narrower than that of the Act itself. Therefore, regulation 44 does not apply to franchise agreements.⁶³⁴¹ The exclusion of B2B contracts from the ambit of regulation 44 does not mean though that a court may not use the list contained therein as a guideline in relation to section 48, especially for smaller, unsophisticated businesses *vis-à-vis* bigger companies. The reasoning behind this idea is that smaller businesses are often comparable to individual consumers in terms of their vulnerability. Hence, regulation 44 might also have a reflective or radiating effect in terms of B2B contracts where smaller businesses are involved, particularly if the transaction is not related to the small business's core expertise, or where it had not much bargaining power.⁶³⁴²

The same applies to the items contained in §§ 308 and 309 that have a radiating effect on the general clause. Under § 310(1) 1st sent., the prohibitions of §§ 308 no. 1, 2 to 8 and 309 do not apply to B2B contracts. Since these prohibitions are a specific manifestation of the evaluative standard laid down in the general clause, based on the principle of good faith, it is not excluded though that clauses that raise concern in terms of §§ 308 or 309 could be ineffective pursuant to § 307. This is explicitly expressed in § 310(1) 2nd sent.⁶³⁴³

Thus, the reflective effect in both regimes ensures that also B2B agreements are included in the content control under the general clause.

⁶³⁴⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 9.

⁶³⁴¹ Van Eeden and Barnard *Consumer Protection Law* 267. See also 'consumer agreements' in s 1 which expressly excludes franchise agreements.

⁶³⁴² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 6. This is also the case in Germany or the Netherlands, for instance.

⁶³⁴³ Stoffels *AGB-Recht* 233. As regards the radiating effect, see discussion on the general clause in Part II ch 5 *passim*.

2. Blacklisted clauses

Section 51 of the Consumer Protection Act contains prohibited clauses. In contrast to regulation 44, section 51 applies to all agreements covered by the Act, which means that also franchise agreements are included,⁶³⁴⁴ as long as the threshold requirements of section 5 are met. § 309, on the other hand, applies to all standard clauses, with the exceptions mentioned in § 310(1).

Regarding the blacklists, the only difference between the two pieces of legislation in terms of the personal scope of application lies in the fact that for the application of the Act, the threshold of section 5 must be met, whereas for the German regime, such a requirement is inexistent.

As discussed, section 51(1)(a) and (b) is unnecessarily verbose and imprecise and contains interrelations with the purpose of the Act. This makes it difficult to determine whether a term is prohibited or not. Hawthorne remarks that this provision 'works from the general to the specific'⁶³⁴⁵ so that subparagraphs (a) and (b) could be seen as a sort of 'general clause', which does not make it more tangible, however.⁶³⁴⁶ On the other hand, § 309 contains a precise and succinct enumeration of prohibited provisions in standard business terms in no. 1 to 15 without an 'introduction'.

Black- or greylists should be drafted in a simple and clear language so that consumers, consumer advisers and businesses who are not lawyers can understand them.⁶³⁴⁷ The South African blacklist does not fulfil this standard. The legislator should therefore reformulate the blacklist so that it conforms to international standards.

Section 51(1)(c) to (j) and 51(2) contains an enumeration of forbidden clauses that will be discussed as follows in a comparative perspective.

2.1 Exemption clauses for gross negligence etc.

Section 51(1)(c) prohibits the limitation or exemption from liability concerning goods or services for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier. The interplay between sections 51(1)(c) and 61 has already been discussed earlier: The principal difference between these two provisions is that in terms of section 51, the supplier is also answerable before the delivery of goods or services; the latter does not need to be defective. Moreover, section 51 does not require a

⁶³⁴⁴ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 1.

⁶³⁴⁵ Hawthorne 2012 *THRHR* 363.

⁶³⁴⁶ See Part I ch 3 para 2.1.

⁶³⁴⁷ Naudé 2007 *SALJ* 146.

contractual *nexus*, and section 61 expands its application to all members of the supply chain, whereas section 51(1)(c) comprises merely the supplier and persons acting for or controlled by him or her.⁶³⁴⁸

Section 51(1)(c) also prohibits terms imposing the assumption of risk or liability by the consumer for a loss as well as any obligation to pay for damages to goods displayed by the supplier. Since the assumption of risk or liability ultimately leads to an exemption of liability of the supplier, this prohibition is consequent. The second case, prohibiting so-called 'you-break-it-you-buy-it' policies, except for damage resulting from the consumer's gross negligence, recklessness, malicious behaviour or criminal conduct under section 18(1) ascertains a high degree of consumer protection, especially for vulnerable consumers.⁶³⁴⁹

§ 309 no. 7 lit. b) also prohibits pre-formulated restrictions or exclusions of the user's liability for damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user.⁶³⁵⁰

The South African and the German norm are thus similar to the extent in that they exclude both restrictions and exclusions of the user's/supplier's liability, and that no contractual *nexus* is necessary. What is more, they extend the supplier's liability to other persons involved in the agreement. The South African formulation 'any person acting for or controlled by the supplier' is similar to the German phrase 'by a legal representative (...) or a person used to perform an obligation of the user'. That no contractual *nexus* is required is expressed by the fact that also liability for breach at the moment of the conclusion of the agreement (*culpa in contrahendo*) under §§ 280 and 311(2) and for tortious acts in terms of § 823 *et seq.* are included.⁶³⁵¹

§ 309 no. 7 lit. b) provides for an exception concerning the transport and tariff rules for regular public transport services on the road, as well as state-approved lotteries and gaming contracts. The insertion of these exceptions in the German provision is based on German idiosyncrasies, especially concerning the mentioned transport and tariff rules, which are predicated on an Order with normative character containing restrictions for liability.⁶³⁵² It is hence not astonishing that the Act does not contain a similar provision in section 51.

⁶³⁴⁸ See Part I ch 3 para 2.2 a).

⁶³⁴⁹ See Part I ch 3 para 2.2 a).

⁶³⁵⁰ See discussion of this item in Part II ch 5.

⁶³⁵¹ See Part II ch 5 para 2.2.7.1 a) aa).

⁶³⁵² See Part II ch 5 para 2.2.7.1 a) bb).

On the other hand, § 309 no. 7 BGB does not expressly prohibit the assumption of risk or liability by the other party, unlike section 51(1)(c) of the Act. The German provision does not require though that the exclusion be mentioned explicitly in the standard clause. It suffices if the clause gives the impression that it has the object or effect of excluding liability. This is the case where the objective obligation that is the basis for liability is excluded, and the risk is transferred solely to the other party.⁶³⁵³ Hence, both pieces of legislation come to the same result.

Section 51(1)(c) only prohibits the supplier's exclusion or limitation from liability based on gross negligence. Damage based on the supplier's intention is not mentioned. This is not necessary because one can make the argument that if the supplier's liability cannot be excluded or restricted for gross negligence, the less it can be restricted for intentional conduct. Such exclusion or restriction would also be contrary to section 48, read in conjunction with section 3 of the Act. In any event, it would be contrary to public policy.

The fact that § 309 no. 7 lit. b) mentions intentional breach only concerning the legal representatives or persons used to perform the user's obligations but not the user is due to the fact that under § 276(3), the obligor may not be released in advance from liability for intention.⁶³⁵⁴

The German provision expressly states the exclusion or limitation of liability. It also applies to restrictive modalities for the assertion of a given claim by the other party, though.⁶³⁵⁵ These are formal hindrances, such as a very short preclusion period, which create an obstacle for the user's liability. In order to ensure adequate consumer protection, such restrictive modalities should also apply in terms of section 51(1)(c). What is more, in practice, it is often difficult to distinguish between objective and formal liability restrictions.⁶³⁵⁶

As discussed,⁶³⁵⁷ the prohibition of exemption clauses with regard to gross negligence does not mean that the exemption of ordinary negligence is always permitted. This is because the general clause of section 48 establishes an overarching fairness framework that also applies to exemption clauses that comply with the formal requirements set out in section 49.⁶³⁵⁸

⁶³⁵³ BGH *NJW* 2001, 751 (752). See Part II ch 5 para 2.2.7.1 d).

⁶³⁵⁴ Stoffels *AGB-Recht* 382.

⁶³⁵⁵ BGH *NJW* 2007, 674 (675).

⁶³⁵⁶ UBH/*Christensen* § 309 no. 7 para 28. See Part II ch 5 para 2.2.7.1 d) cc).

⁶³⁵⁷ See Part I ch 3 para 2.2 a).

⁶³⁵⁸ Naudé 'Section 51' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

Based on § 307, the BGH has determined a prohibited area 'proceeding' the forbidden domain in terms of § 309 no. 7. Therefore, also clauses excluding or restricting simple negligence under lit. b) can be ineffective.⁶³⁵⁹ This is namely the case where a provision erodes essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised in terms of § 307(2) no. 2. Moreover, the user is not allowed to restrict its liability by exempting itself from obligations that are necessary for the fulfilment of the agreement and that the other party regularly can rely on ('cardinal obligations').⁶³⁶⁰ The standard of control is § 307(2) no. 2, i.e., the specification of the general clause.⁶³⁶¹

Hence, both regimes refer to the respective general clause in order to prohibit simple negligence.

As a result, the South African and German provisions merely differ in that § 309 no. 7 lit. b) contains exceptions concerning the transport and tariff rules for regular public transport services on the road, due to German idiosyncrasies. All other aspects are similar in that they come to the same results.

2.2 Transfer of the consumer's claim to the Guardian's Fund

Section 51(1)(f) of the Act has no counterpart in §§ 305 *et seq.*⁶³⁶² A person who manages the funds of another person in its quality as a custodian or executor of a will is subject to the German civil-law provisions, however. Hence, §§ 305 *et seq.* apply to these persons too in cases where the custodian or executor of a will acts within its functions on behalf of the person he or she represents. An equivalent of a Guardian's Fund does not exist in Germany.

Under § 1964(1), if the heir is not determined within a period appropriate to the circumstances, the probate court must determine that there is no existing heir other than the treasury. § 1965(1) provides that the determination must be preceded by a public invitation to notify the rights of succession, laying down a period for notification. Finally, according to § 1965(2), a right of succession is not taken into account if it is proved to the probate court within three months after the expiry of the notification period that the right of succession exists or that it has been asserted against the treasury in a legal action. In other words, if an heir cannot be found, there is no need

⁶³⁵⁹ BGH *NJW* 2013, 2502 (2503).

⁶³⁶⁰ *Kardinalpflichten*. See, e.g., BGH *NJW* 2002, 673 (674); 2005, 1774.

⁶³⁶¹ Stoffels *AGB-Recht* 384. See Part II ch 5 para 2.2.7.2.

⁶³⁶² See Part I ch 3 para 2.2 b).

to have administered the decedent's estate by another person, except where the testator determines an executor (§§ 2197 *et seq.*).

If a person of full age cannot in whole or in part take care of his affairs, by reason of a mental illness or a physical, mental or psychological handicap, the custodianship court, on his application or of its own motion, appoints a custodian for this person.⁶³⁶³ The custodianship includes all activities that are necessary to attend to the affairs of the person under custodianship from a legal point of view. The custodian must attend to the affairs of the person under custodianship in a manner that is conducive to his welfare.⁶³⁶⁴ In his or her group of tasks, the custodian represents the person under custodianship in court and from court.⁶³⁶⁵ For some legal transactions, the custodian requires the custodian court's approval, e.g., for medical treatments, accommodation, abandonment of a rented home.⁶³⁶⁶

§ 1909 provides that a person who is subject to parental custody or guardianship is given a curator for matters which the parents or the guardian are prevented from carrying out. In particular, he or she is given a curator to manage the property that he acquires as a result of death or that is given to him or her free of charge *inter vivos* if the testator by testamentary disposition or the donor when making the disposition stipulated that the parents or the guardian were not to manage the property. For curatorship, the family court is competent.⁶³⁶⁷

Thus, the protection granted by section 51(1)(f) is achieved in Germany especially by provisions contained in Books 4 and 5 of the BGB, i.e., family law and the law of successions.

2.3 False acknowledgements

The 'deeming provision' of section 51(1)(g) deals with fictional declarations and fictional receipts of documents, goods or services.⁶³⁶⁸ It prohibits entire agreement clauses⁶³⁶⁹ to the extent that they exclude additional warranties as well as no-representations clauses.⁶³⁷⁰

The first part of item (g) of section 51 has almost the same regulatory content as regulation 44(3)(v), except that the item of the regulation is more comprehensive and catches more clauses

⁶³⁶³ § 1896(1).

⁶³⁶⁴ § 1901(1) and (2).

⁶³⁶⁵ § 1902. '(...) *gerichtlich und außergerichtlich*'.

⁶³⁶⁶ These are set out in §§ 1904 to 1908.

⁶³⁶⁷ § 1909(2).

⁶³⁶⁸ Naudé 2007 *SALJ* 161.

⁶³⁶⁹ Clause stating that the document in question is the sole record of the contract and no reliance may be placed on any warranties, promises, undertakings and conditions not contained in this document. Sometimes referred to as 'integration clause'.

⁶³⁷⁰ Clause excluding liability for pre-contractual representations made by or on behalf of the other party. Sharrock 2010 *SA Merc LJ* 319, Sharrock *Judicial control* 141.

in that it does not contain any timeframe ('before the agreement was made'). Naudé correctly asserts that also regulation 44(3)(c) catches more types of terms that aim to achieve the same effect as section 51(1)(g).⁶³⁷¹ Section 51 also applies to businesses so that B2B contracts afford protection too. Besides, item (c) of regulation 44(3) only applies to commitments undertaken by the supplier's agents, and not to the supplier itself, unlike section 51(3)(g).

Item 44(3)(v) corresponds to § 308 no. 5 which will be discussed later in this chapter. The fact that entire agreement and no-representation clauses that are targeted by section 51(1)(g)(i) as well as acknowledgements in terms of section 51(1)(g)(ii) have the effect of modifying the burden of proof⁶³⁷² means that § 309 no. 12 lit. b) could cover the same cases as section 51(1)(g). In terms of no. 12 lit. b), provisions having the other party to the contract confirm certain facts are prohibited if they modify the burden of proof to its disadvantage. These clauses lead to a factual shift of the onus of proof, and users have no legitimate interest to require such a declaration from their clients.⁶³⁷³ The confirmation of certain facts requires a modification of the burden of proof with regard to legally significant facts, the other party's knowledge about certain facts or factual events.⁶³⁷⁴

As discussed earlier,⁶³⁷⁵ completeness clauses (or entire agreement clauses) may prevent customers from referring to possible verbal agreements.⁶³⁷⁶ This means that to this extent, an indirect shift of the burden of proof exists, or at least a modification of the requirements for the production of evidence.⁶³⁷⁷ Such a broad comprehension of the phrase 'modification of the burden of proof' is the law's objective and the German legislator's intention.⁶³⁷⁸ The objective of the provision is to prohibit clauses by which a contrary assertion of the client is 'impeded or made impossible'.⁶³⁷⁹ Hence, such clauses are also prohibited under § 309 no. 12 lit. b).

Many (invalid) clauses concern the circumstances in which the contract has been concluded ('I have received a copy of the contract').⁶³⁸⁰ Section 51(1)(g)(ii) prohibits clauses that falsely express that the consumer has received a document that is required by the Act. Section 51 is

⁶³⁷¹ Naudé 2009 *SALJ* 523.

⁶³⁷² See Part II ch 5 para 2.2.12.4.

⁶³⁷³ Stoffels *AGB-Recht* 288.

⁶³⁷⁴ See Part II ch 5 para 2.2.12.4.

⁶³⁷⁵ See Part II ch 5 para 2.2.12.4 b) aa).

⁶³⁷⁶ UBH/*Habersack* § 309 no. 12 para 22.

⁶³⁷⁷ Stoffels *AGB-Recht* 289.

⁶³⁷⁸ The BGH also referred to this fact, but in another context. See BGH *NJW* 1987, 1634 (1635).

⁶³⁷⁹ BT-Drs. 7/3919 at 39.

⁶³⁸⁰ BGH *NJW* 1987, 2012 (2014).

therefore narrower in this regard because the given document has to be required by the Act, whereas § 309 no. 12 lit. b) applies to all kinds of facts, including the confirmation having received *any* document.

§ 309 no. 12 lit. b) *in fine* contains an exception for pre-formulated acknowledgements of receipt for which the user has a legitimate interest.⁶³⁸¹ This provision applies to receipts in the sense of § 368,⁶³⁸² i.e., written confirmation that the other party has received performance.⁶³⁸³ The German provision is thus not contrary to the South African item since the receipt under § 368 is established after reception of the given goods or services. Such an acknowledgement of receipt does therefore not 'falsely express an acknowledgement' in the sense of section 51(1)(g).

Therefore, with regard to false acknowledgements, both regimes are similar in that such clauses have the effect of modifying the burden of proof, which is prohibited under § 309 no. 12 lit. b). The prohibition also extends to entire agreement clauses. The South African provision is somewhat narrower as the document in question must be required by the Act, which is not the case for the German regime. In both regimes, receipts are not considered false acknowledgements as these are established after the customer has received the given goods or services.

2.4 Forfeiture of money to the supplier

§§ 305 *et seq.* do not contain a similar item to section 51(1)(h). Under this provision, a supplier cannot require a consumer to forfeit money to the supplier if the consumer exercises any right in terms of the Act. An example is a deposit that the supplier must pay back to the consumer if the latter cancels an advance booking under section 17(2) or the price which the supplier has to refund if the consumer returns a defective good in terms of section 56(1).⁶³⁸⁴

The German BGB contains several provisions elsewhere than in §§ 305 to 309 in terms of which a party has to refund the other party. According to § 651h, for instance, if the traveller revokes the travel package agreement before commencement of travel, the travel organiser loses its claim to the agreed package price. The travel organiser may demand appropriate

⁶³⁸¹ Stoffels *AGB-Recht* 290.

⁶³⁸² § 368: 'Upon receiving performance, on demand, the obligee must issue a written acknowledgement of receipt (receipt). If the obligor has a legal interest in having the receipt issued in another form, he may demand issue in that form.'

⁶³⁸³ WLP/Dammann § 309 no. 12 para 61.

⁶³⁸⁴ See Part I ch 3 para 2.2 d).

compensation, though. In the case of a defective good that the purchaser returns, the seller must refund its client under § 437 no. 2, read in conjunction with § 346(1).

Even though §§ 305 *et seq.* do not contain a similar provision to section 51(1)(h), similar protection is granted by other BGB provisions.

2.5 Unfair enforcement clauses

a) Authorisation to enter premises in order to repossess goods

This prohibition contained in section 51(1)(i) aims to prevent that suppliers enforce sanctions that generally have to be authorised by court order.⁶³⁸⁵ That only 'persons acting on behalf of the supplier' are included, and not the supplier itself is probably an unintended loophole.⁶³⁸⁶

The requirement of a court order is expressed, e.g., in section 4(3)(c) of the Rental Housing Act,⁶³⁸⁷ according to which the tenant's rights against the landlord include his or her right not to have his or her possessions seized, except in terms of a law of general application and *having first obtained an order of court*.⁶³⁸⁸

In German law too, a court order is generally needed to enter another person's premises in order to repossess goods. An example for such a case is §§ 562 *et seq.* in terms of which the lessor, for his claims under the lease, has a security right⁶³⁸⁹ over things contributed by the lessee. The requirement of a court order for the enforcement of the lessor's right is impliedly expressed in § 562b. Under this provision, the lessor may prevent the removal of the things that are subject to his or her security right, *even without having recourse to the court*, to the extent that he or she is entitled to object to removal. This means that only if the tenant wants to remove the given things, the lessor may intervene without recourse to the court. If the lessee moves out, the lessor may take possession of these things.⁶³⁹⁰

Hence, the German and the South African law come to the same result, even though the German law does not contain a similar item in §§ 308 or 309. The South African provision is more general and covers more cases than §§ 562 *et seq.* in terms of repossession. Under no circumstances, the lessor may enter the tenant's premises without a court order, except to

⁶³⁸⁵ OFT *Unfair Contract Terms Guidance* (2008) para 18.3.2 at 74.

⁶³⁸⁶ See Part I ch 3 para 2.2 e) aa).

⁶³⁸⁷ 50 of 1999.

⁶³⁸⁸ Emphasis added.

⁶³⁸⁹ *Pfandrecht des Vermieters* or *Vermieterpfandrecht*.

⁶³⁹⁰ Emphasis added.

prevent the removal of things falling under its security right. In any event, such enforcement clauses would be illegal in terms of the German general clause.

b) Undertaking to sign documents relating to enforcement

Provisions in terms of which the consumer has to sign in advance documents relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed, are blacklisted under section 51(1)(i)(ii).

The German provisions of §§ 308 or 309 do not contain a similar item. Such clauses are ineffective in terms of the general clause of § 307, however. Suppliers that do not take all necessary steps after the consumer is in default in order to enforce the agreement create an unreasonable disadvantage in the sense of § 307, e.g. by depriving him or her from a warning notice pursuant to § 286. What is more, such a clause would be ineffective under § 309 no. 4 which provides that a provision by which the user is exempted from the statutory requirement of giving the other party to the contract a warning notice or setting a period of time for the latter to perform or cure is invalid.⁶³⁹¹

Hence, both provisions make such clauses subject to content control by different mechanisms, i.e., by blacklisting them, or by application of the general clause, respectively.

c) Deposit of documents with the supplier, provision of a PIN etc.

The German black- or greylists do not contain a similar item to section 51(1)(j)(i) and (ii) of the Consumer Protection Act.

If personal data is collected from an identity card or passport for identification purposes and/or stored as a copy, the principles for processing personal data from article 5 GDPR⁶³⁹² must

⁶³⁹¹ See Part II ch 5 para 2.2.4.1.

⁶³⁹² GDPR = Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). **Article 5 GDPR:** '(Principles relating to processing of personal data) 1. Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'); (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation'); (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation'); (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy'); (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation'); (f) processed in a manner that

always be observed, however. In this area, the principles of data minimisation and storage limitation in accordance with article 5(1) lit. c) and e) GDPR are of paramount importance. The principle of data minimisation stipulates that personal data must be adequate and relevant to the purpose and limited to what is necessary for the purposes of the processing. On the other hand, according to the principle of storage limitation, personal data should be stored in a form that allows the identification of data subjects only for as long as necessary for the purposes for which they are processed.

If copies of the data are no longer needed, they shall be deleted or destroyed immediately after the necessary information has been established. Exceptions to this rule may result from special statutory retention periods.

It will often not be necessary to make a copy of the identity card. A typical case is the employer's driver's license check which has to be carried out twice a year, e.g., for professional lorry drivers. It is sufficient for the respective employee to show his or her driving licence, and the employer can then take note that the employee has shown a valid driver's licence. The additional preparation and filing of a copy of an identity card would infringe the principle of data minimisation because the same purpose could be achieved without copying the identity card and storing it.

The supervisory authority acknowledges that especially outside of 'mass transactions', the identity of the contracting party may be important when concluding a contract (e.g., a lease agreement). In this case, it will usually be sufficient to prove the identity by presenting the identity card. The data contained in the document can also be extracted and noted, but only to the extent that they are relevant to the contractual relationship and identification. The notation of further information (e.g., the serial number of the ID card) would be inadmissible under data protection law.

Frequently, the obligation of those responsible for collecting and storing copies of ID cards for identity and documentation purposes arises from the GwG⁶³⁹³ (in particular § 8 GwG). Liable parties within the meaning of the GwG must identify their contractual partners to establish the business relationship or carry out the transaction. Since 26 June 2017, credit and financial

ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality'). 2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').'

⁶³⁹³ GwG = Geldwäschegesetz (Money Laundering Act).

services institutions, insurance companies, accountant, real estate agent and so-called commodity traders are obliged to make a complete copy of the identity card or to record it entirely optically digitised. Records made in this way must be deleted immediately and regularly 5 years after the end of the business relationship.

Telecommunications providers may require the production of an official identity document to verify the information provided by the customer if this information is necessary for verification purposes. In this context, a copy of the ID card may also be made and used to establish identity. This must be deleted by the telecommunications provider immediately after the data required for the contract have been established.

According to § 29(2) BMG,⁶³⁹⁴ hotels are obliged to document specific details about the person accommodated in a registration form, such as name, date of birth and address. There is no obligation to check for accuracy though. There is thus no legal basis for collecting identity data from identity documents. An exception to this rule applies under § 29(3) BMG, according to which foreign persons to be listed on the registration form must be identified by presenting a valid identity document. In this case, there is an obligation to check, but not to copy the identity card. Making a copy could constitute a violation of article 5(1) lit. c) GDPR.

Companies that lend or hire out an object may make a note of the contact details and, if applicable, the period of validity of the identification document. It will not be permitted to make a copy or scan the identification document. The deposit of the identity card is already inadmissible according to § 1(1) 3rd sent. PersAuswG.⁶³⁹⁵

The provision of a personal identification code or number to be used to access an account is not prohibited in terms of the BGB. The banks' standard business terms systematically contain a provision according to which the provision of the PIN or other means of identification is not allowed though. If the bank's client provides its PIN to another person and this person illegitimately withdraws money from the other's bank account, the account holder is liable.⁶³⁹⁶

⁶³⁹⁴ BMG = Bundesmeldegesetz (Federal Registration Act).

⁶³⁹⁵ Gesetz über Personalausweise und den elektronischen Identitätsnachweis (PersAuswG) = Identity Card Act. § 1(1) PersAuswG: 'Germans as defined in Article 116 (1) of the [Grundgesetz] shall be required to possess an identity card once they have reached the age of 16 and are subject to the general registration requirement, or if not subject to this requirement, then if they mainly reside in Germany. They must present their identity card at the request of an authority entitled to check identification. Identity card holders may not be required to deposit their identity card or otherwise surrender possession. This shall not apply to authorities entitled to check identification nor in case of withdrawal or confiscation.' See 'Personalausweis kopieren oftmals nach DSGVO verboten' at <https://www.datenschutzbeauftragter-info.de/ldi-nrw-personalausweis-kopieren-oftmals-nach-dsgvo-verboten>.

⁶³⁹⁶ See decision of LG Cologne of 10 September 2019 (21 O 116/19) at <https://www.online-und-recht.de/urteile/Haftung-wegen-PIN-Weitergabe-Landgericht-K%C3%B6ln-20190910>.

Both regimes thus prohibit the deposit of an ID and the provision of personal identification codes by different means. The provision of the data contained in an ID is not prohibited *per se* but subject to the principles of data minimisation and storage limitation in the EU. It is recommended that the South African legislator inserts a mechanism in the Act similar to the GDPR in which also the provision (i.e., not the deposit) of data contained in IDs etc. is regulated in terms of data minimisation and storage limitation.

2.6 Other provisions contained in section 51

Section 51(1)(d) prohibits negative option marketing and is a restatement of section 31 of the Act. The failure of the consumer to respond to an offer of the supplier does thus not amount to acceptance. This is also true for the common law.⁶³⁹⁷

In German law, for a valid agreement, an offer has to be expressly or impliedly, e.g., by nodding or paying, accepted. Laxer rules apply to business people who maintain a commercial relationship. Under § 362(1) HGB, if a merchant receives an offer from someone with whom he or she has a business relationship, he or she is obliged to reply immediately. His or her silence shall be deemed to constitute acceptance of the application.

Under § 241a BGB, the supply of movable things that are not being sold by way of an execution of judgment or otherwise by authority of law (goods), or the provision of other services to the consumer by a trader, does not create a claim against the consumer if the consumer has not ordered these goods or other services. There may be no derogation from the stipulations of this provision to the disadvantage of the consumer. The stipulations apply even if other constructions circumvent them.

The South African and German regimes thus come to the same results regarding consumers.

Section 51(1)(e) prohibits terms that require the consumer to enter into a supplementary agreement or sign a document prohibited by subsection (2)(a). The German lists do not contain a similar item.

⁶³⁹⁷ *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) 422: 'Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon that other a condition to that effect.'

3. The South African greylist in comparison to the German provisions

3.1 Introduction

As mentioned in the introduction of this chapter, regulation 44(3) and § 308 contain so-called 'greylists'. Nonetheless, the two regimes differ in that the items contained in the South African regulation are presumed to be unfair, whereas the German list contains evaluative elements in the form of indeterminate legal terms.⁶³⁹⁸ This is in keeping with the respective individual-personalised and abstract-general approach. In the following, the items of the South African list will be put in comparative perspective to the German provisions.

3.2 The greylisted clauses

a) Regulation 44(3)(a)

Regulation 44(3)(a) greylists terms that exclude or limit the supplier's liability for death or personal injury caused to the consumer.⁶³⁹⁹

'Death or personal injury' in regulation 44(3) is similar to 'injury to life, body or health' in § 309 no. 7. However, § 309 no. 7 lit. a) blacklists these terms, unlike the South African regulation. § 309 no. 7 lit. a) provides that the exclusion or restriction of liability for the violation of highest-ranking legal rights, i.e., injury to life, body or health,⁶⁴⁰⁰ is not possible, not even when committed negligently.⁶⁴⁰¹

Terms that exclude or limit any liability for death or personal injury should be blacklisted instead of greylisted where the supplier is at fault, with simple negligence as a threshold. The fact that the limitation or exclusion of the supplier's liability for any loss attributable to gross negligence is blacklisted in section 51(c)(i), and that the limitation or exclusion of its liability for death or personal injury – unless it concerns section 61(1) – is 'only' presumed to be unfair is a systemic weakness that should be corrected. In this context, it must be considered that the common law and the Constitution attribute a very high rank to the sanctity of life.⁶⁴⁰² Naudé's argument according to which in a developing country such as South Africa the outright prohibition of excluding or restricting liability for companies could have disastrous effects on

⁶³⁹⁸ *Unbestimmte Rechtsbegriffe*. See Part II ch 5 para 2.1.

⁶³⁹⁹ See discussion on regulation 44(3)(a) in Part I ch 3 para 3.4.1 a).

⁶⁴⁰⁰ The definition of these terms corresponds to § 823(1). See Palandt/*Grüneberg* § 309 para 43.

⁶⁴⁰¹ See discussion on § 309 no. 7 lit. a) in Part II ch 5 para 2.2.7.

⁶⁴⁰² See discussion on reg 44(3)(a) in Part I ch 3 para 3.4.1 a).

businesses because of high insurance costs, for instance,⁶⁴⁰³ is not convincing because of practical problems and the systematic imbalance mentioned earlier.⁶⁴⁰⁴

The unfairness standard of the Act is likely to be fulfilled more easily than the one which indicates that a clause is against public policy or unconstitutional (under section 2(1), the consumer may still rely on the common law).⁶⁴⁰⁵ The greylisting of clauses that exclude injury or death is an indication in that sense as the Act shifted the onus from the consumer to the supplier.⁶⁴⁰⁶ This could suggest that even though the item is greylisted in South Africa, in most cases terms falling under this provision will be declared unfair. Despite the fact that one could argue that for this reason, blacklisting is not necessary because in practice, courts will declare such terms unfair in any event, greylisting of such terms sends the wrong signal.

Furthermore, unlike § 308 no. 7 lit. a), regulation 44(3)(a) does not include the supplier's representatives and is thus narrower in its scope of application. On the other hand, regulation 44(3)(d) applies to the supplier's vicarious liability under the residual common law, as section 113(1) applies to the supplier's joint and several liability under the Act.⁶⁴⁰⁷ Therefore, the supplier's agents are also included in its liability, and the two regimes come to a similar result.

Regulation 44(3)(a) refers to injury or death caused by a reason other than a defective good. Under section 61, it is not permitted to exclude liability for harm caused by defective, unsafe or hazardous goods or those that suffer from a product failure.⁶⁴⁰⁸ When reading section 51(1)(c)(i) together with regulation 44(3)(a), it becomes clear that the latter only refers to exemption clauses excluding liability which is not based on gross negligence and which does not fall into the ambit of section 61.⁶⁴⁰⁹

The German legislator regulated gross negligence for other damages than those set out in lit. a) in § 309 no. 7 lit. b). Hence, in terms of regulation 44(3)(a) and § 309 no. 7 lit. a), both regimes only apply to personal injury and death.

The wording of section 49(2) *in fine* indicates that as long as the supplier has fulfilled the formal requirements set out in this provision, the clause excluding its liability for injury or

⁶⁴⁰³ Naudé 2007 SALJ 156, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 24.

⁶⁴⁰⁴ See discussion on reg 44(3)(a) in Part I ch 3 para 3.4.1 a).

⁶⁴⁰⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

⁶⁴⁰⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 20.

⁶⁴⁰⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 48.

⁶⁴⁰⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

⁶⁴⁰⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

death is deemed fair.⁶⁴¹⁰ The exclusion of the supplier's liability only by having initialled or signed the clause in question seems to be too oppressive as regards the consumer's fundamental right to life, however. It could thus be contrary to public policy. Such a clause will be presumed to be unfair under regulation 44(3)(a), unless the supplier can convince the court why such a clause is fair in the particular circumstances.⁶⁴¹¹ The wording of section 49(2)(c) could still make sense, though, as this provision could have a warning function in that it aims to incite consumers to take adequate precautions against the risk of injury or death that should be specifically pointed out and initialled or signed.⁶⁴¹²

The German regime does not contain a similar 'disclaimer' provision.

According to § 310(1) 1st sent., § 309 no. 7 is not directly applicable to B2B contracts, but its valuations have a radiating effect on the general clause.⁶⁴¹³ Since the corresponding item is greylisted in South Africa, it only applies to B2C contracts (regulation 44(1)). The reflective effect of regulation 44 on the South African general clause, especially for small businesses, has been discussed above. The personal scope of application of both regimes is therefore similar.

The exceptions set out in § 309 no. 7 *in fine* concerning the transport and tariff rules for regular public transport services on the road, as well as state-approved lotteries and gaming contracts are also applicable to lit. a) of this provision. The reasons for these exceptions in German legislation have been discussed in Part II.⁶⁴¹⁴ Because of certain idiosyncrasies in the German regime, there is no similar provision in South African consumer protection legislation.

In summary, the South African legislator should blacklist the contents of regulation 44(3)(a) because the greylisting of such terms is a systemic weakness with regard to the Constitution and the common law. Even though the scope of application of item (a) is narrower than the one of § 308 no. 7 lit. a), the two regimes come to the same result concerning the supplier's representatives because the latter are included in regulation 44(3)(d). South African and German legislation only apply to personal injury and death but not to other damages. These are covered by section 61 and § 309 no. 7 lit. b). The formal requirements contemplated in section 49(2) *in fine* should in practice not free suppliers from liability. The provision could nonetheless have a warning function and should not function as a disclaimer provision. The

⁶⁴¹⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

⁶⁴¹¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

⁶⁴¹² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 19.

⁶⁴¹³ Stoffels *AGB-Recht* 385 and 386.

⁶⁴¹⁴ See Part II ch 5 para 2.2.7.1 a) bb). See also discussion on s 51(1)(c) in this chapter.

personal scope of application in relation to B2B contracts is similar in both regimes because of the radiating effect on the general clause of both items. The main differences between both regimes lie thus in the grey- *versus* blacklisting of the respective item, and the fact that, at least in theory, a supplier can exclude its liability by having signed or initialled the given provision. In practice, this should make no difference because the courts will most likely declare such terms unfair because of public policy.

b) Regulation 44(3)(b)

This item of the greylist can be divided into two parts when comparing it with the German standard business terms legislation.

The first part of item (b) is more general and does not have a similar provision in §§ 307 to 309. According to this provision, the supplier may not exclude or restrict the legal rights or remedies of the consumer in the event of total or partial breach. This item does not concern non-derogable rights that are afforded under other legislation, such as the tenants' rights under the Rental Housing Act, or rights afforded under sections 19(6)(c), 54(2) or 56(2) of the Consumer Protection Act.⁶⁴¹⁵

§ 309 no. 8 lit. b) aa) applies to clauses that provide that claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties. The provision expresses the principle that the customer must remain entitled to warranties, and that its contractual partner, the user, must remain the primary obligated party for any warranty.⁶⁴¹⁶ The concept of breach in terms of regulation 44(3)(b) is wider though since it means failing to perform any term of a contract, written or oral, without a legitimate legal excuse.⁶⁴¹⁷

The same applies to § 309 no. 8 lit. b) bb) which concerns provisions limiting the other party's claim to cure.

On the other hand, in terms of § 309 no. 8 lit. b) cc), a provision that excludes or limits the duty of the user to bear the expenses necessary for cure, in particular, to bear transport, workmen's travel, work and materials costs is ineffective. The seller or contractor must usually bear these expenses in terms of §§ 439(2) or 635(2), respectively.

⁶⁴¹⁵ See discussion of this item in Part I ch 3 para 3.4.1 b).

⁶⁴¹⁶ WLP/Dammann § 309 no. 8 lit. b) aa) para 1.

⁶⁴¹⁷ See 'breach of contract' at <http://dictionary.law.com/Default.aspx?selected=93>. 'Breach' can also be defined as a civil wrong that may give rise to a duty to pay damages as compensation. See Hutchison *et al* *Law of Contract* 39.

In terms of section 56(2) of the Act, the consumer may return the defective goods to the supplier within six months after delivery, without penalty and at the supplier's expense.

A term stipulating that consumers have to bear their expenses in connection to the transport of a defective good related to a service contract could be prohibited by section 54(2). This provision does not prohibit clauses under which the consumer has to bring the defective good to the supplier's place of business if the consumer exercises this right under section 54. A term under which the consumer has to do so at his own expense falls under regulation 44(3)(b) though because it excludes the consumer's common-law right to claim damages for breach by the supplier in cases where the consumer can show that it acted reasonably by incurring costs in transporting the goods for the repair, which would have been avoided had the service been adequately performed.⁶⁴¹⁸

With regard to such expenses, the German and the South African provisions come to the same result.

The second part of regulation 44(3)(b) concerns set-offs. Unlike the South African provision, § 309 no. 3 requires that the claim be uncontested or has been finally and non-appealably established. A claim is uncontested when its legal basis and amount are not disputed (*cum certum est an et quantum debeatur*).⁶⁴¹⁹ The German legislator did not outlaw clauses that prohibit the exertion of a right to set-off claims *per se*, but only cases in which this right is uncontested or has been finally and non-appealably established. What is more, the other party does not suffer a total loss of its legal rights in the case where set-offs are prohibited.⁶⁴²⁰ Thus, the blacklisting of this item in the German regime approaches somewhat the greylisting of the South African regulation.

A claim has been finally and non-appealably established in case of an enforceable and final judgement in terms of § 704, read in conjunction with § 794 ZPO.⁶⁴²¹ According to the majority view, also claims that are ripe – or ready – for judgment⁶⁴²² are equal to those that have been finally and non-appealably established.⁶⁴²³ What is more, uncontested claims are a sub-

⁶⁴¹⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 32.

⁶⁴¹⁹ WLP/Dammann § 309 no. 3 para 31.

⁶⁴²⁰ BT-Drs. 7/3919 at 29.

⁶⁴²¹ Stoffels *AGB-Recht* 346.

⁶⁴²² *Entscheidungsreif*.

⁶⁴²³ BGH *WM* 1978, 620 (621), Erman/Roloff § 309 para 29, WLP/Dammann § 309 no. 3 para 31, Palandt/*Grüneberg* § 309 para 17.

category of finally and non-appealably established claims since both are not contestable anymore.⁶⁴²⁴

The BGH held that the prohibition of such clauses also applies to those that restrict the right to set off to claims that have been recognised by the user.⁶⁴²⁵ The same applies to regulation 44(3)(b) in that the debt must be capable of easy and speedy proof, a prerequisite for a *compensatio*.⁶⁴²⁶ This is notably the case where the plaintiff admits a debt.⁶⁴²⁷

The other requisites for set-off are similar in both regimes: the debts must be mutual, the performances must be due and of the same nature, and the *compensatio* must not be excluded. Like in South Africa, alimonies cannot be set off in Germany,⁶⁴²⁸ but a set-off with owed tax *vis-à-vis* the tax administration with a refund claim is not excluded in Germany (§ 226 AO).⁶⁴²⁹ In South Africa, taxes due to the *fiscus*, i.e., SARS, cannot be set-off.⁶⁴³⁰

In both regimes, the clause must not necessarily use the word 'set-off'. It is sufficient that its effect amounts to exclusion or restriction of a *compensatio*. This is namely the case where the consumer is requested to pay promptly and in full and without deduction as soon as the supplier chooses to consider its side of the bargain as finished.⁶⁴³¹ The same applies to standard clauses by which only payment in cash is accepted. These can be seen as an implied exclusion of set-off. Other examples are 'net-cash clauses' or provisions that establish that the customer must pay in advance. They have the effect that the client cannot set off claims because of defects of the *merx*.⁶⁴³²

In Part I⁶⁴³³ of this thesis, it was submitted that regulation 44(3)(b) must be interpreted widely, so that also clauses by which a supplier may require full payment before it has delivered the

⁶⁴²⁴ BGH NJW 1989, 3215 (3216).

⁶⁴²⁵ BGH NJW 1994, 657 (658); 2007, 3421 (3422). See also *Smith v Morum Bros* (1877) 7 Buch 20 where it is also admitted that a set-off is possible in these cases because there is 'easy and speedy proof'.

⁶⁴²⁶ *Treasurer-General v Van Vuren* 1905 TS 582 at 589.

⁶⁴²⁷ *Smith v Morum Bros* (1877) 7 Buch 20.

⁶⁴²⁸ BGHZ 197, 326.

⁶⁴²⁹ AO = Abgabenordnung (German Fiscal Code). § 226 AO ('Set-off): '(1) Unless otherwise stipulated, the provisions of civil law shall apply *mutatis mutandis* with regard to using both claims from the tax debtor-creditor relationship and counterclaims to set off claims. (2) Claims arising from the tax debtor-creditor relationship may not be used as set-off where they have lapsed through limitation or the expiry of a period of exclusion. (3) Taxpayers may set off claims arising from the tax debtor-creditor relationship only with counterclaims which are uncontested and have been established as final and binding. (4) The political subdivision that administers the tax shall also be deemed to be creditor or debtor of a claim from the tax debtor-creditor relationship with respect to any set-off.'

⁶⁴³⁰ See Christie and Bradfield *Law of Contract* 497, with further references.

⁶⁴³¹ OFT *Unfair Contract Terms Guidance* (2008) para 2.5.3 at 28.

⁶⁴³² BGH NJW 1985, 550 and 1998, 3119 *et seq.*

⁶⁴³³ See discussion on reg 44(3)(b) in Part I ch 3 para 3.4.1 b).

agreed service, such as the installation, are unfair. This similar treatment to the German regime seems also justified in South Africa. Otherwise, the consumer bears the risk in case of the supplier's insolvency, which is not rare in South Africa, especially for artisans. A different treatment seems appropriate where the monies to be paid by the client are held under secure arrangements (deposit account).

The first part of regulation 44(3)(b) has no similar provision in §§ 307 to 309. § 309 no. 8 lit. b) aa) and bb) have a different scope of application. Both regimes come to the same result regarding expenses related to the transport of defective goods. With regard to the second part of item (b), most conditions for a set-off are similar in both regimes. The greylisting of the South African provision comes to the same results as the blacklisting of the German item since the German legislator did not outlaw set-offs *per se*, but only in certain cases. The user's recognition of a claim means that the debt is capable of easy and speedy proof, which is also a prerequisite for a *compensatio* in the South African regime. In Germany, a set-off with owed tax *vis-à-vis* the tax administration is possible however, unlike South Africa. In both countries, set-offs with alimonies are forbidden though.

c) Regulation 44(3)(c)

Under this item, a term is presumed to be unfair if it has the purpose or effect of limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition that depends exclusively on the supplier. This provision targets entire agreement clauses and non-variation clauses.⁶⁴³⁴

The German standard terms legislation does not contain a comparable item. § 309 no. 11 applies to provisions by which the supplier imposes a liability or duty of responsibility on an agent, and therefore has another scope of application. No. 13 of § 309 concerns clauses that provide that declarations are tied to a more stringent form than written or text form, or to special receipt requirements.

On the other hand, according to the BGH and legal literature, written-form clauses cannot prevent the validity of an individually agreed term if the parties expressly agreed that their oral agreement should prevail over the pre-formulated written-form clause.⁶⁴³⁵ This even applies if the written-form clause is valid in terms of the general clause of § 307.⁶⁴³⁶ If there is a need for

⁶⁴³⁴ See discussion on reg 44(3)(c) in Part I ch 3 para 3.4.1 c).

⁶⁴³⁵ BGH NJW 1985, 320 (322), WLP/Hau § 305b para 33, with further references.

⁶⁴³⁶ BGH NJW 2006, 138 *et seq*; NJW-RR 1995, 179 (180); UBH/Ulmer and Schäfer § 305b para 33.

clarification and proof, e.g., in life-insurance contracts, the written form clause may be valid, however.⁶⁴³⁷ It may also be valid if it is made before the conclusion of the contract in order to protect the supplier from agreements made by its agents that go beyond their power of representation.⁶⁴³⁸ In any event, the user's and the other party's interests have to be balanced against each other.⁶⁴³⁹

In other words, the fact that regulation 44(3)(c) greylists such clauses whereas German courts take a nuanced stance as to the parties' mutual interests means that in many cases, both regimes come to the same result. The German regime seems to be more stringent however since it only accepts the validity of such clauses in some instances.

d) Regulation 44(3)(d)

Item (d) of regulation 44(3) applies to the supplier's vicarious liability for its agents. This provision only applies to the supplier's vicarious liability under the residual common law since section 113(1) applies to the supplier's joint and several liability in terms of the Act, e.g., the liability for defective goods pursuant to section 61.⁶⁴⁴⁰

Vicarious liability of the employer is given where the employee fulfils three requirements. First, a particular relationship, e.g., employment, is necessary at the time when the delict is committed. Second, the delict must have been committed by the employee, and third, the latter must act within the scope of its employment when committing the delict or must have been engaged in any activity reasonably incidental to it.⁶⁴⁴¹

§§ 308 or 309 do not contain a similar item. § 309 no. 11 pertains to the other party's and not to the supplier's agents⁶⁴⁴² and therefore has another ambit.

Under § 831, a person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. German legislation only allows the user to exculpate itself if it exercises reasonable care when selecting the person deployed and, to the extent that it is to procure devices or equipment or to

⁶⁴³⁷ BGH *NJW* 1999, 1633 (1634 *et seq.*).

⁶⁴³⁸ BGH *NJW* 1991, 2559.

⁶⁴³⁹ See Part II ch 3 para 3.3 c).

⁶⁴⁴⁰ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 48.

⁶⁴⁴¹ *F v Minister of Safety and Security and Another (Institute for Security Studies and Others as Amici Curiae)* 2012 (3) BCLR 244 (CC).

⁶⁴⁴² See discussion on reg 44(3)(c) and (d) in Part I ch 3 paras 3.4.1 c) and d). See also item (n) in the Annex of the EU Unfair Terms Directive that largely corresponds to item (c) of reg 44(3).

manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.⁶⁴⁴³

Hence, the content of regulation 44(3)(d) is not reflected in §§ 308 or 309, but in § 831 dealing with tort. Both regimes thus come to the same results.

e) Regulation 44(3)(e)

Item (e) greylists clauses that force the consumer to assume liability for obligations that the supplier has in terms of the Act, e.g., a claim for harm caused by defective goods under section 61.⁶⁴⁴⁴ Such terms are an inappropriate transfer of risks to the consumer.⁶⁴⁴⁵

The German standard business terms legislation does not contain a similar item. § 309 no. 8 lit. b) aa) prohibits clauses providing that claims against the user due to defects in their entirety or in regard to individual parts are excluded, limited to the granting of claims against third parties or made dependent upon prior court action taken against third parties.⁶⁴⁴⁶

The German provision only applies to the supply of newly produced things and relating to the performance of work and is thus narrower. Both regimes are somehow congruent though in that the entire or partial exclusion of claims against the supplier/user with regard to individual parts is prohibited. In terms of the BGB, the client must be allowed to the minimum standard set out in §§ 434 and 634 and be entitled to free itself from the agreement.⁶⁴⁴⁷

One could make the argument that § 309 no. 8 lit. b) bb) concerning the exclusion of the other party's rights is more similar to section 51(1)(b)(i) and (ii). This item blacklists clauses that purport to waive or deprive a consumer of a right in terms of the Act (i) or avoid a supplier's obligation or duty in terms of the Act (ii). Such rights are afforded to the consumer in terms of sections 54, 55 and 56.

What is more, § 309 no. 8 lit. b) bb) has a broader scope of application in the sense that it also prohibits clauses by which the user refers its client to a third party in order to assert his or her rights. In addition, clauses that require prior court action against third parties are also forbidden by this provision.

⁶⁴⁴³ Palandt/*Sprau* § 831 paras 10-15.

⁶⁴⁴⁴ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 50. See also discussion on reg 44(3)(e) in Part I ch 3 para 3.4.1 e).

⁶⁴⁴⁵ See OFT *Unfair Contract Terms Guidance* (2008) para 18.2.7 at 73.

⁶⁴⁴⁶ See Part II ch 5 para 2.2.8.4.2 a).

⁶⁴⁴⁷ Stoffels *AGB-Recht* 367.

Both the South African and the German provisions are thus only congruent in that the entire or partial exclusion of claims with regard to newly produced things or work performances is concerned. The German provisions have a broader scope of application in that they also prohibit clauses by which the user refers its client to a third party in order to assert his or her rights as well as clauses that require prior court action against third parties.

f) Regulation 44(3)(f)

Item (f) greylists clauses of a consumer agreement if they have the purpose or effect of excluding or restricting the consumer's right to rely on the statutory defence of prescription.⁶⁴⁴⁸

§ 309 no. 8 lit. b) ff) contains a somewhat similar, but narrower provision.⁶⁴⁴⁹

Under section 11(d) of the South African Prescription Act, claims in connection with contracts prescribe after three years.

Prescription periods are generally subject to the principle of freedom of contract in Germany.⁶⁴⁵⁰ On the other hand, for the sale of consumer goods, new provisions on the limitation have been inserted which aim to preserve the consumer's rights in the case of defects⁶⁴⁵¹ with respect to the limitation period and the beginning of this period (§ 438).⁶⁴⁵² A shortening of the limitation period of two years to one year is therefore only permissible for

⁶⁴⁴⁸ See discussion on reg 44(3)(f) in Part I ch 3 para 3.4.1 f).

⁶⁴⁴⁹ See Part II ch 5 para 2.2.8.2.4 f). Pursuant to **§ 309 no. 8 lit. b) ff)**, even to the extent that a deviation from the statutory provisions is permissible, 'the limitation of claims against the user due to defects in the cases cited in [§] 438 (1) no. 2 and [§] 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained' is ineffective.

⁶⁴⁵⁰ Stoffels *AGB-Recht* 373.

⁶⁴⁵¹ **§ 437**: 'If the thing is defective, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified, 1. under [§] 439, demand cure, 2. revoke the agreement under [§§] 440, 323 and 326 (5) or reduce the purchase price under [§] 441, and 3. under [§§] 440, 280, 281, 283 and 311a, demand damages, or under [§] 284, demand reimbursement of futile expenditure.'

⁶⁴⁵² **§ 438**: '(1) The claims cited in [§] 437 no. 1 and 3 become statute-barred 1. in thirty years, if the defect consists a) a real right of a third party on the basis of which return of the purchased thing may be demanded, or b) some other right registered in the Land Register, 2. in five years a) in relation to a building, and b) in relation to a thing that has been used for a building in accordance with the normal way it is used and has resulted in the defectiveness of the building, and 3. otherwise in two years. (2) In the case of a plot of land the limitation period commences upon the delivery of possession, in other cases upon delivery of the thing. (3) Notwithstanding subsection (1) no. 2 and 3 and subsection (2), claims become statute-barred in the standard limitation period if the seller fraudulently concealed the defect. In the case of subsection (1) no. 2, however, claims are not statute-barred before the end of the period there specified. (4) The right of revocation referred to in [§] 437 is subject to [§] 218. Notwithstanding the fact that a revocation is ineffective under [§] 218 (1), the buyer may refuse to pay the purchase price to the extent he would be so entitled on the basis of revocation. If he makes use of this right, the seller may revoke the agreement. (5) [§] 218 and subsection (4) sentence 2 above apply with the necessary modifications to the right to reduce the price set out in [§] 437.'

the sale of used goods (§ 476). Excepted from the prohibition of disadvantageous limitation periods in consumer sale contracts are claims for damages (§ 476(3)).⁶⁴⁵³

With regard to consumer sale contracts, both regimes thus consider an exclusion or restriction of the prescription period suspicious. The German prescription period is one year shorter, though (2 years).

In respect of consumer sale contracts, § 309 no. 8 lit. b) ff) finds no application, and other contracts require a differentiation.⁶⁴⁵⁴

The German provision is more extensive in the sense that the formulation 'making limitation easier' does not only include a shortening of the limitation period but also any measures that have the same direct or indirect result, such as an earlier beginning of the limitation period.⁶⁴⁵⁵

Hence, to some extent, § 309 no. 8 lit. b) ff) is similar to item (f). With regard to consumer sale contracts, both regimes consider an exclusion or restriction of the prescription period suspicious. The German prescription period is one year shorter, though. Moreover, the German regime is more comprehensive because the formulation 'making limitation easier' does not only apply to a shortening of the limitation period but also to any measures that have the same result. The South African legislator should thus consider including such facilitations of the limitation period into the greylist as the consumers' need for protection is similar in these cases.

g) Regulation 44(3)(g)

Regulation 44(3)(g) greylists terms which have the purpose or effect of modifying the normal rules regarding the distribution of risk to the detriment of the consumer. As discussed in Part I,⁶⁴⁵⁶ for the meaning of 'normal rules', the approach by which the *naturalia* of an agreement in the absence of express terms⁶⁴⁵⁷ is convincing.

The common law provides a rule under which the risk of destruction or damage to sold goods rests on the purchaser when the parties agreed that the seller has to deliver goods at a place other than the place of sale or manufacture. Consumers will have difficulties to prove that the supplier took reasonable steps in order to avoid any damage to the goods, which makes this

⁶⁴⁵³ Stoffels *AGB-Recht* 373.

⁶⁴⁵⁴ In relation to a building or building materials, the limitation period is five years (§§ 438(1) no. 2 and 634a (1) no. 2)) because defects in this area often show very late so that the customer must have a period long enough to ascertain his or her rights. Standard clauses making the limitation period in these cases easier are therefore not permissible. See Stoffels *AGB-Recht* 373.

⁶⁴⁵⁵ Staudinger/*Coester-Waltjen* § 309 no. 8 para 95.

⁶⁴⁵⁶ See discussion on reg 44(3)(g) in Part I ch 3 para 3.4.1 g).

⁶⁴⁵⁷ Van Eeden and Barnard *Consumer Protection Law* 278 and 279.

common-law rule unfair.⁶⁴⁵⁸ In the absence of any statutory provision, this would be a ‘normal rule regarding the distribution of risk’ in terms of regulation 44(3)(g).

§§ 308 and 309 do not contain a similar provision. The BGB contains several provisions on the distribution of risk, however.

Under § 286, the obligor who fails to perform, following a warning notice from the obligee that is made after the performance is due, is in default as a result of the warning notice. § 287 provides that while he or she is in default, the obligor is responsible for all negligence. The obligor is liable for performance in the case of chance as well unless the damage would have occurred even if the performance had been made in good time. On the other hand, if the obligee is in default, the obligor is, during the period of the default of the obligee, only responsible for intent and gross negligence (§ 300). For sales shipments, the distribution of risk is set out in § 447. According to this provision, if the seller, at the request of the buyer, ships the thing sold to another place than the place of performance, the risk passes to the buyer as soon as the seller has handed the thing over to the forwarder, carrier or other person or body specified to carry out the shipment. If the buyer has given a particular instruction on the method of shipping the thing and the seller, without a strong reason, does not adhere to this instruction, the seller is liable to the buyer for the damage arising from this.

Since the distribution of risk is exhaustively regulated by statutory law, the German legislature did not need to insert a provision dealing with the distribution of risk into §§ 308 or 309. Both regimes offer a balanced distribution of risk for both parties.

h) Regulation 44(3)(h)

According to regulation 44(3)(h), a provision allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement, is presumed to be unfair.⁶⁴⁵⁹ Hence, a clause may be fair if the consumer is granted a right to cancel the agreement.⁶⁴⁶⁰

§ 309 no. 1⁶⁴⁶¹ prohibits price increases within the first four months after the conclusion of the contract *per se*. Price increases occurring after this period are assessed under the general clause. Naudé contends that such a definite time scale seems unwise and prefers the approach of

⁶⁴⁵⁸ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 53.

⁶⁴⁵⁹ See discussion on reg 44(3)(h) in Part I ch 3 para 3.4.2 a).

⁶⁴⁶⁰ See BT-Drs. 7/3919 at 28.

⁶⁴⁶¹ See discussion on § 309 no. 1 in Part II ch 5 para 2.2.1.

greystlisting.⁶⁴⁶² A fixed time scale gives certainty to the consumer, however. If it is not too long for the supplier, it can adjust its prices quickly when necessary, e.g., because of price increases in raw materials.

The South African provision does not explicitly exclude contracts concerning continuing obligations (open-ended agreements) from its scope of application, unlike § 309 no. 1. The protection granted by the German general clause for price increases concerning continuing obligations would not fall short of item (h) though. What is more, the BGB grants an ordinary right to revoke an agreement as well as an extraordinary right of withdrawal for continuing obligations in terms of § 314 for a compelling reason. An unacceptable price increase is such a compelling reason.⁶⁴⁶³

Insurance contracts, leases, subscriptions or loan agreements, but also apportioned contracts⁶⁴⁶⁴ and recurring obligations⁶⁴⁶⁵ are qualified as continuing obligations in the sense of § 309 no. 1.⁶⁴⁶⁶ German courts apply a more generous standard for continuing obligations, though. They argue that price increase clauses in this type of contracts are an 'appropriate and accepted instrument to keep in balance price and performance'.⁶⁴⁶⁷

Prohibited price increase standard clauses infringe the *pacta sunt servanda* principle and are an obstacle for price comparisons and competition. Price increases concern not only the actual, nominal price but also ancillary performances and VAT. This also applies to the South African regime.⁶⁴⁶⁸

§ 309 no. 1 covers all types of transactions save those concerning immovable objects.⁶⁴⁶⁹ Item (h) of regulation 44(3) applies to consumer agreements, i.e., agreements between a supplier and a consumer other than a franchise agreement.⁶⁴⁷⁰ Both regimes therefore have an extensive scope of application and exclude each only a particular type of transactions.

Section 5(2)(d) excludes the application of the Act for credits which are governed by the National Credit Act. Thus, price increase clauses in such credit agreements, e.g., for interest

⁶⁴⁶² Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 60 note 3.

⁶⁴⁶³ Stoffels *AGB-Recht* 331.

⁶⁴⁶⁴ *Sukzessivlieferungsverträge* or *Teillieferungsverträge*.

⁶⁴⁶⁵ *Wiederkehrschuldverhältnisse*.

⁶⁴⁶⁶ WLP/Dammann § 309 no. 1 para 27.

⁶⁴⁶⁷ BGH *NJW* 2012, 2187 (2189).

⁶⁴⁶⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 62.

⁶⁴⁶⁹ Stoffels *AGB-Recht* 333.

⁶⁴⁷⁰ See definition of 'consumer agreement' in s 1.

and fees, are not covered by regulation 44(3).⁶⁴⁷¹ The German regime does not provide for such an exception, with the exception of the excluded fields contemplated in § 310(4).

§ 309 no. 1 contains an *absolute* prohibition for price increases in the given cases, i.e., without the possibility for the user to justify price increases. Therefore, price increases on the user's side (e.g., price increase for material, raw materials, salaries etc.) do not allow for a passing on to the consumer.⁶⁴⁷² This is not necessarily the case for regulation 44(3)(h) as this provision is merely greylisted. Clauses allowing for price increases because of 'increased labour or material costs', 'costs as a result of industrial dispute', external factors beyond the supplier's control' or 'price increases by the supplier's subcontractors' are likely to be qualified as unfair though. This is especially true if they do not allow the consumer to cancel the agreement. Besides, the consumer is less able in these cases to control and anticipate such changes than the supplier.⁶⁴⁷³ Moreover, regulation 44(4)(b) provides for some exceptions in which item (h) does not apply. These exceptions are legitimate because they are beyond the supplier's control when operating in uncertain markets that contain variable pricing elements.

For so-called 'cost element clauses'⁶⁴⁷⁴ in long-term consumer contracts (over 4 months) for which the general clause of § 307 is applicable, the BGH requires that the clause contain the different cost elements and their weighting for the calculation of the total price.⁶⁴⁷⁵ Where such a concretisation is not possible, the clause must contain the right to cancel the agreement in the case of a price increase.⁶⁴⁷⁶ An exception applies for price adjustment clauses in energy supply contracts. If these do not contain the various cost elements and their weighting with regard to the price calculation, they do not become valid. This applies even if they contain the consumer's right to cancel the agreement when the supplier adjusts its prices, and if the cancellation is only possible for the time after the price increase or is tied to unacceptable costs for the client.⁶⁴⁷⁷

This also applies to the South African regime. Clauses by which suppliers can unilaterally increase their prices without giving their consumers the possibility to cancel the respective agreement are usually unfair. This applies especially when the clause does not contain clear

⁶⁴⁷¹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 63.

⁶⁴⁷² BGH NJW 1985, 855 (856), WLP/Dammann § 309 no. 1 para 52.

⁶⁴⁷³ OFT *Unfair Contract Terms Guidance* (2008) para 12.3 at 67, Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 61.

⁶⁴⁷⁴ *Kostenelementeklausel*.

⁶⁴⁷⁵ BGH NJW 2008, 360 (361).

⁶⁴⁷⁶ BGH NJW 1986, 3134 (3135).

⁶⁴⁷⁷ BGH NJW 2007, 1054.

indications as regards the *modus operandi* for the calculation of the new price and the events triggering such an increase.⁶⁴⁷⁸

The strict evaluations of no. 1 cannot be applied to B2B contracts and have no indicative effect.⁶⁴⁷⁹ This is because business partners can be expected to assess such clauses and refuse them if they are unfair.⁶⁴⁸⁰ Regulation 44(3)(h) does not apply to B2B contracts either.

In summary, regulation 44(3)(h) concerns price increases and corresponds to some extent to the blacklisted item of § 309 no. 1. The German provision contains a fixed time scale, which means that price increases are not prohibited *per se*. This norm excludes open-ended agreements from its scope of application. The BGB grants an ordinary right to revoke an agreement as well as an extraordinary right of withdrawal for continuing obligations, however. Hence, both regimes offer a balanced solution. Both include ancillary performances and VAT into their understanding of price increases and have a wide scope of application. Although the South African item is merely greylisted, price increases due to certain factors that lie in the supplier's sphere are likely to be qualified as unfair so that the same result is achieved in these cases as in the absolute prohibition of the German item. Furthermore, both pieces of legislation require that the supplier must indicate the *modus operandi* for the calculation of the new price (in Germany, this applies for price increases after 4 months). Neither regime is applicable to B2B contracts.

i) Regulation 44(3)(i)

Regulation 44(3)(i) of the Act provides that terms by which the supplier may unilaterally alter the terms of the agreement including the characteristics of the product or service are presumed to be unfair.⁶⁴⁸¹

§ 308 no. 4 contains a similar item.⁶⁴⁸² The German provision contains a reasonableness qualification, though. This means that the modification of the performance must be reasonable ('*zumutbar*') for the client. According to the BGH, pre-formulated and unilateral modification clauses of the user are only effective if the clause indicates serious grounds for the

⁶⁴⁷⁸ See OFT *Unfair Contract Terms Guidance* (2008) para 12.1 at 57.

⁶⁴⁷⁹ UBH/*Fuchs* § 309 no. 1 para 45.

⁶⁴⁸⁰ Stoffels *AGB-Recht* 338.

⁶⁴⁸¹ See discussion on reg 44(3)(i) in Part I ch 3 para 3.4.2 b).

⁶⁴⁸² See discussion on § 309 no. 4 in Part II ch 5 para 2.2.4.1.

modifications, and if the conditions and implications for the other party are reasonably considered.⁶⁴⁸³

The clause must enable the other party to be prepared for a possible modification of the initially agreed performance.⁶⁴⁸⁴ This is the case where the modification or deviation is due to the particularity of the performance, or inevitable due to serious circumstances. A rise of the user's costs is irrelevant however because this would lead to a significant shift of the risks to the customer's disadvantage.⁶⁴⁸⁵ In any event, the balance between performance and consideration⁶⁴⁸⁶ must not be disturbed.⁶⁴⁸⁷

In terms of regulation 44(4)(c)(iv), open-ended agreements⁶⁴⁸⁸ are excluded from the scope of application of regulation 44(3)(i) provided that the supplier informs the consumer thereof and the consumer is free to dissolve the agreement immediately. On the other hand, certain types of long-term agreements are always excluded from the application of the Act, such as employment contracts⁶⁴⁸⁹ or long-term insurance contracts.⁶⁴⁹⁰ Contrary to § 308 no. 3, no. 4 is also applicable to continuing obligations (open-ended agreements) since the danger inherent to modifications or deviations is the same in this type of contracts.⁶⁴⁹¹ The South African legislature was probably of the view that suppliers should be able to modify their performances in longer engagements. The German legislator, on the other hand, aims to protect the other party because it should receive what it contracted for, also in long-term contracts, *ergo* open-ended agreements.

Under regulation 44(4)(c), item (i) of regulation 44(3) does not apply to a term under which a supplier of financial services reserves the right to alter the interest rate payable *by the consumer or due to the latter*, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier informs the consumer immediately thereof and the consumer can dissolve the agreement at the earliest opportunity.

⁶⁴⁸³ BGH NJW 2000, 515 (521). According to the OFT, variation clauses allowing minor technical amendments which do not affect the performance of the product, or amendments required by law should not be considered unfair. See OFT *Unfair Contract Terms Guidance* (2008) para 11.3 at 54.

⁶⁴⁸⁴ BGH NJW 2008, 360 (362), WLP/Dammann § 308 no. 4 para 24.

⁶⁴⁸⁵ UBH/Schmidt § 308 no. 4 para 9, Stoffels *AGB-Recht* 328.

⁶⁴⁸⁶ *Äquivalenzverhältnis*.

⁶⁴⁸⁷ MüKo/Wurmnest § 308 no. 4 para 7.

⁶⁴⁸⁸ These are contracts of indeterminate duration. See Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 64.

⁶⁴⁸⁹ See s 5(2)(e).

⁶⁴⁹⁰ Schedule 2 item 10 read with s 1 s.v. 'service' (c)(ii).

⁶⁴⁹¹ Stoffels *AGB-Recht* 327.

This partly corresponds to no. 4 of § 308 because this item only concerns modifications of the *user's* performance.⁶⁴⁹² For modifications of the other party's performance, the given clause has to be assessed under the general clause.⁶⁴⁹³

The South African regime thus excludes performances related to interests outright, no matter which party owes the interests. On the other hand, the exception of regulation 44(4)(c)(i) only concerns suppliers of financial services. Other suppliers that do not fall under this category therefore seem to be subject to regulation 44(3)(i). The German legislation takes a more general stance by excluding all performances of the client and includes all standard business terms users, and not only financial services suppliers.

Regulation 44(4)(c) also excludes transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control. It applies as well as to an agreement for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

§ 308 no. 4 does not contain a similar caveat, which is however balanced by the fact that the German provision contains a reasonableness requirement. This is because a clause that excludes the aforementioned transactions must enable the other party to be prepared for a possible modification of the initially agreed performance.⁶⁴⁹⁴ This is the case where the modification or deviation is due to the particularity of the performance, or inevitable due to serious circumstances. For the type of transactions mentioned above, this can be assumed because clients of transferable securities or those buying shares are aware of fluctuations of the given markets and prepared to non-foreseeable performances.

Regulation 44(3)(i) greylists alterations of the terms of the agreement, including the characteristics of the product or service, whereas § 308 no. 4 speaks of the 'performance promised'. The prohibition in the German provision does not only cover the principal obligation though as the wording ('modify the performance promised') covers any modifications of

⁶⁴⁹² UBH/*Schmidt* § 308 no. 4 para 4. Regulation 44(3)(i) read in conjunction with reg 44(4)(c) comes to the same result in the case of interest rates and other financial charges payable by the consumer by simply excluding them from the application of reg 44(3)(i).

⁶⁴⁹³ Stoffels *AGB-Recht* 326. In this context, the BGH decided that a pre-formulated interest adjustment clause by which the bank can modify the interest rate payable in the context of a saving contract at will infringes § 308 no. 4. In this case, the interests are the client's, and not the bank's performance (BGH *NJW* 2004, 1588 (1589)). On the other hand, an interest rate adjustment clause in a mortgage contract by which the bank is entitled to modify the interest rate if it deems necessary to do so is ineffective under § 307 (BGH *NJW* 2009, 2051 (2053 *et seq*)).

⁶⁴⁹⁴ BGH *NJW* 2008, 360 (362), WLP/*Dammann* § 308 no. 4 para 24.

ancillary obligations and performances as well as the modalities of the performance.⁶⁴⁹⁵ Clauses by which the user is entitled to render part performance (§ 266) are also subject to no. 4.

Despite the different wording, both regimes are formulated wide enough to cover all sorts of 'performances'.

Item (i) thus corresponds partly to § 308 no 4 with the exception that the German provision contains a reasonableness qualification. The South African item does not apply to open-ended agreements, however. Excluded are also modifications of the interest rate payable by the consumer or due to the latter. This corresponds to some extent to § 308 no. 4 in that the German item only concerns a modification of the user's performance. The German provision is more general because it excludes all performances of the client and includes not only suppliers of financial services but all standard business terms users. The fact that the German item does not contain a similar caveat as in regulation 44(4)(c) is balanced by the reasonableness requirement of § 308 no. 4. Even though both regimes chose a different wording, they are worded wide enough to cover all sorts of 'performances'.

j) Regulation 44(3)(j)

§§ 308 or 309 do not contain a provision similar to regulation 44(3)(j), according to which a term is presumed to be unfair if it gives the supplier the right to determine whether the goods or services supplied are in conformity with the agreement, or the exclusive right to construe any term of the agreement.⁶⁴⁹⁶

§ 309 no. 2 lit. b) mentions the acknowledgement of defects by the user but only in the context of a right of retention in terms of § 273.⁶⁴⁹⁷ This provision is therefore much more restrictive in its application than item (j) of the South African regulation.

Such terms are thus assessed in terms of the German general clause of § 307. Even though the seller might exclude or restrict the buyer's rights with regard to a defect in terms of §§ 434 *et seq.* insofar as the seller did not fraudulently conceal the defect or gave a guarantee of the quality of the thing (§ 444), clauses that give the supplier the right to determine whether the goods or services supplied are in conformity with the agreement are likely to be unfair. This is

⁶⁴⁹⁵ WLP/Dammann § 308 no. 4 paras 5 and 7.

⁶⁴⁹⁶ Item (m) of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993 has the same wording as reg 44(3). See discussion on reg 44(3)(j) in Part I ch 3 para 3.4.2 c).

⁶⁴⁹⁷ See discussion on § 309 no. 2 in Part II ch 5 para 2.2.2.

because they are not compatible with essential principles of the statutory provisions from which they deviate, i.e., §§ 434 *et seq.* A standard clause by which the seller unilaterally is entitled to determine whether he or she has supplied in conformity with the contract is not compatible with the principle that the buyer should not be subject to a clause which gives the supplier the right to carry out its own tests or inspections in order to determine whether the client's complaint is well-founded. Such clauses would be a restriction of the consumer's right to declare a dispute as to whether the supplier has performed its part of the agreement. In this case, the supplier would be the judge in its own affair, place its conduct above the law, and confer a judicial authority which is usually performed by the courts.⁶⁴⁹⁸

The same applies to clauses by which the other party has the exclusive right to interpret the terms of the contract.

Thus, the German regime achieves the same level of protection by applying the general clause.

k) Regulation 44(3)(k)

Item (k) greylists terms allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer.⁶⁴⁹⁹

This item is comparable with § 308 no. 3, read in conjunction with no. 8.⁶⁵⁰⁰ No. 3 of § 308 provides that an agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract is ineffective. Under no. 8, the reservation of the user's right to free itself from its duty to perform in the absence of availability of performance is ineffective if the user does not agree to inform the other party without undue delay of the unavailability and reimburse the latter immediately for consideration.

Neither the South African nor the German regimes apply to open-ended agreements. Continuing obligations subject to the German provision must thus be assessed in terms of the general clause of § 307. In this regard, the evaluations of the provisions of the Annex of the Unfair Terms Directive must be taken into account, namely items (c), (f) and (g).⁶⁵⁰¹ The

⁶⁴⁹⁸ Van Eeden and Barnard *Consumer Protection Law* 294.

⁶⁴⁹⁹ See discussion on reg 44 (3)(k) in Part I ch 3 para 3.4.2 d).

⁶⁵⁰⁰ See discussion on § 308 no. 3 and 8 in Part II ch 5 para 2.3.3.

⁶⁵⁰¹ **Item (c) of the Annex of the Unfair Terms Directive 93/13/EEC:** Terms which have the object or effect of 'making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone' are ineffective. **Item (f):** Terms 'authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where

German legislator was of the view that it is the characteristic of open-ended agreements to be ended without any particular reason, by ordinary termination. According to the legislature, an ordinary termination would be an objectively justified reason for this type of agreements. If standard business terms provided for an ordinary termination of continuing obligations, it would not make sense to require also the indication of a justified reason.⁶⁵⁰²

Regulation 44(3)(k) of the Act does not apply to open-ended agreements either (see regulation 44(3)(l)) for fixed-term agreements; for the latter, section 14(2)(b) applies in terms of cancellation). Hence, item (k) is only applicable to 'once-off' transactions. As section 14 does not apply to juristic persons, regardless of their annual turnover or asset value, juristic persons do not seem to have the protection of section 14.⁶⁵⁰³

Item (l) of the South African regulation deals with the termination of open-ended agreements. The legislator does not greylist terminations 'at will' like in item (k), but the supplier must not terminate the contract without reasonable notice (except in case of material breach).⁶⁵⁰⁴

Although in terms of the wording of regulation 44(4)(a), paragraph (k) of subregulation 44(3) does not apply to a term by which a supplier of financial services reserves the right to terminate an open-ended agreement without notice unilaterally, this qualification was actually meant to qualify item (l) in regulation 44(3), which deals with termination clauses for open-ended agreements.⁶⁵⁰⁵ This editorial error should be corrected. For open-ended agreements, item (l) of the regulation is *lex specialis* to item (k).

Compared to § 308 no. 3 and 8, regulation 44(3)(k) has another legal purpose. The main criterion for greylisting terms according to which the supplier may terminate the contract at will where the same right is not granted to the consumer is the excessive one-sidedness,⁶⁵⁰⁶ whereas § 308 no. 3 and 8 aim at ensuring compliance with the *pacta sunt servanda* principle.⁶⁵⁰⁷

§ 308 no. 3 requires that a clause in terms of which the user is entitled to free itself from the contract be transparent and that the reason for the disengagement be indicated explicitly in the

it is the seller or supplier himself who dissolves the contract' are ineffective. **Item (g):** Terms 'enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so' are ineffective.

⁶⁵⁰² BT-Drs. 7/3919 at 26.

⁶⁵⁰³ Section 14(1).

⁶⁵⁰⁴ Item (l) will be discussed later.

⁶⁵⁰⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 79.

⁶⁵⁰⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 75.

⁶⁵⁰⁷ Stoffels *AGB-Recht* 319.

clause so that an average client can assess when the user is entitled to use this right.⁶⁵⁰⁸ Clauses such as 'operational problems of any kind'⁶⁵⁰⁹ or 'for compelling reasons'⁶⁵¹⁰ are too vague and therefore insufficient. On the other hand, indications like 'in the case of force majeure, strike or shortage of raw materials'⁶⁵¹¹ sufficiently restrict the cases in which the user may free itself from the contract and give the other party a clear understanding.

The former UK Office of Fair Trading took a similar stance. According to the Office, a clause which does not merely allow the supplier to cancel at will may be fair if it would be impractical or impossible to complete the contract, provided that it clearly and accurately describes the circumstances in which the supplier may terminate the contract, and require that the supplier find out and inform the consumer as soon as possible. The circumstances must be beyond the supplier's control. In such circumstances, it may also be fair only to return prepayments without any further liability.⁶⁵¹² This position corresponds to § 308 no. 8 lit. b) according to which the other party's counter-performance must be reimbursed immediately if the performance is not available.

Under the German provision, the specifically indicated reason for the user's disengagement must also be objectively justified. This means that the reason mentioned in the contract must concern – in an abstract manner – significant interests of the user in order to be legitimate. No. 3 thus requires a weighing of both parties' interests, and the user can only free itself from the contract if it has an outweighing or at least a reasonable interest to end the agreement.⁶⁵¹³

This corresponds to the South African formulation 'at will' in item (k). Clauses that are subject to this item must clearly and specifically describe the circumstances in which the supplier may cancel. They must also require that the supplier find out and inform the consumer as soon as possible if such circumstances do apply, and explain the reasons for the proposed cancellation if they are not obvious. The circumstances must be beyond the supplier's control.⁶⁵¹⁴

Regulation 44(3)(k) does not apply to clauses which allow a termination of the contract for stated reasons, like breach. A cancellation clause (*lex commissoria*) allowing termination for breach, even when minor, or a clause allowing a termination upon stated but vaguely worded

⁶⁵⁰⁸ BAG NZA 2006, 539 (541).

⁶⁵⁰⁹ See BGH NJW 1983, 1320 (1321).

⁶⁵¹⁰ See OLG Cologne NJW-RR 1998, 926.

⁶⁵¹¹ See OLG Koblenz NJW-RR 1989, 1459 (1460).

⁶⁵¹² OFT *Unfair Contract Terms Guidance* (2008) para 6.1.5 at 44. See also § 308 no. 8.

⁶⁵¹³ BGH NJW 1987, 831 (833), BAG NZA 2006, 539 (541).

⁶⁵¹⁴ OFT *Unfair Contract Terms Guidance* (2008) para 6.1.5 at 44.

general grounds, must be assessed under section 48. Some pieces of legislation (e.g., the Hire-Purchase Act,⁶⁵¹⁵ the Alienation of Land Act⁶⁵¹⁶ and the National Credit Act⁶⁵¹⁷) set out criteria that must be met before a contract may be cancelled. Then, a cancellation by the supplier merely reflects the ordinary law and should be qualified as a cancellation *ex lege*, and not as *ex contractu*.⁶⁵¹⁸

Both the South African and the German items concern the termination of agreements by the supplier and do not apply to open-ended agreements. The fact that for the German provision, the specifically indicated reason for the user's disengagement must be objectively justified is reflected by the South African formulation 'at will'. The editorial error contained in regulation 44(4)(a) should be corrected as this provision was meant for item (l) of regulation 44(3).

l) Regulation 44(3)(l)

Regulation 44(3)(l) refers to terms enabling the supplier to terminate an open-ended agreement without reasonable notice save where the consumer has committed a material breach of contract.⁶⁵¹⁹

The exception regulated in regulation 44(4)(a) and the editorial error contained therein have already been discussed further above.

§§ 308 or 309 do not contain a similar provision. As discussed under item (k) above, the German legislator was of the view that open-ended agreements are characterised by the fact that they can be terminated without any particular reason by ordinary termination. § 314⁶⁵²⁰ provides for an exception where open-ended agreements may be terminated for compelling reasons without giving notice. Compelling reasons are, for instance, a cancellation of a gym

⁶⁵¹⁵ 36 of 1942, s 12(b).

⁶⁵¹⁶ 68 of 1981, s 19.

⁶⁵¹⁷ 34 of 2005, s 123.

⁶⁵¹⁸ Vessio *LLD thesis* 429.

⁶⁵¹⁹ See discussion on reg 44(3)(l) in Part I ch 3 para 3.4.2 e).

⁶⁵²⁰ § 314: '(1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period. (2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. Section 323 (2) number 1 und 2 applies, with the necessary modifications, as regards the dispensability of specifying a period for such relief and as regards the dispensability of a warning notice. Specifying a period for relief and issuing a warning notice can also be dispensed with if special circumstances are given which, when the interests of both parties are weighed, justify immediate termination. (3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination. (4) The right to demand damages is not excluded by the termination.'

membership due to the member's pregnancy. The cancellation of a life insurance policy due to the insolvency of the insured person is not considered a compelling reason in the sense of this provision, though.⁶⁵²¹ A wrongful act, or breach, is not necessary for § 314.

The German provision thus offers the possibility to both parties, and not only the supplier, to cancel an open-ended agreement without reasonable notice under certain circumstances. What is more, a wrongful act such as breach is not necessary. This difference of both regimes can be explained by their underlying dogmatic foundations. The Act is a pure consumer protection statute which aims to protect consumers, whereas the BGB provisions strive at a balanced solution for both parties.

m) Regulation 44(3)(m)

In terms of regulation 44(3)(m), a clause is presumed to be unfair if it has the purpose or effect of obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations.⁶⁵²²

Even though item (m) reflects several items of the EC Unfair Terms Directive, such as items (b), (n) and (o), the German grey- or blacklists do not contain a similar provision. § 309 no. 8 lit. b) dd)⁶⁵²³ has a different scope of application since regulation 44(3)(m) mainly concerns provisions by which the consumer has to continue paying although the goods or services he or she had contracted for are not provided as agreed. Item (m) therefore concerns the supplier's principal obligation and not secondary claims such as warranties.

On the other hand, § 309 no. 2 has the same effect as item (m). According to the German provision, exclusions or restrictions of the other party's right to refuse performance under § 320 or its right of retention in terms of § 273 are prohibited.

§ 320 contains a right to refuse performance. It regulates that a person who is a party to a reciprocal contract may refuse his or her part of the performance until the other party renders consideration unless he or she is obliged to perform in advance.

The right of retention of § 273⁶⁵²⁴ is also based on the principle of contractual fairness. This provision grants a right of retention for all rights originating from the same legal relationship

⁶⁵²¹ Palandt/*Grüneberg* § 314 para 7, with further references.

⁶⁵²² See discussion on reg 44(3)(m) in Part I ch 3 para 3.4.2 f).

⁶⁵²³ See discussion on § 309 no. 8 lit. b) dd) in Part II ch 5 para 2.2.8.2.4 d).

⁶⁵²⁴ § 273: '1) If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention). (2) A person who is obliged to

on which the obligor's obligations are based. The legislator considered the legislator's broad interpretation of 'same *legal* relationship' too far-reaching for § 309 no. 2 which is why this provision only applies to a right of retention that is based 'on the same *contractual* relationship'.⁶⁵²⁵ It is irrelevant whether the right of retention refers to principal or secondary obligations, or if the agreement is synallagmatic.⁶⁵²⁶

§ 309 no. 2 does not apply where the user's standard terms set out an obligation for the other party to pay in advance.⁶⁵²⁷ In such a case, the given clause is subject to the general clause.⁶⁵²⁸

Hence, item (m) partly corresponds to § 309 no. 2 with respect to the effect of both provisions. Under the German provision, exclusions or restrictions of the other party's right to refuse performance or its right of retention are prohibited. The German norm does not apply to standard clauses stipulating advance payment, however. These are assessed under the general clause. It can thus be said that both regimes afford the same level of protection.

n) Regulation 44(3)(n)

This subregulation refers to clauses which, e.g., entitle the supplier to deliver only partially whereas the consumer would have to pay in full.⁶⁵²⁹

The practical relevance of this subregulation is however limited as item (b) already greylists clauses excluding or limiting the consumer's right in the event of breach of contract by the supplier. Other terms will already be prohibited outright by mandatory provisions in the Act concerning the quality of the goods or services, e.g., sections 54, 55 56 and 61, read with section 51.

Regulation 44(3)(n) partly corresponds to § 309 no. 2. In this context, reference is made to the discussion on § 309 no. 2 under regulation 44(3)(m). Both regimes offer a comparable level of protection.

return an object has the same right, if he is entitled to a claim that is due on account of outlays for the object or on account of damage caused to him by the object, unless he obtained the object by means of an intentionally committed tort. (3) The obligee may avert the exercise of the right of retention by providing security. The providing of security by guarantors is excluded.'

⁶⁵²⁵ Stoffels *AGB-Recht* 339. Emphasis added.

⁶⁵²⁶ WLP/Dammann § 309 no. 2 paras 34-36.

⁶⁵²⁷ BGH *NJW* 2006, 3134.

⁶⁵²⁸ WLP/Dammann § 309 no. 2 para 12 *et seq.*

⁶⁵²⁹ See discussion on reg 44(3)(n) in Part I ch 3 para 3.4.2 g).

o) Regulation 44(3)(o)

Item (o) of the South African regime concerns one-sided renewal terms and greylists clauses in terms of which the supplier, but not the consumer, is permitted to renew or not renew the agreement. Section 14 of the Consumer Protection Act sets out the maximum duration of fixed-term agreements and other formal requirements for the supplier.⁶⁵³⁰

This provision aims to ensure that the contractual *equilibrium* between the parties is not distorted. Consumers and suppliers should be on an equal footing as regards their right to end or withdraw from the contract.

§§ 308 or 309 do not contain a similar item. § 309 no. 9 protects customers from entering into contracts with too long durations by limiting the initial duration to two years, tacit extensions to one year and notice periods to three months for certain continuing obligations (open-ended agreements).⁶⁵³¹ The German provision has therefore another and narrower scope of application.

Hence, such clauses must be assessed in terms of the general clause of § 307, especially by taking into consideration the essential principles or duties of statutory provisions from which the standard clause deviates and the essential rights or duties inherent in the nature of the contract (§ 307(2)).

Such principles, rights and duties are set out in various provisions throughout the BGB. § 622, for example, deals with notice periods for employment relationships. Under this norm, for notice of termination *by the employer*, certain notice periods are applicable, depending on the duration of the employment relationship. For notice of termination of employment *by the employee*, no longer notice period may be agreed than for notice of termination by the employer (§ 622(6)). This provision ensures the balance between the parties' rights with respect to notice periods. Under § 489, the borrower may terminate a loan contract with a pegged lending rate, in whole or in part under certain conditions. He or she may terminate a loan contract with a variable rate of interest at any time, giving three months' notice of termination. The right of termination of the borrower may not be excluded or made more difficult by contract.

⁶⁵³⁰ See discussion on reg 44(3)(o) in Part I ch 3 para 3.4.2 h).

⁶⁵³¹ Stöffels *AGB-Recht* 301. See discussion on § 309 no. 9 in Part II ch 5 para 2.2.9.1.

In German law, the balance between the parties' rights and obligations in terms of the renewal or termination of agreements is thus ascertained by § 307(2) in conjunction with the applicable statutory provisions. The level of protection is thus comparable in both regimes.

p) Regulation 44(3)(p)

Item (p) of regulation 44(3) greylists a term allowing the supplier an unreasonably long time to perform.⁶⁵³² § 308 no. 1 1st sent. 2nd var. contains a similar provision.⁶⁵³³

In terms of section 19(2), the supplier, '*unless otherwise expressly provided or anticipated in an agreement*',⁶⁵³⁴ is obliged to deliver the goods or perform the services on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement. In German law, *where no time for performance has been specified or is evident from the circumstances*, the other party may demand performance immediately, and the user may effect it immediately (§ 271(1)).⁶⁵³⁵ In both regimes, the parties may agree on different periods of time for performance. The greylisting of item (p) and § 308 no. 1 is justified though as otherwise, it would be difficult for the other party to serve notice of default⁶⁵³⁶ because the user's standard terms provide for a lax determination of the period for performance and the performance is not due (yet). The customer could not free itself from the contract and would be restricted, whereas the user could freely determine the time of performance.⁶⁵³⁷ What is more, clients often face harsh consequences if they do not pay in time, whereas a too long period of time for the user's performance would lead to an obvious imbalance.⁶⁵³⁸

In order to achieve maximum protection, it is recommended that the South African item applies, like the German provision, to all sorts of periods for performance (e.g., for the delivery of goods, the payment or the obligation to accept a work produced) as well as grace and extension periods that provide an additional period of time after the expiry of the actual period

⁶⁵³² See discussion on reg 44(3)(p) in Part I ch 3 para 3.4.2 i).

⁶⁵³³ See discussion on § 308 no. 1 1st sent. 2nd var. in Part II ch 5 para 2.3.1.2.

⁶⁵³⁴ Emphasis added.

⁶⁵³⁵ *Stoffels AGB-Recht* 315. § 271(1): '(Time of performance) Where no time for performance has been specified or is evident from the circumstances, the obligee may demand performance immediately, and the obligor may effect it immediately. (2) Where a time has been specified, then in case of doubt it must be assumed that the obligee may not demand performance, but the obligor may effect it prior to that time.'

⁶⁵³⁶ See § 280(3) read in conjunction with § 281; § 280(2) read in conjunction with § 286; § 323.

⁶⁵³⁷ BT-Drs. 7/3919 at 24, UBH/*Schmidt* § 308 no. 1 para 12.

⁶⁵³⁸ BT-Drs. 7/3919 at 24.

of time for performance,⁶⁵³⁹ or those applicable after a particular event (e.g., strike⁶⁵⁴⁰ or force majeure⁶⁵⁴¹).⁶⁵⁴²

Unlike the South African provision, § 308 no. 1 1st sent. 2nd var. distinguishes between unreasonably long periods for performance and insufficiently specific periods for performance. Item (p) only covers 'an unreasonably long time to perform' and is thus formulated a bit narrower.

What is more, the German provision contains an exception for consumer contracts. The user is therefore entitled in these cases to withhold its performance until the other party's right to withdraw has expired in order to avoid an unnecessary back and forth of the performance.⁶⁵⁴³ This exception does not apply to distance contracts⁶⁵⁴⁴ and distance learning contracts⁶⁵⁴⁵ where the right of withdrawal only begins after delivery.⁶⁵⁴⁶ Such an exception does not exist in the South African regime.

Lastly, § 308 no. 1 also covers other cases that have no equivalent norm in the South African regime. The German norm includes clauses that stipulate an unreasonably long or insufficiently specific period for acceptance or refusal of the offer by the user (this applies above all to situations where the customer has to use an order form of the user containing an acceptance period). Furthermore, no. 1a and 1b of this provision deal with standard clauses by which the user reserves the right to unreasonably long periods of time for the performance of his or her payment to his or her contractual partner by which the user reserves the right to unreasonably long periods of time for review and acceptance of the counter-performance.

Unlike item (p), the German norm distinguishes between unreasonably long periods for performance and insufficiently specific periods for performance. Furthermore, the German item contains an exception for consumer contracts. § 308 no. 1 1st sent. 2nd var. also covers other cases that have no equivalent in the South African provision. Thus, the German item

⁶⁵³⁹ BGH *NJW* 1982, 331 (333); 1983, 1320.

⁶⁵⁴⁰ The former OFT was of the view that factors such as shortage of stock, labour problems, strike or labour shortage may be attributable to the supplier. Hence, clauses in terms of which these factors allow the supplier an unreasonably long time to perform are likely to be unfair. See OFT *Unfair Contract Terms Guidance* (2008) paras 2.6.1-2.6.7 at 31-32.

⁶⁵⁴¹ In a South African context, Hawthorne and Kuschke are of the view that terms such as 'force majeure' or 'Act of God' should be avoided since they are legal jargon. See Hutchison *et al Law of Contract* 412.

⁶⁵⁴² Palandt/*Grüneberg* § 308 para 6, WLP/*Dammann* § 308 no. 1 para 34.

⁶⁵⁴³ MüKo/*Wurmnest* § 308 no. 1 para 23.

⁶⁵⁴⁴ *Fernabsatzverträge*. See § 312d.

⁶⁵⁴⁵ *Fernunterrichtsverträge*. See § 4 FernUSG.

⁶⁵⁴⁶ Palandt/*Grüneberg* § 308 para 9.

covers more instances than the South African regime. It is also formulated in a more nuanced way. In order to achieve better protection, the South African item should also apply to all sorts of periods for performance, like the German provision, and include insufficiently specific periods for performance.

q) Regulation 44(3)(q)

Regulation 44(3)(q) of the Act greylists one-sided forfeiture clauses.⁶⁵⁴⁷ This item includes parts of § 309 no. 6.⁶⁵⁴⁸ In terms of § 309 no. 6, a provision by which the user is promised the payment of a contractual penalty in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the contract frees himself from the contract is invalid. Thus, the German norm is not entirely congruent with regulation 44(3)(q), but equal protection can be achieved by applying §§ 308 no. 7, 309 no. 6 or 307.⁶⁵⁴⁹

The German term for such clauses is 'asymmetric retention clauses'.⁶⁵⁵⁰ In South Africa, they are referred to as 'one-sided forfeiture clauses'.⁶⁵⁵¹ Asymmetric retention/one-sided forfeiture clauses allow the supplier to retain payment in the case of non-compliance without giving the consumer the right to be compensated in the same amount if the supplier commits a breach.

Contrary to the South African regime, the German provision only focuses on the supplier. This could be the reason why the German provision is blacklisted. Under the South African regime, forfeiture clauses may be fair if they are counter-balanced by giving the consumer the right to be compensated in the same amount as the supplier in case of breach of the supplier.

Penalty clauses in the sense of §§ 339 *et seq.* are regulated in South Africa in the Conventional Penalties Act. If the amount is out of proportion of the actual harm suffered by the supplier, the court may reduce it in terms of section 3 of the Conventional Penalties Act.⁶⁵⁵² This provision is comparable to § 343.⁶⁵⁵³

⁶⁵⁴⁷ See discussion on reg 44(3)(q) in Part I ch 3 para 3.4.3 a).

⁶⁵⁴⁸ See discussion on § 309 no. 6 in Part II ch 5 para 2.2.6.

⁶⁵⁴⁹ WLP/Pfeiffer Anhang RiLi para 44.

⁶⁵⁵⁰ Stöffels *AGB-Recht* 361.

⁶⁵⁵¹ See, e.g., Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 95.

⁶⁵⁵² 15 of 1962. **Section 3 of the Conventional Penalties Act:** 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

⁶⁵⁵³ § 343: '(1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded. (2)

According to section 1 of the Conventional Penalties Act,⁶⁵⁵⁴ terms incorporated in a contract shall be deemed penalty stipulations, when the clause provides that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or deliver or perform anything for the benefit of any other person, either by way of penalty or as liquidated damages.⁶⁵⁵⁵ In terms of this provision, all penalty stipulations are *prima facie* enforceable once the existence of a valid and enforceable contract is established, and a penalty stipulation is contained therein and there is a breach of the given contract.⁶⁵⁵⁶

A drawback of penalty clauses, as opposed to forfeiture clauses, is that the proactive and extra-judicial effect of the items of the greylist is circumvented because financial penalties under the Conventional Penalties Act are not submitted to content control according to regulation 44(3) of the Consumer Protection Act. Suppliers will therefore probably tend to put an unreasonably high penalty into their contracts and hope that the consumer will not go to court. If they do so, they bear the cost risk.⁶⁵⁵⁷ Moreover, item (q) only operates in circumstances which are not covered by section 17 and only applies in situations where the forfeiture clause was intended to operate when the contract is cancelled after breach of one of the parties.⁶⁵⁵⁸ In practice, item (q) of regulation 44(3) should thus be of minor relevance.

Penalty clauses have a double function. They shall motivate the debtor to perform and enable the creditor to be indemnified in a simple manner. § 309 no. 6 is tailored to so-called 'dependent penalty agreements' which depend on the main obligation. This provision can also be applied by analogy to 'independent penalty clauses' though. Since the economic implications for the debtor are the same in the case of dependent penalty agreements and forfeiture clauses, no. 6 applies to both.⁶⁵⁵⁹

Contrary to item (q) of the South African regulation, no. 6 of § 309 has thus a wider scope of application. However, as the economic consequences are the same for both types of penalty

The same also applies, except in the cases of [§§] 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action.'

⁶⁵⁵⁴ **Section 1(1) of the Conventional Penalties Act:** 'A stipulation, hereafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.'

⁶⁵⁵⁵ See Vessio *LLD thesis* 463.

⁶⁵⁵⁶ Belcher 1964 *SALJ* 84.

⁶⁵⁵⁷ The same arguments apply in Germany in terms of § 339 *et seq* (see discussion below in this chapter and on reg 44(3)(q) in Part I ch 3 para 3.4.3 a).

⁶⁵⁵⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 98.

⁶⁵⁵⁹ Palandt/*Grüneberg* § 309 para 33, WLP/*Dammann* § 309 no. 6 para 16 *et seq*.

clauses, South African courts should apply regulation 44(3)(q) by analogy also to independent penalty clauses.

Another difference between the two regimes is that the German provision enumerates several cases. i.e., non-acceptance or late acceptance of the performance, payment default and termination of the agreement. The South African provision merely speaks of 'if [the supplier or the consumer] fails to conclude or perform the agreement'. In practice, this should make no difference because both regimes apply to breach, with the caveat that the German item only focuses on the consumer's breach.

Penalty clauses for which § 309 no. 6 does not apply can nonetheless be ineffective in terms of the general clause if they are unreasonably disadvantageous for the other party.⁶⁵⁶⁰ This concerns, e.g., penalty clauses of which the amount is unreasonable. The possibility to reduce the amount by judicial decision in terms of § 343 does not prevent an assessment under the general clause because §§ 339 *et seq.* are tailored for individual agreements. What is more, content control under the general clause refers to the stipulated amount, and not to the payable amount.⁶⁵⁶¹ The amount agreed upon in a penalty clause is unreasonable if it is disproportionate in relation to the violation of the contract and the consequences for the user.⁶⁵⁶² The amount must particularly not be disproportionate in relation to the damage that typically must be expected.⁶⁵⁶³

In summary, both regimes differ in that one-sided forfeiture/asymmetric retention clauses are greylisted in regulation 44(3)(q) and blacklisted in § 309 no. 6. Although the German provision is not entirely congruent with the South African item, equal protection can be achieved by §§ 308 no. 7, 309 no. 6 or 307. The German provision focuses only on the supplier, whereas the South African item includes both parties. This could be a reason why this item is blacklisted in Germany. In both regimes, a penalty that is out of proportion can be reduced by the courts. The German provision has a wider scope of application than the South African item since it directly applies to dependent penalty clauses, and by analogy to independent penalty clauses. South African courts should apply item (q) to both cases too. The fact that the German item, contrary to item (q), enumerates specific applications does not make any difference as both provisions apply to breach.

⁶⁵⁶⁰ UBH/*Fuchs* § 309 no. 6 para 12, WLP/*Dammann* § 309 no. 6 para 30.

⁶⁵⁶¹ BGH *NJW* 1983, 385 (387 *et seq.*).

⁶⁵⁶² BGH *NJW* 1998, 2600 (2606).

⁶⁵⁶³ BGH *NJW* 2012, 2577.

r) Regulation 44(3)(r)

In terms of item (r), clauses are considered unfair if the consumer has to pay higher compensation for a breach than a reasonable pre-estimate of the actual loss caused to the supplier.⁶⁵⁶⁴

§ 309 no. 5 contains a similar item,⁶⁵⁶⁵ although the German legislator chose the formulations 'exceeds the damage expected under normal circumstances' and 'the customarily occurring decrease in value'. This indicates a more abstract-general approach, whereas item (r) of regulation 44(3) takes into consideration the given case ('harm suffered by the supplier').

The comparative standard of § 309 no. 5 lit. a) replicates § 252 2nd sent.⁶⁵⁶⁶ which applies to the compensation of lost profit. The average damages of the given branch⁶⁵⁶⁷ or the average of the decreased value serves as the applicable comparative standard.

According to lit. b) of § 309 no. 5, a lump-sum claim is invalid if the other party is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum. The South African item does not contain a similar provision. For the blacklisted German item, it is sufficient if the clause makes clear for not legally trained customers that they can show that the damage or decrease in value is non-existent or substantially less than the required lump sum.⁶⁵⁶⁸ As the South African item is greylisted, the burden of proof lies with the supplier. The supplier thus has to prove that the damages required do not significantly exceed the harm suffered.

Moreover, the German item not only covers damages but also compensation for a decrease in value. The South African item should also cover both cases though since the term 'damages' comprises both, which is also indicated by the word 'harm' *in fine* of this provision.

Incidentally, note should be taken that German literature refers to 'lump-sum claims' in the context of § 309 no. 5, and not to penalties. The distinction is made by applying functional-typological aspects. A penalty is given where the objective is the fulfilment of the main claim

⁶⁵⁶⁴ See discussion on reg 44(3)(r) in Part I ch 3 para 3.4.3 b). See also OFT *Unfair Contract Terms Guidance (2008)* para 5.1 at 40.

⁶⁵⁶⁵ See discussion on § 309 no. 5 in Part II ch 5 para 2.2.5.

⁶⁵⁶⁶ BGH *NJW* 1984, 2941. § 252 2nd sent.: 'Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.'

⁶⁵⁶⁷ UBH/*Fuchs* § 309 no. 5 para 21.

⁶⁵⁶⁸ Bamberger/Roth/*Becker* § 309 no. 5 para 36, WLP/*Dammann* § 309 no. 5 para 100.

and exerting effective pressure on the other party.⁶⁵⁶⁹ On the other hand, there is a lump-sum agreement where the objective is instead a simplified execution of the given claim. A penalty is therefore rather a 'harsh additional sanction' (and thus higher), whereas a lump-sum claim is more a 'simplified normal sanction' (which is orientated towards actual damage).⁶⁵⁷⁰

Under regulation 44(4)(d), item (r) does not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of the Act or any other law. These are cancellation fees in terms of section 17 or sums payable for fixed-term agreements under section 14, for instance. The German blacklisted item of no. 5 does not contain such a caveat. German courts apply no. 5 also to travel package standard terms though in which compensation in terms of § 651(h)⁶⁵⁷¹ is stipulated in the case of a revocation by the client.⁶⁵⁷² Hence, by the application of no. 5 to these contracts, the possibilities of the travel organiser to claim compensation are mitigated.

In conclusion, it can be said that the fact that in Germany, the other party must be able to show that the damage or decrease in value has not occurred or is substantially less than the lump-sum is mitigated in the South African item by the fact that the latter is greylisted so that the burden of proof lies with the supplier. Both regimes should apply to damages as well as to compensation for a decrease in value since the term 'harm' in the South African provision is wide enough to cover both. § 309 no. 5 does not contain a caveat similar to regulation 44(4)(d). As German courts apply no. 5 also to travel package standard terms in which compensation is stipulated in the case of the client's revocation, the possibilities of the travel organiser to claim compensation are mitigated, however. By and large, both pieces of legislation offer the same level of protection.

s) Regulation 44(3)(s)

The wording of regulation 44(3)(s)⁶⁵⁷³ and § 308 no. 7⁶⁵⁷⁴ is almost similar. Both items are greylisted.

The South African provision uses the term 'termination of the agreement', whereas the German item refers to a revocation of the contract or notice of termination. § 308 no. 7 covers a

⁶⁵⁶⁹ Stoffels *AGB-Recht* 357.

⁶⁵⁷⁰ Stoffels *AGB-Recht* 357.

⁶⁵⁷¹ § 651(h)(1): 'Prior to commencement of travel, the traveller may revoke the contract at any time. If the traveller revokes the contract, then the travel organiser loses his claim to the agreed package price. He may, however, demand appropriate compensation.'

⁶⁵⁷² BGH *NJW* 1985, 633 (635).

⁶⁵⁷³ See discussion on reg 44(3)(s) in Part I ch 3 para 3.4.3 c).

⁶⁵⁷⁴ See discussion on § 308 no. 7 in Part II ch 5 para 2.3.7.

rescission, i.e., the setting aside of a voidable contract *ex tunc*, and cancellation, i.e., the termination of the agreement *ex nunc*. It is irrelevant whether the right to cancel the agreement is based on statutory or contractual provisions, or if it is an ordinary or extraordinary termination of the agreement.⁶⁵⁷⁵ The terminology used by the user is also irrelevant since merely the type of termination that actually applies is decisive.⁶⁵⁷⁶

What is more, where there is an undeniable need for protection of the other party in cases where the user terminates the contract by using another type of cancellation, and where such termination is more attractive to it than execution, no. 7 can be applied by analogy (e.g., voidability,⁶⁵⁷⁷ the occurrence of a resolutive condition, or revocation of a mandate under § 671).⁶⁵⁷⁸ The termination of the contract by mutual agreement is not covered by no. 7 though.⁶⁵⁷⁹

It is thus suggested that 'termination' is congruent to 'revocation' and 'cancellation' and that both regimes have the same scope of application. The wording of the South African provision is somewhat broader so that an analogous application of item (s) should not be necessary in cases such as voidability.

In terms of the German item, when assessing the reasonableness of the amount of the remuneration or the reimbursement, the statutory clauses that would apply if the given clause were inexistent serve as applicable standard.⁶⁵⁸⁰ For the enquiry, the circumstances of the concrete case are not relevant, but only the typical situation for the given type of contract in the case of early termination.⁶⁵⁸¹ Since the Act and its regulation do not apply a supra-individual and generalising approach, for item (s) of regulation 44(3), the concrete circumstances of the given case must be considered.

§ 308 no. 7 is interpreted in that the other party must have the possibility – by analogy to § 309 no. 5 lit. b) – to prove that the actual amount was lower than the demanded sum.⁶⁵⁸² Item (r) of the South African regulation does not include such a possibility, unlike § 309 no. 5. This is

⁶⁵⁷⁵ Stoffels *AGB-Recht* 391.

⁶⁵⁷⁶ UBH/Schmidt § 308 no. 7 para 6, WLP/Dammann § 308 no. 7 para 8.

⁶⁵⁷⁷ §§ 119 *et seq.*

⁶⁵⁷⁸ Palandt/*Grüneberg* § 308 para 39, UBH/Schmidt § 308 no. 7 para 7.

⁶⁵⁷⁹ OLG Hamburg *NJW-RR* 1990, 909. Dammann is of the view that in these cases, § 308 no. 7 has to be applied by analogy (WLP/Dammann § 308 no. 7 para 11).

⁶⁵⁸⁰ BGH *NJW-RR* 2005, 642 (643), UBH/Schmidt § 308 no. 1 para 1.

⁶⁵⁸¹ BGH *NJW* 1983, 1491 (1492).

⁶⁵⁸² Erman/*Roloff* § 308 para 60, UBH/Schmidt § 308 no. 7 para 4.

mitigated by the fact that because of the greylisting of regulation 44(3)(s), the burden of proof lies with the supplier.

Under regulation 44(4)(d), item (s) does not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of the Act or any other law. This item is therefore not applicable to compensation for use according to section 20(6)(c). Section 20(6) determines in which cases the supplier may impose a charge upon the consumer if the latter returns any goods.⁶⁵⁸³

The German item does not contain a similar provision. However, the BGB contains several statutory provisions for a rescission of an agreement (§ 346) or its cancellation (§§ 628, 649) which aim at a balancing of the parties' interests.⁶⁵⁸⁴ § 308 no. 7 aims to reflect the statutory model and to achieve a fair balancing of the parties' interests, which is why this provision is an emanation of § 307(2) no. 1.⁶⁵⁸⁵ In principle, these statutory provisions cover all claims for remuneration or reimbursement in case of early termination of the agreement, except for lump-sum damages and contractual penalties.⁶⁵⁸⁶

On the other hand, also § 357⁶⁵⁸⁷ concerns the reversal of contracts, namely the legal consequences of withdrawal from off-premises contracts and distance contracts (save contracts

⁶⁵⁸³ The supplier may not charge the consumer if the goods are returned in the original unopened packaging (s 20(6)(a)). If the goods are in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for use of the goods during the time they were in its possession, or any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer (s 20(6)(b)). In any other case, the consumer may charge a reasonable amount for the use of the goods or any consumption or depletion, and for necessary restoration costs to render the goods fit for re-stocking, unless the consumer had to destroy the packaging in order to determine whether the goods conformed to the description or sample provided, or were fit for the intended purpose (s 20(6)(c)).

⁶⁵⁸⁴ BT-Drs. 7/3919 at 26.

⁶⁵⁸⁵ WLP/Dammann § 308 no. 7 para 2a.

⁶⁵⁸⁶ See § 309 no. 5 and 6.

⁶⁵⁸⁷ § 357: '(1) The performance received is to be restituted at the latest after fourteen days. (2) The trader must also restitute any payments the consumer may have made for the delivery. This does not apply inasmuch as the consumer has incurred additional costs because he opted for a type of delivery other than the least expensive type of standard delivery offered by the trader. (3) In making the repayment, the trader must use the same means of payment that the consumer used in making the payment. Sentence 1 does not apply if the parties expressly have agreed otherwise and the consumer does not incur any costs as a result. (4) In the case of a sale of consumer goods, the trader may refuse to make repayment until he has received the returned goods or the consumer has provided proof that he has dispatched the goods. This does not apply if the trader has offered to collect the goods. (5) The consumer is not obliged to arrange for the return shipment of the goods received if the trader has offered to collect the goods. (6) The consumer bears the direct costs of return shipment of the goods if the trader has informed the consumer pursuant to Article 246a [§] 1(2) sentence 1 number 2 of the [EGBGB] of this obligation. Sentence 1 does not apply if the trader has stated that he is prepared to bear these costs. In the case of off-premises contracts, in the context of which the goods were delivered to the consumer's dwelling at the time the contract was concluded, the trader is obliged to collect the goods at his own costs if, by their nature, these goods cannot be returned by post. (7) The consumer shall be liable for any diminished value of the goods if 1. the diminished value results from the handling of the goods in any other manner than that necessary to establish the nature,

relating to financial services). § 4 FernUSG⁶⁵⁸⁸ is also a consumer protection provision. It provides that in a distance education contract, the client is entitled to rescind from the contract according to § 355, and that §§ 356 und 357 apply by analogy.⁶⁵⁸⁹ Any infringement of these consumer protection provisions makes the clause void in terms of § 134⁶⁵⁹⁰ so that the application of § 308 no. 7 is not necessary.⁶⁵⁹¹ For the German legislature, a clause similar to regulation 44(4)(d) was thus not necessary.

In summary, the South African item's formulation is broader so that an analogous application similar to the German regime is not necessary in cases such as the occurrence of a resolatory condition or voidability, and where the termination of the agreement is more attractive for the supplier than its execution. Unlike § 308 no. 7, the South African item does not provide for the possibility to prove that the actual amount was lower than the demanded sum. This is not necessary though since because of the greylisting of item (s), the burden of proof lies with the supplier. The German item does not contain a caveat such as regulation 44((4)(d), but other BGB provisions balance the parties' interests in terms of rescission or cancellation. Therefore, a clause with the content of regulation 44(4)(d) was superfluous in the German regime. The level of protection in both regimes is therefore comparable.

t) Regulation 44(3)(t)

Under item (t) in the South African greylist, standard clauses by which the supplier may transfer its obligations to the detriment of the consumer without the latter's consent are presumed to be unfair.⁶⁵⁹²

characteristics, and functioning of the goods, and 2. the trader has informed the consumer pursuant Article 246a [§] 1 (2) sentence 1 number 1 of the [EGBGB] of his right of withdrawal. (8) Where the consumer withdraws from a contract for the provision of services or the supply of water, gas, or electricity, without their supply having been offered for sale in a limited volume or set quantity, or for the supply of distance heating, the consumer shall owe the trader compensation for the value of the performance provided until the time of the withdrawal in those cases in which the consumer has expressly demanded that the trader begin with the performance prior to expiry of the withdrawal period. The claim pursuant to sentence 1 exists only in those cases in which the trader has properly informed the consumer pursuant to Article 246a [§] 1 (2) sentence 1 number 1 and 3 of the [EGBGB]. For off-premises contracts, the claim pursuant to sentence 1 exists only in those cases in which the consumer has transmitted his request pursuant to sentence 1 on a durable medium. In calculating the compensation for value, the total price agreed upon is to be used as a basis. If the total price agreed upon is excessive, the compensation for value shall be calculated on the basis of the market value of the performance provided. (9) Where the consumer withdraws from a contract for the supply of digital content that is not contained in a tangible medium, he shall not compensate for value.'

⁶⁵⁸⁸ Gesetz zum Schutz der Teilnehmer am Fernunterricht (Fernunterrichtsschutzgesetz - FernUSG).

⁶⁵⁸⁹ Stoffels *AGB-Recht* 394.

⁶⁵⁹⁰ § 134: 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'

⁶⁵⁹¹ Bamberger/Roth/Becker § 308 no. 7 para 4, MüKo/Wurmnest § 308 no. 7 para 3.

⁶⁵⁹² See discussion on reg 44(3)(t) in Part I ch 3 para 3.4.4 a).

Contrary to the corresponding German item in § 309 no. 10,⁶⁵⁹³ the South African provision merely refers to the transfer of obligations but not to the transfer of rights. The issue of free assignability of claims, i.e., rights, which is an essential factor in the credit economy, is therefore not concerned by item (t).⁶⁵⁹⁴ The free assignability of rights could be problematic. Hence, the South African legislature should include the transfer of claims too because also in these cases, consumers should be protected from an unfettered change of their contractual partners.

On the other hand, the German item does not contain the phrase ‘to the detriment of the consumer’. Contrary to the BGB provision which prohibits such clauses (with the exceptions mentioned in lit. a) and b)), regulation 44(3)(t) greylists clauses giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement. The German legislator considers all transfers of rights and obligations without the other party's consent detrimental to the other party (with the exceptions mentioned earlier). In contrast, the South African item presumes such a clause unfair if the consumer relied on the supplier's market reputation, goodwill, or a personal relation with the supplier (e.g., in a contract with an architect or lawyer).

What is more, the South African provision covers all types of agreements. It is not limited to certain contract types, unlike the German BGB provision which is applicable only to purchase, loan or service agreements or agreements to produce a result. Not expressly mentioned, but also included in the German item, are contracts dealing with the supply of movable things to be produced or manufactured.⁶⁵⁹⁵ If clauses concerning other contract types are not already surprising under § 305c(1), content control takes place by applying § 307.⁶⁵⁹⁶ For leases concerning apartments and farm leases as well as employment contracts, the transfer of the contractual partner occurs *ex lege*.⁶⁵⁹⁷ A clause in such a contract is thus merely declaratory and not submitted to content control.⁶⁵⁹⁸ Despite the fact that the application of the German item is restricted to certain contract types, for other agreements, a high level of protection is

⁶⁵⁹³ See discussion on § 309 no. 10 in Part II ch 5 para 2.2.10.

⁶⁵⁹⁴ Naudé ‘Regulation 44’ in Naudé and Eiselen (eds) *CPA Commentary* para 104.

⁶⁵⁹⁵ *Werklieferungsvertrag*, § 650 (ex-§ 651). WLP/Dammann § 309 no. 10 para 10.

⁶⁵⁹⁶ Stoffels *AGB-Recht* 310.

⁶⁵⁹⁷ In terms of §§ 566(1) for apartment leases, 581(2) for farm leases and 613a for employment contracts.

⁶⁵⁹⁸ See § 307(3). Bamberger/Roth/Becker § 309 no. 10 para 5, Staudinger/Coester-Waltjen § 309 no. 10 para 10.

thus achieved by § 305c(1) and the general clause, except where the transfer of rights and obligations occurs by law.

The German item is blacklisted, unlike the South African item. However, according to the German provision, the concerned clauses are not prohibited if they identify the third party by name (lit. a), or the other party is granted the right to free itself from the contract (lit. b). These caveats mitigate this provision tremendously.⁶⁵⁹⁹ They have the objective to protect the other party from dealing with suppliers he or she does not know and has not chosen. When exerting the right to free itself from the contract, the other party must not suffer any adverse consequences or enter into a contractual relationship with the third.⁶⁶⁰⁰ Hence, a clause which provides for a term of notice of one month is ineffective because the customer would be obliged to maintain a contractual relationship with the third party until the expiry of this period. Therefore, he or she must have the right to terminate the contract immediately.⁶⁶⁰¹

There may be exceptions where a transfer of obligations can be considered fair under the South African item. This is the case where the consumer is entitled to cancel the agreement, the supplier remains liable for performance of the third party, or the transfer occurs in connection of the transfer of the supplier's business by which all obligations and rights are transferred.⁶⁶⁰² In this regard, both regimes are similar to a certain extent.

Both regimes concern the transfer of *all* the obligations (and rights in the German item), i.e., a change of the contractual partner. A mere transfer of single obligations (and/or rights) does not fall under the respective provision. Typical cases are the transfer of the agreement,⁶⁶⁰³ which is a subrogation of the rights and obligations by the third party, or substitution where the user is merely responsible for a careful selection of the third party.⁶⁶⁰⁴ The legislative purpose of regulation 44(3)(t) and § 309 no. 10 is fulfilled in these cases since the other party shall be protected from a change of the contractual partner so that he or she is always certain with whom conducting business.⁶⁶⁰⁵

In conclusion, it can be stated that contrary to the South African item, § 309 no. 10 also covers the transfer of rights. In both regimes, the transfer of the entirety of the given obligations

⁶⁵⁹⁹ UBH/*Habersack* § 309 no. 10 para 1.

⁶⁶⁰⁰ Palandt/*Grüneberg* § 309 para 99, WLP/*Dammann* § 309 no. 10 para 34.

⁶⁶⁰¹ LG Cologne *NJW-RR* 1987, 885 (886).

⁶⁶⁰² These 'exceptions' are listed, for instance, in art 6:236(e) BW.

⁶⁶⁰³ *Vertragsübernahme*.

⁶⁶⁰⁴ WLP/*Dammann* § 309 no. 10 paras 12-15.

⁶⁶⁰⁵ UBH/*Habersack* § 309 no. 10 para 6, WLP/*Dammann* § 309 no. 10 paras 12-15.

(and/or rights concerning the German item) is required, and not only a transfer of single rights and/or obligations. Therefore, the free assignability of claims is not covered by item (t). This could be problematic, which is why the legislator should include the transfer of claims too. Since the German legislator generally considers all transfers of rights and obligations without the other party's consent detrimental to the other party, a phrase such as 'to the detriment of the consumer' was not necessary. Hence, under the South African item, a clause by which the consumer's obligations are transferred is presumed to be unfair only under certain circumstances. Even though the German item's scope of application is limited to certain contract types, protection for other types of agreements is achieved by § 305c(1) (surprising clauses) and the general clause. Unlike the South African item, § 309 no. 10 is blacklisted. Because of the caveats contained in lit. a) and b) of this provision, this fact is largely mitigated, however. Both regimes thus offer a comparable level of protection only in terms of the transfer of obligations.

u) Regulation 44(3)(u)

Terms restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the consumers are greylisted under regulation 44(3)(u).⁶⁶⁰⁶

The German grey- or blacklists do not contain a similar item.

Under § 309 no. 8 lit. b) aa) *in pr.*, clauses providing that claims against the user due to defects in their entirety or regarding individual parts are excluded are prohibited. The provision expresses the principle that the *customer* must remain entitled to warranties, and that its contractual partner, the user, must remain the primary obligated party for any warranty.⁶⁶⁰⁷ This provision thus only concerns the customer-supplier relationship.

The same principle is expressed in § 443,⁶⁶⁰⁸ according to which only the buyer can make a claim in terms of a commercial guarantee *vis-à-vis* the seller, producer or another third party.

⁶⁶⁰⁶ See discussion on reg 44(3)(u) in Part I ch 3 para 3.4.4 b).

⁶⁶⁰⁷ WLP/Dammann § 309 no. 8 lit. b) aa) para 1.

⁶⁶⁰⁸ § 443: '(1) Where the seller, the producer or some other third party enters into obligation, in addition to his statutory liability for defects, by way of making a declaration or in relevant advertising that was available prior to the purchase agreement being concluded or at the time of its conclusion, such obligation being in particular to reimburse the purchase price, to exchange the thing, to repair it or to provide services in this context should the thing not exhibit the quality or not fulfil other requirements than those concerning its freedom from defects, in each case as described in the declaration or in the relevant advertisement (guarantee), the buyer shall be entitled, in the case of a guarantee having been given, and notwithstanding his statutory claims, to the rights under the guarantee in relation to the person who has given the guarantee (guarantor). (2) To the extent that the guarantor gives a guarantee as to the thing having a specified quality for a specified period (guarantee of durability), the

Similar protection for German standard clauses is therefore achieved by applying the general clause of § 307, especially where the standard provision is not compatible with essential principles of the statutory provision from which it deviates (§ 307(2) no. 1).

v) Regulation 44(3)(v)

Apart from a different choice of the wording⁶⁶⁰⁹ and the grammatical structure,⁶⁶¹⁰ the content of regulation 44(3)(v)⁶⁶¹¹ and § 308 no. 5⁶⁶¹² dealing with fictitious declarations is identical. Both provisions require a reasonable period of time to make an express declaration and the information of the consumer as regards the meaning of the given declaration.

The BGH decided that the fulfilment of the two aforementioned cumulative conditions is not sufficient. For fictitious declarations, the user must also have a legitimate interest concerning such a clause.⁶⁶¹³ This is the case if such fictitious declarations facilitate the execution of mass contracts, such as transactions with banks and insurance companies.⁶⁶¹⁴ It is suggested that this factor should also be considered in terms of the greylisted item of regulation 44(3)(v).

According to paragraph (ii) of regulation 44(3)(v), the supplier has to draw the consumer's attention to the meaning that will be attached to his or her conduct. Naudé contends that this wording is not explicit enough and should be revised according to the German legislation. In her opinion, the provision would be clearer if the supplier itself must draw the consumer's attention to the meaning that will be attached to his or her conduct.⁶⁶¹⁵ However, § 308 no. 5 lit. b) BGB merely provides: '(unless) the user agrees to especially draw the attention of the other party to the contract to the intended significance of his behaviour at the beginning of the period of time.' Apart from the use of synonyms in the official translation ('commencement of the period'/'beginning of the period of time', 'draws the intention of the consumer'/'agrees to especially draw the attention of the other party to the contract', 'to the meaning that will be attached to his or her conduct'/significance of his behaviour'), the German phrase 'to especially draw the attention' seems to be a bit stronger than the South African 'draws the

presumption will be that a material defect which appears during the guarantee period triggers the rights under the guarantee.'

⁶⁶⁰⁹ E.g., 'statement or acknowledgement' or 'conduct' (CPA) vs 'declaration' (BGB/KSchG) or 'behaviour' (BGB)/'conduct' (KSchG).

⁶⁶¹⁰ Active vs passive voice.

⁶⁶¹¹ See discussion on reg 44(3)(v) in Part I ch 3 para 3.4.5 a).

⁶⁶¹² See discussion on § 308 no. 5 in Part II ch 5 para 2.3.5.

⁶⁶¹³ WLP/Dammann § 308 no. 5 para 67, UBH/Schmidt § 308 no. 5 para 9, Palandt/Grüneberg § 308 para 31.

⁶⁶¹⁴ UBH/Schmidt § 308 no. 5 para 7.

⁶⁶¹⁵ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 105.

attention'. The German phrase '*der Verwender sich verpflichtet*' (literally 'the user obligates him- or herself') has been translated in the official translation⁶⁶¹⁶ by 'the user agrees'; the German text is thus a bit stronger here again. As the South African text is written in the active voice ('the supplier draws the attention'), it is clear enough that it is the supplier who has this obligation, and not another person. There is hence no need for another formulation of item (v).

Regulation 44(3)(v) only applies to terms relating to acknowledgements which are not already prohibited elsewhere in the Act (such as sections 51(1)(g), 31(1)(b), 49(1)(d) or 49(2)).⁶⁶¹⁷ Section 51(1)(g), for instance, blacklists a term if 'it falsely expresses an acknowledgement by the consumer that (i) *before*⁶⁶¹⁸ the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier, or (ii) the consumer has received goods or services, or a document that is required by th[e] Act to be delivered to the consumer.' When excluding the provisions mentioned earlier, the scope of application of item (v) is limited to terms purporting to apply to acknowledgements deemed to have been made *after* the conclusion of the agreement and which do not relate to amendments of the agreement itself.⁶⁶¹⁹ This item is therefore of a rather narrow ambit.

The same applies to § 308 no. 5. The prohibition only applies to fictitious declarations concerning the execution of the contract, but not concerning its conclusion.⁶⁶²⁰ For the conclusion of the contract, the legal provisions set out in §§ 145 *et seq.* apply. Standard business terms cannot restrict these.⁶⁶²¹ Furthermore, clauses concerning the renewal of an agreement that the parties agreed to when concluding the contract are not prohibited in terms of § 308 no. 5 either. The renewal is not based on a fictitious declaration but on an agreement that in case of the other party's silence, the contract is tacitly renewed.⁶⁶²² The validity of such clauses must be assessed under § 307, however.⁶⁶²³

⁶⁶¹⁶ Available at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

⁶⁶¹⁷ See reg 44(2)(d).

⁶⁶¹⁸ Emphasis added.

⁶⁶¹⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 106.

⁶⁶²⁰ OLG Koblenz *NJW* 1989, 2950 (2951), Stoffels *AGB-Recht* 278.

⁶⁶²¹ Stoffels *AGB-Recht* 278.

⁶⁶²² BGH *NJW* 2010, 2942 (2943).

⁶⁶²³ Stoffels *AGB-Recht* 278.

Both regimes only concern fictitious declarations *of the consumer/other party*. Declarations of the supplier/user must thus be assessed in terms of the general clause of section 48 or § 307, respectively.⁶⁶²⁴

No. 5 of § 308 and regulation 44(3)(v) only concern *fictitious declarations*. These are clauses that set out that a specific declaration has been made, or has not been made; the actual behaviour of the other party is irrelevant.

On the other hand, under the German regime, fictitious facts where certain facts or circumstances are deemed to exist or not to exist are assessed under § 309 no. 12. If the confirmation of fact is a particular form of a fictitious receipt, the enquiry is undertaken in terms of § 308 no. 6.⁶⁶²⁵ If the declaration is of substantive significance, no. 5 applies.⁶⁶²⁶ Moreover, fictitious declarations are characterised by the fact that evidence to the contrary is not possible.⁶⁶²⁷

Concerning the South African regime, for fictitious receipts, regulation 44(3)(w) is applicable. However, item (y) of the greylist does not contain a provision similar to § 309 no. 12 lit. b), according to which a provision by which the user modifies the burden of proof to the disadvantage of the other party, in particular by having the other party confirm certain facts is invalid. Thus, for confirmation of facts in South African standard clauses, section 48 applies.

In summary, the content of item (v) of the South African regime and the German provision of § 308 no. 5 is identical. For item (v), the fulfilment of the two cumulative conditions of subparagraphs (i) and (ii) should not be sufficient because the user should in addition have a legitimate interest concerning clauses dealing with fictitious declarations. This corresponds to the BGH's position. Both regimes merely apply to fictitious declarations of the consumer or other party but not to the supplier's/user's declarations. These must be assessed in terms of the respective general clause. In both regimes, the respective items apply merely to fictitious declarations that concern the execution of the contract but not its conclusion. The legislation of both countries differs in that fictitious facts are assessed under § 309 no. 12 in the German regime, whereas for confirmation of facts, section 48 applies to South African clauses. For fictitious receipts too, other provisions are applicable in both pieces of legislation.

⁶⁶²⁴ See WLP/Dammann § 308 no. 5 para 25.

⁶⁶²⁵ UBH/Schmidt § 308 no. 5 para 9, Palandt/Grüneberg § 308 para 28.

⁶⁶²⁶ Palandt/Grüneberg § 308 para 28.

⁶⁶²⁷ Stöffels AGB-Recht 279.

w) Regulation 44(3)(w)

Item (w) of the South African greylist⁶⁶²⁸ concerns fictitious receipts. A similar provision can be found in § 308 no. 6.⁶⁶²⁹

The German provision is also applicable by analogy to 'acts similar to legal transactions'⁶⁶³⁰ such as overdue notices⁶⁶³¹ or notifications of defects⁶⁶³² in terms of § 377 HGB. As such legal acts are also of particular interest to the consumer, they should also be covered by item (w). It seems that a direct application is possible as the South African wording ('statement') is wider than the German term 'declaration'.

According to the South African item, clauses dealing with fictitious receipts are not considered unfair if such statement has been sent by prepaid registered post to the chosen address of the consumer. The German provision does not contain a similar exception. On the contrary, there is no *prima facie* proof that a registered letter has actually reached the person for which it was intended.⁶⁶³³ Hence, it is not sufficient to present the transmission confirmation for the reception of an e-mail⁶⁶³⁴ or fax.⁶⁶³⁵ Thus, the discussions related to whether the South African item should be completed by also inserting other means of communication, such as e-mail, as Naudé suggests,⁶⁶³⁶ or the deeming provision of section 23 ECTA,⁶⁶³⁷ is irrelevant for § 308 no. 6. Nonetheless, the South African legislator should include these means of communication.

The German regime knows only two legal exceptions of this principle, set out in §§ 132 BGB and 13 VVG.⁶⁶³⁸ § 132 BGB provides for two possibilities by which the sender can substitute the receipt by service. Under paragraph (1) of this provision, a declaration of intent is deemed to have been received if it is served through a bailiff as an intermediary. The service is effected

⁶⁶²⁸ See discussion on reg 44(3)(w) in Part I ch 3 para 3.4.5 a).

⁶⁶²⁹ See discussion on § 308 no. 6 in Part II ch 5 para 2.3.6.

⁶⁶³⁰ *Geschäftsähnliche Handlungen*.

⁶⁶³¹ *Mahnungen*.

⁶⁶³² *Mängelrügen*.

⁶⁶³³ BGH NJW 1996, 2033 (2035).

⁶⁶³⁴ This is only different if the confirmation of receipt and the read receipt can be presented. See Mankowski NJW 2004, 1901.

⁶⁶³⁵ BGH NJW 1995, 665 (667) sees the transmission confirmation merely as an indication for the reception but not as a *prima facie* proof.

⁶⁶³⁶ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 107.

⁶⁶³⁷ **Section 23 ECTA:** 'A data message (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee, (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.'

⁶⁶³⁸ *Versicherungsvertragsgesetz*.

under the provisions of the Code of Civil Procedure (ZPO). § 132(2) provides that if the person declaring is unaware, through no negligence on his part, of the identity of the person to whom the declaration is to be made, or if the whereabouts of this person are unknown, service may be effected in accordance with the provisions of the ZPO relating to service by publication. In the former case, the local court (*Amtsgericht*) competent for the approval is the one in whose district the person declarant its residence,⁶⁶³⁹ or in the absence of a residence within the country, its abode.⁶⁶⁴⁰ In the latter case, the local court competent for the approval is the one in the district of which the person to whom service is required to be effected had its last residence, or, in the absence of a residence within the country, its last abode.

§ 13 VVG is relevant in cases where the policyholder changes its address or name. Pursuant to this provision, if the policyholder has not informed the insurer of a change of address, the dispatch of a letter sent recorded delivery to the policyholder's last known address shall suffice in respect of a declaration of intention to be made to the policyholder. The declaration shall be deemed to have been received three days after the letter was dispatched. The first and second sentences shall apply *mutatis mutandis* in respect of a change of the policyholder's name.⁶⁶⁴¹

Consequently, for these two legal exceptions, content control does not take place in terms of § 307(3) since standard clauses reflecting these provisions do not derogate from the law.⁶⁶⁴²

In conclusion, it can therefore be said that because 'acts similar to legal transactions', such as overdue notices, are also of particular interest to consumers, they should also be covered by the South African item. Unlike the South African regime, German legislation does not accept the *prima facie* proof that a registered letter has actually reached the person for which it was intended. §§ 132 BGB and 13 VVG are the only exceptions in this regard. The South African legislature should also insert other means of communication in this item though.

x) Regulation 44(3)(x)

According to regulation 44(3)(x), terms are presumed to be unfair if they exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, including by requiring

⁶⁶³⁹ *Wohnsitz*.

⁶⁶⁴⁰ *Aufenthalt*. This is usually where someone has its temporary residence, e.g., on holiday. See Creifelds *Rechtswörterbuch* s.v. 'Aufenthalt, gewöhnlicher'.

⁶⁶⁴¹ § 13(1) VVG.

⁶⁶⁴² UBH/Schmidt § 308 no. 6 para 3.

the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation.⁶⁶⁴³

§ 309 no. 14 contains a similar item.⁶⁶⁴⁴ Here too, the given clause must make arbitration mandatory. Although item (x) does exclusively mention arbitration, it is submitted that it also applies to mediation, as otherwise the objective of the norm would not be attained, i.e., greylisting clauses that are an obstacle for the consumer to take legal action. Item (x) of regulation 44(3) seems to be more restrictive than § 309 no. 14 however in that it regulates that the clause requires the consumer to take disputes *exclusively* to arbitration. Therefore, it targets permanent exclusions of a judicial dispute resolution. In contrast, no. 14 merely requires a dilatory clause, i.e., a temporary exclusion.

No. 14 of § 309 is not applicable to standard terms that provide for Alternative Dispute Resolution on a voluntary basis, or those referring to such proceedings.⁶⁶⁴⁵ From the wording of item (x) of the South African greylist, it is clear that arbitration covered by the Act, such as the involvement of an applicable industry ombud accredited for the particular sector,⁶⁶⁴⁶ is not regarded as unfair. What is more, clauses by which a consumer agrees to have settled a dispute that has already arisen to arbitration instead of submitting it to a court are not suspicious if he or she has been informed in advance of the potential costs involved.⁶⁶⁴⁷

Both regimes therefore do not prohibit voluntary arbitration.

It should be noted that item (x) does not greylist terms requiring compulsory arbitration covered by the Act or other legislation. § 309 no. 14 does not provide for such a caveat. What is more, terms providing that consumers first take disputes to the applicable industry ombud under section 69 of the Consumer Protection Act are not greylisted either.

A differentiation between arbitration and mediation clauses is not necessary under § 309 no. 14 as both are prohibited to the extent that ADR is mandatory before any court action. Mediation often takes place in relationships that are characterised by a personal relationship between the parties, such as company law or family law. These areas are excluded from the application of

⁶⁶⁴³ See discussion on reg 44(3)(x) in Part I ch 3 para 3.4.6 a).

⁶⁶⁴⁴ See discussion on § 309 no. 14 in Part II ch 5 para 2.2.14.

⁶⁶⁴⁵ § 36 **Verbraucherstreitbeilegungsgesetz (VSBG)** provides, among other things, that a user of standard business terms must inform the consumer 'together with its standard business terms' of the possibility of such proceedings. § 36 VSBG came into effect on 1 February 2017 (see § 24(1) 2nd sent. of the *Umsetzungsgesetz* of 19 February 2016, BGBl. 2016 I 254).

⁶⁶⁴⁶ See s 69.

⁶⁶⁴⁷ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 109.

no. 14 by § 310(4), so that mediation clauses have practically no relevance in this regard. On the other hand, the use of arbitration clauses in standard terms has more relevance in practice. The emphasis of no. 14 thus lies here.⁶⁶⁴⁸

Because of the wide wording of § 309 no. 14, this provision applies to all types of claims of the client. A restriction of an 'ADR standard clause' to specific claims of the customer does therefore not exclude its application.⁶⁶⁴⁹

Although the title of § 309 no. 14 ('waiver of action') indicates that the provision only concerns actions in court, it also includes other proceedings, such as for the preservation of evidence,⁶⁶⁵⁰ dunning procedures⁶⁶⁵¹ or preliminary injunctions.⁶⁶⁵² A restriction to court actions would not sufficiently honour the normative objective of the provision.⁶⁶⁵³ It is recommended that the same should apply to the South African regime.

In conclusion, it is suggested that item (x) greylists not only arbitration but also mediation as otherwise, the objective of the South African provision would not be achieved. The scope of application of the South African item is more restrictive as it sets out that the clause must require that the consumer take disputes exclusively to arbitration, i.e., a permanent exclusion of a judicial dispute resolution. Voluntary arbitration is permitted in both regimes. Item (x) should also apply to other proceedings, like in Germany, such as preservation of evidence or preliminary injunctions, because a restriction to court actions would not sufficiently honour the normative objective this provision.

y) Regulation 44(3)(y)

Item (y) of the South African regulation greylists clauses restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier.⁶⁶⁵⁴

Item (q) of the EC Directive on Unfair Terms in Consumer Contracts served as a model for this greylisted item. Under the Directive, the clause must be 'unduly' restrict the evidence

⁶⁶⁴⁸ UBH/Schmidt (2016) § 309 no. 14 para 9. See also Jauernig/Stadler § 309 para 23.

⁶⁶⁴⁹ UBH/Schmidt (2016) § 309 no. 14 para 12.

⁶⁶⁵⁰ *Beweissicherungsverfahren*.

⁶⁶⁵¹ *Mahnverfahren*.

⁶⁶⁵² *Verfahren des vorläufigen Rechtsschutzes*.

⁶⁶⁵³ UBH/Schmidt (2016) § 309 no. 14 para 13.

⁶⁶⁵⁴ See discussion on reg 44(3)(y) in Part I ch 3 para 3.4.6 b).

though.⁶⁶⁵⁵ § 309 no. 12 also concerns the modification of the burden of proof, but instead of 'unduly' restricting the evidence, the German item requires a modification of the burden of proof 'to the disadvantage of the other party'.⁶⁶⁵⁶ With regard to the rationale of no. 12, it is suggested that 'unduly' in the Directive corresponds to 'to the disadvantage of the other party'. This is because rules concerning the burden of proof are not merely considerations of expediency, but an emanation of substantive principles of fairness and justice. A modification of these principles by standard business terms might jeopardise the other party's situation in that it might make its legal defence more difficult or even impossible.⁶⁶⁵⁷

The German legislator aimed to exclude any disadvantageous modification of the burden of proof. Thus, a modification of the burden of proof not only exists where the onus is reversed⁶⁶⁵⁸ but also where other aggravations exist. A distinction between a reversal of the onus and other obstructions in terms of no. 12 is not necessary. Other aggravations are restrictions to certain evidence (e.g., a clause requiring the consumer to provide the original invoice in order to have corrected a defect on the good he had purchased)⁶⁶⁵⁹ as well as modifications of the principle of *prima facie* evidence.⁶⁶⁶⁰ On the other hand, also facilitations of the burden of proof concerning the user fall under this provision.⁶⁶⁶¹

Thus, 'modifying' the burden of proof in terms of no. 12 of § 309 also entails 'restricting' the evidence available to the consumer in terms of regulation 44(3)(y). Both regimes expressly mention that the imposition of the burden of proof on the consumer/other party which, according to the applicable law, should lie with the supplier/user is suspicious or even prohibited. The South African item seems to treat this case as an alternative ('or') within the given item, whereas the German provision mentions lit. a) of no. 12 as a specific example ('in particular'). In practice, the different wording should have no relevance, however. The South

⁶⁶⁵⁵ Under **item (q) of the Annex to the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC** of 5 April 1993 clauses '(...) unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' may be regarded as unfair.

⁶⁶⁵⁶ See discussion on § 309 no. 12 in Part II ch 5 para 2.2.12.1.

⁶⁶⁵⁷ § 309 no. 12 is the transposition of item (q) of the Annex of the Unfair terms Directive 93/13/EEC.

⁶⁶⁵⁸ BGH NJW 1987, 1634 (1635), UBH/Habersack § 309 no. 12 para 8.

⁶⁶⁵⁹ See Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005)191.

⁶⁶⁶⁰ UBH/Habersack § 309 no. 12 para 11 *et seq.* This is also applicable in South African law because reg 44(3)(y) expressly greylists 'clauses restricting the evidence available to the consumer'.

⁶⁶⁶¹ Stöffels *AGB-Recht* 405.

African legislature should consider a widening of item (y) towards a 'modification of the burden of proof' in order to include other aggravations.

'Conclusive proof certificates' under South African common law, i.e., certificates established by the creditor and purporting to be conclusive proof of a certain balance due by the debtor, are invalid as they are against public policy, *contra bonos mores* and unenforceable.⁶⁶⁶² Such certificates are unilaterally established by the creditor and are therefore no equivalent to promises to fulfil an obligation⁶⁶⁶³ or declaratory acknowledgements of a debt⁶⁶⁶⁴ according to German law. The latter are 'contracts' between the parties.⁶⁶⁶⁵ Hence, so-called 'conclusive proof certificates' should always be considered unfair.⁶⁶⁶⁶

Section 65 provides that when a supplier has possession of any property belonging to or ordinarily under the control of a consumer, the supplier is liable to the owner of the property for any loss resulting from a failure to comply with the supplier's obligation to treat that property as being its own and to handle, safeguard and utilise that property with the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person. This provision seems to place the burden of proof on the consumer of whether the loss or damage of the goods in the supplier's possession was caused by the supplier's failure to take reasonable care. Section 65 thus deviates from the common-law rule according to which the supplier who takes the goods of the consumer into its safekeeping in the context of a depositum or bailment for reward⁶⁶⁶⁷ will be presumed to be at fault if the goods are damaged. According to section 2(10), a consumer can rely on the aforementioned residual rules though, and a term which excludes such common-law rules and places the onus on the consumer will be presumed to be unfair under regulation 44(3)(y).

Naudé argues that terms changing the onus of proof in contracts for safekeeping may sometimes be fair because the Act itself seems to allow such a shift.⁶⁶⁶⁸ On the one hand, the

⁶⁶⁶² *Sasfin v Beukes* 1989 (1) SA 1 (A) 15A, *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd & Donelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A).

⁶⁶⁶³ *Abstrakte Schuldversprechen*. See BGH NJW 1991, 1677.

⁶⁶⁶⁴ *Deklatorische Schuldanerkenntnisse*. See BGH NJW 2003, 2386 (2388).

⁶⁶⁶⁵ See wording of §§ 780 and 781.

⁶⁶⁶⁶ In this regard, see discussion in Part I ch 3 para 3.4.6 b).

⁶⁶⁶⁷ Bailment describes the transfer of the possession of goods from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It arises when a person gives property to someone else for safekeeping, hiring of goods, the loan of goods, the pledge of goods, and the delivery of goods for carriage or repair. It is a cause of action independent of contract or tort. See Law *Oxford Dictionary of Law* s.v. 'Bailment'.

⁶⁶⁶⁸ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 119.

party giving the good under the control of another will have difficulties to prove how the good was dealt with. For the party who has the control of the good it will be easy to prove the measures it took for keeping the good safe, and the circumstances which lead to its damage or destruction. The praetor's edict on seamen, innkeepers and stablekeepers provides that when goods are lost or damaged by such suppliers, the latter will be liable, except if they can prove one of a limited number of defences, such as *vis maior*.⁶⁶⁶⁹ There is no reason why innkeepers, for instance, should bear the onus of proof for goods 'occasionally' placed in their sphere of influence, whereas a party who agreed in safekeeping a good in terms of a depositum or bailment, i.e., a contract which *expressly* has the object of keeping goods safe, should have the possibility to shift the onus onto the consumer. A term placing the burden of proof on the consumer will thus be presumed to be unfair under regulation 44(3)(y). Interestingly, the BGH held in a landmark decision of 1964⁶⁶⁷⁰ concerning a standard clause by which the depositor (client) had to prove the responsibility of the warehouse keeper's staff after stored items had disappeared that the user could not relieve itself from circumstances lying in the sphere of its own responsibility to the client's disadvantage. This principle is now expressed in § 309 no. 12 lit. a).⁶⁶⁷¹ Both regimes should therefore apply the same standard in terms of clauses that shift the burden of proof in instances where the supplier has control of the given item.

In summary, the German provision is wider since a modification of the burden of proof does not only exist where the onus is reversed but also where certain evidence is restricted, or where the burden of proof is facilitated. The South African legislator should consider a broader application of this provision in order to include other aggravations. Conclusive proof certificates are not an expression of the parties' mutual consent, contrary to promises to fulfil an obligation or declaratory acknowledgements of a debt under German law and should thus always be considered unfair. Standard clauses which modify or restrict the burden of proof of suppliers who have control of the other's items should systematically be declared unfair.

z) Regulation 44(3)(z)

Item (z) of the South African regulation greylists clauses imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer.⁶⁶⁷²

⁶⁶⁶⁹ See *Davis v Lockstone* 1921 AD 153, *Essa v Divaris* 1947 (1) SA 753 (A).

⁶⁶⁷⁰ BGH NJW 1964, 1123.

⁶⁶⁷¹ Stoffels *AGB-Recht* 404.

⁶⁶⁷² See discussion on reg 44(3)(z) in Part I ch 3 para 3.4.6 c).

As discussed in Part I, the Consumer Protection Act is an Act of Parliament in terms of section 11(d) of the Prescription Act.⁶⁶⁷³ This provision sets out that the general prescription period, save where an Act of Parliament provides otherwise, is three years 'in respect of any other debt' than debts mentioned in paragraphs (a) to (d) of this provision. Section 11(d) of the Prescription Act includes consumer contracts. Provisions contained in the Consumer Protection Act dealing with prescription periods are sections 56(2) or 61(4)(d).

§ 309 no. 8 lit. b) ee) and ff) cover the scope of application of item (z) partly.⁶⁶⁷⁴

Item ee) of no. 8 lit. b) concerns cut-off periods for notice of defects. In terms of this provision, standard clauses by which the user sets a cut-off period for the other party to the contract to give notice of non-obvious defects which is shorter than the permissible period of time under double letter (ff) of § 309 no. 8 lit. b) are ineffective. Especially for non-obvious defects, the economic result is actually a shorter limitation period.⁶⁶⁷⁵ For this reason, the legislator designed item ee) in tandem with item ff) dealing with limitation periods.

The general permissible period of time is one year (see item ff). For purchase agreements, it is five years in relation to a building, and in relation to a thing that has been used for a building in accordance with the normal way it is used and which has resulted in the defectiveness of the building (§ 438(1) no. 2). The permissible period in the context of a contract to produce a work is also five years in the case of a building and for a work of which result consists in the rendering of planning or monitoring services for this purpose (§ 634a(1) no. 2). Clauses setting out shorter cut-off periods are hence ineffective, even if the loss of the rights due to a missed deadline is not expressly mentioned in the standard clause. Hence, the clause 'the buyer must notify the company of any defects after they have been discovered' is ineffective according to the BGH.⁶⁶⁷⁶

A contrario, a clause containing a cut-off period for notice of *obvious* defects that is shorter than the permissible limitation period might be effective, except in consumer contracts. A defect is obvious when it can be discovered without further ado by an average non-

⁶⁶⁷³ 68 of 1969.

⁶⁶⁷⁴ See discussion on § 309 no. 8 in Part II ch 5 paras 1.2.8.1-1.2.8.6.

⁶⁶⁷⁵ Stoffels *AGB-Recht* 372.

⁶⁶⁷⁶ BGH *NJW* 2001, 292 (300).

entrepreneurial customer.⁶⁶⁷⁷ Such clauses are subject to the general clause.⁶⁶⁷⁸ In this regard, standard business terms should distinguish between latent and patent defects.⁶⁶⁷⁹

Regulation 44(3)(z) of the Act greylists clauses imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer. Section 56 of the Act is 'legislation' in terms of this regulation. The parties may not deviate from such provisions by agreement.

Under section 56(2), the consumer may return defective goods within six months to the supplier who in return must repair or replace the defective item or refund the consumer. It is submitted that returning defective goods can be qualified as giving notice to the supplier of the defectiveness. According to section 55(5)(a), it is irrelevant whether a defect was latent or patent, or whether the consumer could have detected it before taking delivery of the item. Hence, the 'cut-off period' of item (z) is at least six months in terms of defective products, irrespective of whether the defects are obvious or non-obvious. This is notably shorter than the limitation periods set out in §§ 438 and 634a (two to five years) and the minimum limitation period of one year in § 309 no. 8 lit. b) ff) for other cases. It is also shorter than the one-year minimum limitation period for the sale of consumer goods (§ 476).

The consumer's right to good quality goods under section 55 of the Act does not apply to goods bought at an auction in terms of section 45. Because of the interplay between sections 55 and 56, it is suggested that this exclusion also applies to section 56. § 474(2) excludes the application of provisions concerning contracts on the sale of consumer goods to used things bought at an auction. Section 55(1) does not distinguish between used and unused goods bought at an auction. In practice, this differentiation should however only be relevant where new, unused things are offered at an auction, e.g., the warehouse stock of a company to be liquidated.

According to § 309 no. 8 lit. b) ff), a supplier must not set a limitation period of less than one year after the start of the statutory limitation period.⁶⁶⁸⁰ This limitation for suppliers entails more balanced clauses in the context of standard terms where consumers only have limited

⁶⁶⁷⁷ UBH/*Christensen* § 309 no. 8 para 92.

⁶⁶⁷⁸ *Stoffels AGB-Recht* 372.

⁶⁶⁷⁹ *Stoffels AGB-Recht* 373.

⁶⁶⁸⁰ **§ 309 no. 8:** '(...) (b) [A] provision by which in contracts relating to the supply of newly produced things and relating to the performance of work (...) (ff) the limitation of claims against the user due to defects in the cases cited in [§] 438 (1) no. 2 and [§] 634a (1) no. 2 is made easier, or in other cases a limitation period of less than one year reckoned from the beginning of the statutory limitation period is attained' is ineffective.

bargaining power. The South African legislator did not opt for such a minimum period but referred to the limitation periods applicable under the common law or legislation.

The formulation 'making limitation easier' in § 309 no. 8 lit. b) ff) includes a shortening of the limitation period as well as any measures that have the same direct or indirect result, such as an earlier beginning of the limitation period.⁶⁶⁸¹ The South African item is more restrictive in this regard as it applies merely to a shortening of the limitation period.

In conclusion, it can be stated that the scope of application of item (z) is partly covered by § 309 no. 8 lit. b) ee) and ff). The cut-off period of item (z) of at least 6 months for defective products is notably shorter than the limitation periods set out in §§ 438 and 634a (2 to 5 years), and the minimum limitation period of one year under § 309 no. 8 lit. b) ff) in other cases. What is more, the South African provision is more restrictive because it only applies to a shortening of the limitation period and not to other clauses that 'make limitation easier'. Item (z) should be amended in this regard in order to include all sorts of negative modifications of the limitation period for consumers.

aa) Regulation 44(3)(aa)

Regulation 44(3)(aa) provides that a term is presumed to be unfair if it entitles the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale.⁶⁶⁸²

German legislation does not black- or greylist similar legal provisions because their regulatory content is limited by other norms dealing with tariffs.

In Germany, the 'principle of the unity of costs'⁶⁶⁸³ prevails. This means that the court costs and fees,⁶⁶⁸⁴ as well as the so-called extra-judicial fees, such as lawyers' fees⁶⁶⁸⁵ are determined by the court *ex officio* in a so-called 'basic decision on the costs' (order on the costs)⁶⁶⁸⁶ in terms of §§ 308(2) and 91 *et seq.* ZPO. This decision only concerns the question of who has to bear the costs and in which proportion but not the actual amount. Under § 11(1) and (2)

⁶⁶⁸¹ Staudinger/*Coester-Waltjen* § 309 no. 8 para 95.

⁶⁶⁸² See discussion on reg 44(3)(aa) in Part I ch 3 para 3.4.6 d). As to the different formulations for these clauses and further explanations, see 'The difference between party-and-party costs and attorney-and-client costs are becoming a problem.' at <http://billsforcosts.co.za/component/content/article.html?catid=1:latest&id=19:problem-p-a-p--a-a-c&Itemid=2>.

⁶⁶⁸³ *Einheit der Kostenentscheidung*.

⁶⁶⁸⁴ *Gerichtskosten* and *Gebühren*.

⁶⁶⁸⁵ *Außergerichtliche Kosten*.

⁶⁶⁸⁶ *Kostengrundentscheidung*.

Gerichtskostengesetz (GKG),⁶⁶⁸⁷ read with Annex 1 and 2 to the GKG, the court costs and fees as well as the lawyer's costs are calculated on the basis of the amount in dispute.⁶⁶⁸⁸ The calculation itself is done by applying the so-called Baumbach formula.⁶⁶⁸⁹ The actual amount of the court's costs and fees as well of the lawyers' fees is decided by a registrar/officer of justice in a taxation of costs procedure⁶⁶⁹⁰ according to §§ 103 and 104 ZPO, read in conjunction with §§ 19 GKG and 21 no. 1 and 3 RPflG.⁶⁶⁹¹ The amount a lawyer can require is set out in the RVG.⁶⁶⁹² Since 1 July 2006, lawyers can negotiate their fees for extra-judicial services. For all other services before the courts, their fees are set out in the GKG.⁶⁶⁹³

A similar item was thus not necessary in the German grey- or blacklists.

bb) Regulation 44(3)(bb)

Under regulation 44(3)(bb), a term providing that a law other than that of South Africa applies to a consumer agreement concluded and implemented in South Africa, where the consumer was residing in South Africa at the time when the agreement was concluded, is presumed to be unfair.⁶⁶⁹⁴

The reason for the greylisting of such terms is that consumers should not be prevented from taking legal action in their local courts. It would not be fair if they were forced to travel long distances and use procedures that are unfamiliar to them.⁶⁶⁹⁵

In German contract law, the parties have the free choice as to which law should apply to their agreement. Article 3(1) of the Rome-I Regulation provides that the parties can freely select the law applicable to the contract. The parties or the contract do not need to have any relation to the chosen law. Under certain circumstances, the law applicable to the standard business terms of the user can be freely chosen.⁶⁶⁹⁶

The law applicable to the contract according to a choice of law or objective connectivity criterion means that only the provisions of the legal system in question apply to the contract

⁶⁶⁸⁷ GKG = Court Fees Act.

⁶⁶⁸⁸ *Streitwert* or *Gegenstandswert*.

⁶⁶⁸⁹ *Baumbach'sche Formel*.

⁶⁶⁹⁰ *Kostenfestsetzungsverfahren*.

⁶⁶⁹¹ RPflG = Rechtspflegergesetz (Act on the Competencies of Officers of Justice).

⁶⁶⁹² RVG = Rechtsanwaltsvergütungsgesetz (Lawyers' Compensation Act), formerly the Bundesrechtsanwaltsgebührenordnung (BRAGO).

⁶⁶⁹³ See Creifelds *Rechtswörterbuch* s.v. 'Kostenentscheidung', 'Kostenfestsetzung' and 'Rechtsanwaltsgebühr'. See also 'Kostenquotelung' at www.juratexte.de.

⁶⁶⁹⁴ See discussion on reg 44(3)(bb) in Part I ch 3 para 3.4.7.

⁶⁶⁹⁵ OFT *Unfair Contract Terms Guidance* (2008) para 17.4 at 68.

⁶⁶⁹⁶ See discussion in Part II ch 2 para 3.

'from the cradle to the grave'. The applicable legal provisions determine the coming into being and validity of the contract,⁶⁶⁹⁷ its formal validity,⁶⁶⁹⁸ as well its scope and performance of the contractual obligations, its interpretation and the consequences of breach (damages).⁶⁶⁹⁹

This means that if German law applies, the customer benefits from §§ 305 *et seq.*⁶⁷⁰⁰

Notwithstanding article 6(1) of Rome I (law of the habitual residence of the consumer), the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3 (freedom of choice). Such a choice may thus not have the result of depriving the consumer of the protection afforded by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1. Hence, in consumer contracts, one must assess if the national law contains mandatory provisions from which the parties must not derogate. In practice, German companies often choose foreign law, e.g., Swiss law, in B2B contracts.⁶⁷⁰¹

In order to enhance consumer protection and because of a lack of a similar mechanism such as in the EU, the South African legislature rightly opted for the solution set out in item (bb). A recourse to section 2(2), i.e., the consideration of foreign law, would not be possible in this regard since for a mechanism similar to the Rome-I Regulation, other countries must adhere to the same mechanism, which is not the case.

4. Provisions subject to the general clause

4.1 Structural aspects

As discussed in Part I,⁶⁷⁰² the South African general clause contained in section 48 of the Act is lengthy and verbose. Usually, general clauses in other regimes are rather straightforward. According to Kötz, 'the precise formulation of the general clause does not cause any excessive difficulties. The formulation of the general clause should be as accurate and precise as possible'.

⁶⁶⁹⁷ **Article 10(1) of Rome I:** 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

⁶⁶⁹⁸ **Article 11(1) of Rome I:** 'A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.'

⁶⁶⁹⁹ **Article 12(1) of Rome I:** 'The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract.'

⁶⁷⁰⁰ Stoffels *AGB-Recht* 77.

⁶⁷⁰¹ Stoffels *AGB-Recht* 233. See Part II ch 5 para 3.5.1.

⁶⁷⁰² See Part I ch 3 para 4.1.

Thus, general clauses that merely contain terms such as 'inequitable' or 'inadequate' without further qualification are too vague. The general clause should instead express that an imbalance between the rights and obligations of the parties leads to ineffectiveness.⁶⁷⁰³ A formulation of the general clause such as in Germany would thus have been more advantageous regarding clarity and application.

The South African general clause uses the terms 'unfair, unreasonable or unjust', which are not defined in the Act. These three adjectives mean more or less the same. At least, no differentiation emanates from the Act, e.g., from sections 1 or 3. Moreover, the Act contains even more synonyms for 'unfair' in other instances in section 48, such as 'inequitable'⁶⁷⁰⁴ or 'unconscionable'.⁶⁷⁰⁵ The German general clause in § 307 does not contain a term such as 'unfair' and focuses instead on an imbalance between the parties' rights and obligations ('unreasonably disadvantage').

The general clauses of both regimes contain concretisations, however. § 307(2) with its two concretisations is concisely formulated, whereas section 48 contains a 'general unfairness standard' (section 48(1)), a 'basic unfairness standard' (section 48(2)(a) and (b)), as well as a 'deceptive standard' (section 48(2)(c)) and a 'procedural standard' (section 48(2)(d)). The two last mentioned standards are out of place and should not appear in a general clause. The legislator should consider a reformulation of the general clause in this regard too.

As discussed in Part I,⁶⁷⁰⁶ section 48(2) of the Act is not *lex specialis* to subsection (1) as these two provisions complete each other. It is suggested that subsection (2) has a radiating effect on subsection (1), however. Hence, when assessing whether a clause is excessively one-sided in terms of subsection (2)(a), one has to take into consideration whether the consumer had to waive any rights in favour of the supplier, or if any terms have been imposed onto the consumer, for instance.⁶⁷⁰⁷

The same approach can be found in the German general clause where § 307(1) has a guiding function *vis-à-vis* paragraph (2). Only where cardinal obligations are restricted, the legislator

⁶⁷⁰³ Kötz *Gutachten* 50. DJT 63. My own translation.

⁶⁷⁰⁴ Section 48(2)(b).

⁶⁷⁰⁵ Section 48(2)(d)(i).

⁶⁷⁰⁶ See Part I ch 3 para 4.1.2.

⁶⁷⁰⁷ Section 48(1)(c)(i) and (iii).

expressly stated that paragraph (2) takes precedence over paragraph (1).⁶⁷⁰⁸ Only insofar, § 307(2) is *lex specialis* to paragraph (1).⁶⁷⁰⁹

The prevailing opinion which classifies paragraph (2) of § 307 as legal rule examples for paragraph (1) of § 307 has significant disadvantages though.⁶⁷¹⁰ According to this view, 'in case of doubt' is to be read as 'in general', which means that an unreasonable disadvantage exists if the conditions of paragraph (2) are fulfilled, save where there are indications in the concrete case that this rule does not lead to fair results.⁶⁷¹¹

The drawback of this opinion is that it is hardly imaginable that a clause creating an unreasonable disadvantage under paragraph (2) can become valid under paragraph (1). A correction of the evaluation obtained with regard to paragraph (2) by assessing the clause against the background of paragraph (1) is excluded from a methodological point of view. Because of the many open concepts contained in paragraph (2), this provision is able to integrate the given transactions and allow a final evaluation. Paragraph (2) should thus be regarded as a self-contained provision of content control which determines unequivocally whether there is an unreasonable disadvantage.⁶⁷¹² Hence, the phrase 'in case of doubt' is superfluous.⁶⁷¹³

The formulation '[w]ithout limiting the generality of subsection (1)' in section 48(2) of the Act must be read as an indicator of the radiating effect of subsection (2) to subsection (1). In contrast, the German wording 'in case of doubt' that, according to the (incorrect) prevailing view, must be read as 'in general' has, according to the correct view, no meaning because § 307(2) is a self-contained provision with respect to paragraph (1) of the general clause.

When enquiring the fairness of standard terms, the potential unfairness or 'tendency' should be assessed, and not the actual use of a term.⁶⁷¹⁴ On the other hand, the interpretation of these terms has to be done on a case-to-case basis.⁶⁷¹⁵ Although the Consumer Protection Act focuses on the individual consumer, contrary to §§ 305 *et seq.*, it is suggested that the Act should apply

⁶⁷⁰⁸ BT-Drs. 7/3919 at 23.

⁶⁷⁰⁹ Stoffels *AGB-Recht* 204.

⁶⁷¹⁰ Von Hoyningen-Huene § 9 AGBG para 238, Larenz and Wolf *BGB-AT* 790.

⁶⁷¹¹ See Part II ch 5 para 3.3.1.

⁶⁷¹² Staudinger/*Coester* (2006) § 307 para 226.

⁶⁷¹³ Schmidt-Salzer *AGB* para F 46 ('superfluous or ineffective'), Staudinger/*Schlosser* (1980) § 9 AGBG para 19 ('virtually without any relevance'). See Part II ch 5 para 3.3.1.

⁶⁷¹⁴ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 13, Van Eeden and Barnard *Consumer Protection Law* 249.

⁶⁷¹⁵ Van Eeden *Guide to the CPA* 182, Van Eeden and Barnard *Consumer Protection Law* 249.

elements of an abstract-universal approach in that the tendency of a clause, i.e., whether the term allows the supplier to act in an unfair manner *vis-à-vis* the consumer, and not its actual application must be assessed.

In the German regime, a radiating effect also exists with regard to § 308 on B2B contracts. According to § 310(1) 1st sent., the prohibitions contained in §§ 308 no. 1, 2 to 8 and 309 do not apply to B2B contracts. Since these prohibitions are a specific manifestation of the evaluative standard laid down in the general clause, based on the principle of good faith, it is not excluded though that clauses that are problematic in terms of §§ 308 or 309 could be ineffective under § 307. This is explicitly expressed in § 310(1) 2nd sent.⁶⁷¹⁶

§ 308 contains prohibitions based on a significant disadvantage for a contractual party. The result depends here on an evaluation which takes into account the contract type, the parties and their typical needs. These considerations can be integrated without problems into B2B relationships so that the evaluations contained in § 308 are not problematic for this kind of contracts.⁶⁷¹⁷ On the other hand, § 309 contains more restricted formulations which make their application for B2B contracts more difficult. Therefore, it would be better to comprehend the prohibitions of § 309 as criteria for encompassing content control.⁶⁷¹⁸

Since the greylist contained in regulation 44(3) of the Act does not apply to B2B contracts (regulation 44(1)), the factors mentioned in this list do not have a radiating effect on the general clause. The Act does not contain a similar clause to § 310(1) 2nd sent. In such cases, section 48 applies, and the consumer has the onus of proof.⁶⁷¹⁹ On the other hand, the blacklist of section 51 applies to B2B contracts, provided that section 5(2)(a) does not apply.⁶⁷²⁰

As submitted in Part I,⁶⁷²¹ section 48(2)(b) requires a two-part enquiry in which the adverseness to the consumer, on the one hand, and the inequitableness, on the other, are examined. This is the same approach as for § 307 in which first a disadvantage, and then the unreasonableness of the disadvantage must be assessed.⁶⁷²² It is submitted that the adverseness in section 48(2)(b)

⁶⁷¹⁶ Stoffels *AGB-Recht* 233.

⁶⁷¹⁷ UBH/*Fuchs* § 307 para 383, Palandt/*Grüneberg* § 307 para 40.

⁶⁷¹⁸ UBH/*Fuchs* § 307 para 382. See Part II ch 5 para 3.5.2.

⁶⁷¹⁹ Naudé 'Regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5.

⁶⁷²⁰ See discussion of the scope of application of the CPA in Part I ch 2.

⁶⁷²¹ See Part I ch 3 para 4.1.2 b).

⁶⁷²² Stoffels *AGB-Recht* 192 and 193.

is comparable to the 'disadvantage' in § 307(1) 1st sent. For this purpose, a comparison between the legal situation with and without the clause in question has to take place.⁶⁷²³

In summary, the South African general clause is verbose, unsystematic, lacks clarity and does not correspond to international standard and good legal practice. It also contains 'concretisations' that do not have their place in a general clause. A more concise provision with some precise guidelines, such as § 307, would have been more effective. Even though the Act is built around individual consumers, it contains elements of an abstract-universal approach in that the tendency of a term and not its actual application must be assessed. Contrary to § 308 (greylist) which has a radiating effect on B2B contracts, regulation 44(3) finds no application to these agreements. On the other hand, the South African blacklist applies to B2B contracts, whereas the application of § 309 to B2B contracts is excluded so that the general clause applies in these cases. The reason for this difference is that the Act is a pure consumer protection statute that also protects small businesses, whereas the BGB provisions take into account that between companies laxer rules may apply because they do not deserve the same level of protection. Both regimes apply a two-part assessment for their general clause. This logical approach allows for a differentiating scrutiny.

4.2 Moment of evaluation

According to section 52(2)(c) of the Consumer Protection Act, the court also has to consider circumstances that existed when the agreement was made, irrespective of whether the Act was in force at that time. The fairness enquiry is thus shifted temporally forward. In practice, this could be relevant for agreements for the continuous supply of goods or services but should have less and less relevance. This applies only to factual circumstances but not to regulatory changes.⁶⁷²⁴

In the German regime, the time of the conclusion of the contract is the relevant moment for the enquiry in individual proceedings.⁶⁷²⁵ For consumer contracts, this is expressly stated in § 310(3) no. 3.⁶⁷²⁶ This does not only apply to factual circumstances but also evaluative elements. Therefore, regulatory changes can neither make a clause valid if it was invalid at the

⁶⁷²³ See Part II ch 5 para 3.2.1.

⁶⁷²⁴ See discussion on s 52(2)(c) in Part I ch 3 para 4.1.4 a) cc).

⁶⁷²⁵ BGH *NJW* 2000, 1110 (1113), Medicus *NJW* 1995, 2579 *et seq*, Staudinger/*Coester* (2006) § 307 para 100, Schmidt *BGB-AT* 431.

⁶⁷²⁶ § 310(3): 'In the case of contracts between an entrepreneur and a consumer (consumer contracts) the rules in this division apply with the following provisos: (...) 3. In judging an unreasonable disadvantage under [§] 307(1) and (2), the other circumstances *attending the entering into of the contract* must also be taken into account.' Emphasis added.

time of the conclusion of the contract or *vice versa*.⁶⁷²⁷ In contrast, in institutional actions (abstract challenges) where no concrete contract has been entered into, the moment of the last oral proceedings is relevant.⁶⁷²⁸

Since the Act has been in force for over a decade now, the two regimes should not differ anymore in this regard.

4.3 Clauses subject to the general clause

a) Negotiated terms, price control, performance

The general unfairness standard of section 48(1) even applies to terms specifically agreed after negotiations, and not only to terms in standard-form contracts or non-negotiated terms.⁶⁷²⁹ In contrast, § 305b excludes content control for individually negotiated clauses.⁶⁷³⁰ As discussed earlier,⁶⁷³¹ the courts must consider all the relevant factors in the fairness enquiry, and the fact that certain terms have been negotiated should be considered by the courts.

It is unclear whether section 48(1)(a)(i) of the Act aims at a price control mechanism and a tool to control general price levels. As discussed in Part I,⁶⁷³² such price control would raise complex practical and theoretical questions. Competition law and the rules on improper conduct in the pre-contractual phase already provide sufficient and effective price control.⁶⁷³³ Furthermore, sections 40, 41 and 29 offer sufficient protection against unconscionable conduct and false, misleading or deceptive representations as well as reprehensible marketing methods.

As mentioned further above,⁶⁷³⁴ German courts apply price control in terms of §§ 305 *et seq.* only where a legal price regulation exists and a standard clause differs from it.⁶⁷³⁵ The threshold for court intervention is very high though.⁶⁷³⁶ In South Africa, such a high threshold for court intervention could be achieved by following Van Eeden's and Naudé's argumentation. According to these authors, section 48(1)(a)(i) is appropriately applied in instances where an unfair price is applied and other factors, e.g., unconscionable conduct or deception, are

⁶⁷²⁷ Stoffels *AGB-Recht* 184.

⁶⁷²⁸ UBH/*Fuchs* § 307 para 119. See Part II ch 5 para 3.2.2.

⁶⁷²⁹ Sharrock 2010 *SA Merc LJ* 307, Sharrock *Judicial control* 128.

⁶⁷³⁰ § 305b: 'Individually agreed terms take priority over standard business terms'.

⁶⁷³¹ See Part III ch 2 para 2.1.

⁶⁷³² See Part I ch 3 para 4.1.1 a).

⁶⁷³³ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁶⁷³⁴ See Part II ch 5 para 3.2.5 e).

⁶⁷³⁵ Erman/*Roloff* § 307 para 45.

⁶⁷³⁶ Under § 138(2), in order to fulfil the conditions of usury, the price must not only be excessive ('disproportionate'), but the other party must also fulfil subjective conditions.

present,⁶⁷³⁷ or where the agreement was concluded on the basis of misrepresentation or other unconscionable conduct under sections 40 and 41, for instance.⁶⁷³⁸ Price control without further qualification should in any event not be possible under the Act. The South African legislature should nonetheless make clear that it did not wish to introduce a price-control mechanism in the Act as such.

b) Declaratory clauses

As discussed earlier,⁶⁷³⁹ so-called 'declaratory clauses', i.e., provisions that have the same content as legal provisions ('regulatory identity'), are also subject to content control in South Africa. This is not the case in Germany. Naudé⁶⁷⁴⁰ correctly averts that control of these clauses should be excluded since it is a constitutional question of whether a legal provision has to be declared void.⁶⁷⁴¹

4.4 Aspects of content control

As the Consumer Protection Act applies an individualised approach, the fairness enquiry under the general clause also has to be performed by considering the factors listed in section 52(2).

§§ 305 *et seq.* do not contain a similar list of factors to be taken into account. § 310(3) no. 3, which deals specifically with consumer contracts, merely provides that 'in judging an unreasonable disadvantage under section 307(1) and (2) [general clause], the other circumstances attending the entering into of the contract must also be taken into account.' §§ 305 *et seq.* do not define these 'other circumstances attending the entering into of the contract'. Recital 16 of the EU Unfair Terms Directive gives some guidance though and makes clear what has to be taken into consideration (e.g., the parties' respective bargaining position, the existence of an inducement for the consumer, or a special order of the consumer).⁶⁷⁴²

Section 52(2) focuses mainly on procedural unfairness, as opposed to substantive unfairness.⁶⁷⁴³ In some instances, control on substantive unfairness alone would also be justified though because the use of standard contract terms creates procedural unfairness due to the lack of incentives for the consumer to read and bargain about terms.⁶⁷⁴⁴ This applies

⁶⁷³⁷ Van Eeden and Barnard *Consumer Protection Law* 259 and 260.

⁶⁷³⁸ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 8.

⁶⁷³⁹ See para 1, above.

⁶⁷⁴⁰ Naudé 2009 *SALJ* 534.

⁶⁷⁴¹ See s 167(4)(b) of the Constitution.

⁶⁷⁴² See Part II ch 5 para 3.2.4 b).

⁶⁷⁴³ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 11.

⁶⁷⁴⁴ Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 16.

irrespective of whether the consumer ‘could have acquired identical or equivalent goods or services from a different supplier’⁶⁷⁴⁵ as it is highly unlikely that a consumer will shop around and compare the goods and standard terms in question. In many cases however, procedural and substantive unfairness cannot be separated as there is often an interplay due to the structural inequality caused by the use of standard form contracts.⁶⁷⁴⁶ For example, the prominence of a term must be considered in conjunction with its content.⁶⁷⁴⁷

Many instances are not mentioned in the list but considered in foreign legislation. They can thus be taken into account by South African courts under section 2(2). Therefore, other factors, such as those which serve as the best international model of relevant factors, should also be considered by the courts.⁶⁷⁴⁸ The Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission in 2005, for example, contains such a list of factors.⁶⁷⁴⁹

Predictability and certainty would be enhanced if a court would be prepared to declare a term unfair *per se* in a particular industry, or based on the ‘tendency of the clause’. Such an objective finding, which does not consider the parties of the particular case, would be in the interest of the consumers and the suppliers of the trade sector in question. It would also advance predictability and eliminate unfair terms in the given sector and most probably in other related and unrelated sectors as well. This is because some unfair terms are so repugnant that they rarely can be fair.⁶⁷⁵⁰

The same approach can be found in the German regime where the circumstances of the parties involved in a particular transaction are not taken into account, but rather the transactions of the type and classes of the participants.⁶⁷⁵¹ Therefore, in the fairness control, one has also to consider the socio-economic context in which a term is used. This also applies to so-called

⁶⁷⁴⁵ See s 52(2)(i).

⁶⁷⁴⁶ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 12. See also *Barkhuizen v Napier* at para [149] where Sachs J already recognised this in his minority judgment, and BVerfG NJW 1993, 36.

⁶⁷⁴⁷ See Part I ch 3 para 4.1.4 a).

⁶⁷⁴⁸ See s 14(4) of the Unfair Contract Terms Bill published in Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

⁶⁷⁴⁹ Naudé ‘Section 52’ in Naudé and Eiselen (eds) *CPA Commentary* para 13, Naudé 2006 *Stell LR* 373 and 374.

⁶⁷⁵⁰ See also Naudé ‘Section 48’ in Naudé and Eiselen (eds) *CPA Commentary* para 17. In *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA), the SCA decided in an obiter dictum that a term excluding liability for death caused negligently would probably be contrary to public policy because it conflicts with s 11 of the Bill of Rights, namely the right to life. It should be noted that terms excluding or limiting the liability for death or personal injury are presumed to be unfair under reg 44(3)(a).

⁶⁷⁵¹ BGHZ 22, 91 (98); 17, 1 (3).

‘abstract’ or ‘general use’ challenges brought by consumer organisations or regulators, where no individual consumer is involved in the given dispute.⁶⁷⁵²

Hence, South African courts should not only apply the factors contained in section 52(2), but also those taken into account in foreign legislation. Even though the German regime does not provide for a list of factors, in consumer contracts, the 'other circumstances attending the entering into of the contract must also be taken into account'. For the definition of these 'other circumstances', the EU Unfair Terms Directive gives guidance. In order to enhance predictability and certainty, South African courts should also be able to declare terms unfair *per se* in a particular industry, or based on the 'tendency of the clause'. Such an objective finding is the German approach and the basis of institutional actions.

4.4.1 Factors listed in section 52(2) of the Consumer Protection Act

a) Fair value of the goods or services

South African courts can consider the fair value of the given goods or services in terms of section 52(2)(a). The fact that a price exceeds the market price of the relevant goods or services is in itself not sufficient to declare it unfair because, as discussed before, the South African legislator did not intend to introduce a price control mechanism in the Act.⁶⁷⁵³ There are instances though where the price of a product reflects the existence of exemption clauses or extended warranties or guarantees and their influence on the price. When assessing the fairness of a price, also other clauses should hence be considered.⁶⁷⁵⁴

As the German regime applies an abstract-universal approach, this factor is not relevant under §§ 305 *et seq.* What is more, the so-called 'price argument'⁶⁷⁵⁵ in terms of which an unfair clause might become fair by compensating it with a lower price, is generally irrelevant.⁶⁷⁵⁶ An exception exists where the consumer has a real choice between different versions of a contract entailing different prices, e.g., with or without the seller's liability.⁶⁷⁵⁷ The BGH also puts some weight on the price argument and the exclusion of the supplier's liability in the electricity

⁶⁷⁵² Naudé 'Section 48' in Naudé and Eiselen (eds) *CPA Commentary* para 18.

⁶⁷⁵³ Sharrock 2010 *SA Merc LJ* 309, Sharrock *Judicial control* 131.

⁶⁷⁵⁴ Naudé 'Introduction to Sections 48-52 and regulation 44' in Naudé and Eiselen (eds) *CPA Commentary* para 5. See Part I ch 3 para 2.1.

⁶⁷⁵⁵ *Preisargument*.

⁶⁷⁵⁶ BGH *NJW-RR* 2008, 818 (820), UBH/*Fuchs* § 307 para 145.

⁶⁷⁵⁷ UBH/*Fuchs* § 307 para 148, Palandt/*Grüneberg* § 307 para 18.

supply sector.⁶⁷⁵⁸ In other instances, the German regime does not consider price issues so that both regimes are only comparable to this extent.⁶⁷⁵⁹

b) Nature of the parties

The nature of the parties, their relationship to each other and their relative capacity, experience and bargaining position etc. are factors that relates to procedural fairness.⁶⁷⁶⁰

Because of the general-abstract approach of the German regime, these factors are not considered under the general clause. An exception exists for consumer contracts under § 310(3) where also 'the other circumstances attending the entering into of the contract' must be considered. Such 'other circumstances' are personal characteristics of the contractual partners which may influence their respective bargaining position, their knowledge and experience and the dependence on the contractual performance. For practical reasons and legal certainty, only apparent deviations are taken into account in standard contracts. Furthermore, the particularities of the concrete situation at the moment of the conclusion of the agreement must be taken into account (information provided by the user before the conclusion of the contract, duration and intensity of the negotiations, or tactics to surprise and overpower the other party). Lastly, the existence of untypical particular interests of the consumer belongs to such 'other circumstances' that have to be considered where they are visible for the user.⁶⁷⁶¹

In the German regime, the characteristics mentioned in section 52(2)(b) of the Act thus only apply in consumer contracts. For legal certainty and practicability, only apparent characteristics should be considered in both regimes.

c) Circumstances of the transaction

The circumstances that existed or were reasonably foreseeable when the contract was concluded (section 52(2)(c)) are also a procedural aspect that the German law can only take into account in the context of consumer contracts under § 310(3). The German provision limits the scope of application to circumstances 'attending the entering into of the contract' (*'die den Vertragsschluss begleitenden Umstände'*) though. If circumstances that were merely 'foreseeable', i.e., those that were not yet existent, must also be taken into account is not clear. It is suggested that such foreseeable circumstances can only be considered when they had an influence on the conclusion of the contract and have been known by both sides. This is

⁶⁷⁵⁸ BGH NJW 1998, 1640 (1644).

⁶⁷⁵⁹ See discussion of the price argument in Part II ch 5 para 3.2.5 e).

⁶⁷⁶⁰ See discussion of this factor in Part I ch 3 para 4.1.4 a) bb).

⁶⁷⁶¹ UBH/Fuchs § 307 paras 406-409. See Part II ch 5 para 3.2.4 b).

congruent with Sharrock's view in the South African context, according to which only circumstances of which *both* parties knew about or should have reasonably foreseen are relevant in terms of section 52(2)(c).⁶⁷⁶²

Unlike German law⁶⁷⁶³ and other legal systems, the South African regime does not recognise a doctrine of 'change of circumstances' or 'hardship' allowing the cancellation or adaption of a contract when *unforeseeable* circumstances arise. Since the South African legislator seems to be 'paralysed with indecision' on this topic, the common law should be developed in this regard.⁶⁷⁶⁴ This could be done by introducing a definition of hardship in order to cover frustration of purpose and impracticability.⁶⁷⁶⁵ Sharrock opines that a possible solution would be the reliance on a tacit resolutive condition.⁶⁷⁶⁶ Then, 'a contract terminates, even though it is not physically or legally impossible to perform if circumstances change so fundamentally as to remove the basis of the contract and negate the purpose or object that the parties had in mind when they contracted'.⁶⁷⁶⁷ Ideally, the legislature should introduce a doctrine of 'change of circumstances' or 'hardship'.

d) Conduct of the parties

The conduct of the parties when concluding their agreement (section 52(2)(d))⁶⁷⁶⁸ is a procedural factor too that in the German regime can only be taken into account for consumer agreements in terms of § 310(3).

⁶⁷⁶² Sharrock 2010 *SA Merc LJ* 311, Sharrock *Judicial control* 132.

⁶⁷⁶³ In German law, this is called 'interference with the basis of the transaction (*Störung der Geschäftsgrundlage*)' (§313 BGB), which is based on the former doctrine of 'cessation of the basis of the transaction (*Wegfall der Geschäftsgrundlage*)'. This doctrine was originally developed by the courts and is similar to the English doctrine of frustration. See Sharrock 2010 *SA Merc LJ* 312 note 99, Sharrock *Judicial control* 133 note 99. **§ 313 BGB:** '(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.' The English doctrine of frustration, on the other hand, provides for the possibility that a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract. See Law *Oxford Dictionary of Law* s.v. 'Frustration of contract'.

⁶⁷⁶⁴ Hutchison *PhD thesis* 245, Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 24.

⁶⁷⁶⁵ Hutchison *PhD thesis* 232 *et seq.*

⁶⁷⁶⁶ Sharrock 2010 *SA Merc LJ* 312 note 99, Sharrock *Judicial control* 133 note 99.

⁶⁷⁶⁷ Sharrock *Judicial control* 133 note 99.

⁶⁷⁶⁸ See discussion of this factor in Part I ch 3 para 4.1.4 a) dd).

As suggested in Part I,⁶⁷⁶⁹ conduct may also take the form of an omission, e.g., where the supplier did not fully answer pertinent questions of the customer so that the latter did not obtain a full picture of his or her rights and obligations. This also applies to cases where the supplier puts pressure on the consumer to sign the contract without allowing him or her to read it.

This is in line with the German legislation in terms of consumer contracts where the type and the scope of the information given by the standard terms user before the entering into the contract as well as the refusal to inform the consumer appropriately are taken into account as 'other circumstances' in terms of § 310(3).⁶⁷⁷⁰ Pressure too can be considered as tactics to overpower the other party.⁶⁷⁷¹

For the consideration of the conduct of the parties, a wide stance should thus be taken that also considers withheld information, any form of pressure and other tactics to overpower consumers.

For the consideration of the conduct of the parties, South African courts should take a wide stance which also considers withheld information or other omissions, any form of pressure and other tactics to overpower consumers.

e) Existence of negotiations and their extent

Item (e) of section 52(2) concerns negotiated terms. South African legislation does also include these in the fairness enquiry.⁶⁷⁷²

In German law, § 305b sets out that individually agreed terms take priority over standard terms and therefore are not controllable in terms of fairness (§ 305(1) 3rd sent.).⁶⁷⁷³

What is more, according to § 305(1) 3rd sent., contract terms do not become standard terms to the extent that they have been *negotiated in detail* between the parties. German courts apply a very high standard for that standard terms can be considered negotiated in detail in the sense of § 305(1) 3rd sent. The fact that the parties 'negotiate' is not sufficient. The BGH requires that the parties meet the conditions of an '*Aushandeln*' and not only of a '*Verhandeln*'.⁶⁷⁷⁴ '*Aushandeln*' requires that the user places the clauses that differentiate from the statutory provisions seriously at the other party's disposal and allows the client the liberty to shape the

⁶⁷⁶⁹ Part I ch 3 para 4.1.4 a) dd).

⁶⁷⁷⁰ UBH/*Fuchs* § 307 para 408.

⁶⁷⁷¹ In this sense: UBH/*Fuchs* § 307 para 408.

⁶⁷⁷² See discussion of this factor in Part I ch 3 para 4.1.4 a) ee).

⁶⁷⁷³ See Part II ch 2 para 1.1.4 b).

⁶⁷⁷⁴ BGH *NJW-RR* 2005, 1040; *NJW* 2013, 856; 2014, 1725 (1727).

content of these terms.⁶⁷⁷⁵ Hence, the user must be ready to modify its standard terms accordingly. It is not sufficient that the user expresses its *general* and diffuse willingness to modify specific clauses if the other party wishes so,⁶⁷⁷⁶ or that the client is 'free' to sign the contract or to step away.⁶⁷⁷⁷

The Act does not define the term 'negotiation'. With regard to other factors, it is assumed that this factor has to do with choice. The question therefore is whether the consumer had a real opportunity to influence the contents of the contractual terms. The mere fact that a supplier presents the consumer with more than one pre-formulated alternative to choose from does not qualify as 'negotiation'.⁶⁷⁷⁸ It is my submission that real negotiation only takes place where the parties have the liberty to alter terms without being limited to pre-formulated clauses.

The German regime excludes negotiated terms from content control *per se*, whereas these are included in terms of section 52(2). To which extent is unclear, however. In any event, the South African courts should distinguish between negotiated and non-negotiated terms.

f) No legitimate interest of the supplier

A corresponding provision to item (f) of section 52(2)⁶⁷⁷⁹ cannot be found in the German regime. Even for consumer contracts under § 310(3), the user's interests cannot be considered 'other circumstances' attending the conclusion of the contract.

A factor for the fairness enquiry in the German context is the insurability of the risk though. Hence, it is crucial to know whether the risks involved can be insured better by the user (supplier) or the other party (consumer).⁶⁷⁸⁰ In this context, the economic analysis of the law refers to the 'cheapest insurer'.⁶⁷⁸¹ Not only the possibility to insure the risk is relevant in this regard, but also the premiums to be paid as well as the coverage offered. In addition, the claims settlement must be acceptable for the party in question and be a widespread practice.⁶⁷⁸² Where it is common practice that the consumer insures the risk inherent to a particular business sector, the supplier can rely on this practice, and the exclusion of the risk is not an unreasonable

⁶⁷⁷⁵ BGH NJW 2013, 856; 2014, 1725 (1727); BAG NZA 2006, 40 (44); 2008, 229, Brox and Walker *SchuldR-AT* 40.

⁶⁷⁷⁶ BGH NJW-RR 2005, 1040 (1041).

⁶⁷⁷⁷ BGH NJW 2005, 2543.

⁶⁷⁷⁸ Stoop *LLD thesis* 152.

⁶⁷⁷⁹ See discussion of this factor in Part I ch 3 para 4.1.4 a) ff).

⁶⁷⁸⁰ BGH NJW 1991, 1886 (1888); 2002, 673 (675), UBH/*Fuchs* § 307 para 156 *et seq.*, von Hoyningen-Huene § 9 AGBG para 216 *et seq.*

⁶⁷⁸¹ Schäfer and Ott *Ökonomische Analyse* 407 *et seq.*

⁶⁷⁸² BGH NJW 1992, 1761 (1762), UBH/*Fuchs* § 307 para 159.

disadvantage for the consumer.⁶⁷⁸³ A shift of the supplier's liability onto the consumer does thus not raise concern where usually the clients insure the risk(s) in question.⁶⁷⁸⁴

For the fairness control of a clause which passes a certain risk onto a party, it is relevant to enquire in whose sphere the risk is passed onto, and if the realisation of the risk can be avoided better and cheaper by the consumer or the supplier. This will generally be the person controlling the risk.⁶⁷⁸⁵ This criterion is confirmed by the economic analysis of the law which aims at allocating the risk of a breach or default of the contract to the 'cheapest cost avoider'.⁶⁷⁸⁶

According to section 52(2)(f) of the Consumer Protection Act, the court must consider whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier.⁶⁷⁸⁷

In the South African regime, the enquiry of the legitimate interest of the supplier begs the question of whether a term represents a proportionate response to the supplier's interest. Such an interest is, for instance, a risk faced by it, other possible ways by which it could have protected its interest as well as market practice.⁶⁷⁸⁸ Where the supplier limits its liability, one must consider whether it was reasonable to expect it to insure itself against the liability and whether the consumer could be expected to insure him- or herself. Regarding the consumer, the question of whether the supplier had advised the consumer timeously to take insurance, or whether the consumer should otherwise have realised that he or she needed insurance, are essential factors for this enquiry.⁶⁷⁸⁹

The factor contained in section 52(2)(f) thus only plays a role in the German regime with regard to insurance. The aspect of risk control and the concept of the cheapest insurer should apply in the South African regime too.

⁶⁷⁸³ BGH NJW 1992, 1761 (1762).

⁶⁷⁸⁴ BGH NJW 2002, 673 (675).

⁶⁷⁸⁵ BGH NJW 2005, 422 (424), von Hoyningen-Huene § 9 AGBG para 190 *et seq.*

⁶⁷⁸⁶ Schäfer and Ott *Ökonomische Analyse* 227 *et seq.*, Stoffels *AGB-Recht* 192.

⁶⁷⁸⁷ Two **factors of the SA Law Commission's list** implicitly refer to the legitimate interest criterion: '(m) whether a term is unduly difficult to fulfil, or imposes obligations or liabilities on a party which are *not reasonably necessary* to protect the other party' and '(n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is *not reasonably necessary* to protect his or her interests'. Emphasis added.

⁶⁷⁸⁸ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 28.

⁶⁷⁸⁹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 30.

g) Plain language / transparency

The plain language requirement of section 52(2)(g),⁶⁷⁹⁰ read in conjunction with section 22, is also expressed in § 307(1) 2nd sent. According to the German provision, '[a]n unreasonable disadvantage may also arise from the provision not being clear and comprehensible.'

In the Act, the transparency requirement is set out in various other provisions, such as section 48(2)(c), read with section 41 (false, misleading or deceptive representations), or section 48(2)(d)(ii), read with section 49 (terms must be drawn to the consumer's attention).

Fuchs and Stoffels legitimately argue that incompliance with the transparency requirement leads to ineffectiveness of a provision if the intransparency leads to an unreasonable disadvantage.⁶⁷⁹¹ The determination of such an unreasonable disadvantage is dispensable though if there is an irrefutable presumption that such a disadvantage exists.⁶⁷⁹² Since the enquiry of the existence of an unreasonable disadvantage is performed without having a particular consumer in mind, there is an irrefutable presumption of an unreasonable disadvantage in cases where an abstract danger of the loss of market opportunities exists.⁶⁷⁹³ This is even more so where intransparency results in the concealment of the real legal position as the customer might be deterred to claim his or her rights.⁶⁷⁹⁴ The actual realisation of this danger is not necessary because under § 307(1) 2nd sent., an unreasonable disadvantage is already given if the provision is unclear. Hence, it can be argued that intransparency leads to ineffectiveness of a standard clause where the determination of a disadvantage due to intransparency is not necessary. This view is covered by the wording of § 307(1) 2nd sent. and by the governmental argumentation, according to which intransparent clauses are to be considered ineffective *per se* without a material unreasonable disadvantage.⁶⁷⁹⁵ In Stoffel's view, this formulation is misleading, though, because the unreasonableness of a disadvantage is necessarily a consequence of the clause's intransparency.⁶⁷⁹⁶

In practice, it should not matter whether the plain language or the transparency requirement are assessed on an abstract-general manner or with having the individual consumer in mind. This applies even more because of the fact that the determination of a disadvantage due to

⁶⁷⁹⁰ See discussion of this factor in Part I ch 3 para 4.1.4 a) gg).

⁶⁷⁹¹ UBH/*Fuchs* § 307 para 330, Stoffels *AGB-Recht* 236.

⁶⁷⁹² Stoffels *AGB-Recht* 236. According to Fuchs (UBH § 307 para 331), this view goes too far. Coester (Staudinger (2006) § 307 para 174) opines that this irrefutable presumption exists 'as a general rule'.

⁶⁷⁹³ Staudinger/*Coester* (2006) § 307 para 175 *et seq.*, OLG Celle *NJW-RR* 1995, 1133.

⁶⁷⁹⁴ Staudinger/*Coester* (2006) § 307 para 178.

⁶⁷⁹⁵ BT-Drs. 14/6014 at 154.

⁶⁷⁹⁶ Stoffels *AGB-Recht* 237.

intransparency is unnecessary under the German regime, and in terms of the Consumer Protection Act, the plain language requirements of section 22 are applied to 'an ordinary consumer of the *class of persons* for whom the [document] is intended'.⁶⁷⁹⁷

According to the Act, plain language is merely a factor that the courts must consider, and does not lead automatically to voidness of a clause. Since standard clauses that are written in an incomprehensible manner are unfair *vis-à-vis* consumers, the courts will most likely strike down such provisions though. This is in line with German legislation where an unreasonable disadvantage ('unfairness') exists in the case of unclear or incomprehensible provisions.

h) Knowledge of unfair terms

In terms of section 52(2)(h), a court must consider whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, having regard to any custom of trade, and any previous dealings between the parties. This item hence concerns procedural fairness taking precedence over substantial fairness.⁶⁷⁹⁸

Besides the fact that the BGB applies a supra-individual and generalising approach, § 305(2)⁶⁷⁹⁹ provides that the user simply must explicitly refer to the contract terms at the time when the parties enter into a contract in an acceptable manner, and the other party has to have the opportunity to take notice of their contents.⁶⁸⁰⁰ If the reference to such terms is only possible with disproportionate difficulty, it is sufficient to post the terms in a visible manner at the place where the contract is concluded. In special cases (transportation, telecommunications, information services etc.), § 305a allows incorporation without compliance with these requirements if the consumer agrees to their applying. If these conditions are not fulfilled, the clauses do not become part of the contract.⁶⁸⁰¹ It is thus irrelevant if the consumer took the opportunity to take knowledge of the given terms.⁶⁸⁰² In German law, it is not necessary to expressly point out unfair terms, as long as the entire legal instrument of standard terms has

⁶⁷⁹⁷ Emphasis added.

⁶⁷⁹⁸ See discussion of this factor in Part I ch 3 para 4.1.4 a) hh).

⁶⁷⁹⁹ § 305(2): 'Standard business terms only become a part of a contract if the user, when entering into the contract, 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and 2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents, and if the other party to the contract agrees to their applying.'

⁶⁸⁰⁰ WLP/Pfeiffer § 305 para 62.

⁶⁸⁰¹ See discussion in Part II ch 3 paras 1.1-1-3.

⁶⁸⁰² UBH/Ulmer and Habersack § 305 para 145, Stöffels *AGB-Recht* 99.

been duly incorporated into the contract. It is also not relevant whether the consumer has read or understood the terms.

For consumer agreements in terms of § 310(3) an individual approach must be applied by taking into consideration the circumstances attending the conclusion of the given contract, however. The standard business terms user has to inform its client about the terms of the agreement and answer pertinent questions.⁶⁸⁰³ Hence, if the other party knew about terms that are disadvantageous for him or her, one might conclude that the given terms are not unfair.

The Law Commission of England and Wales and the Scottish Law Commission take the same stance.⁶⁸⁰⁴ It should also be applied to the South African context. According to these commissions, courts should consider if the party understood a term's meaning if a person in a similar position as the consumer would usually expect a similar transaction in the given situation, the information given to the consumer before he or she signed the contract as well as further explanations made by the supplier. Furthermore, the courts should assess whether the consumer had a reasonable opportunity to absorb provided information as well as the complexity of the transaction, and whether it was transparent and if the consumer took professional advice or was reasonable to expect to have done so. It is noteworthy that the UK Law Commissions refer to the 'knowledge and *understanding*' instead of merely 'knowledge'.⁶⁸⁰⁵

Other considerations, such as customs of trade or previous dealings between the parties, which are set out in section 52 of the Act, are not part of these considerations in the German regime, however. In the German context, knowledge of unfair terms is thus only relevant in consumer contracts. In any case, South African suppliers should ensure that their customers understand their standard terms and give, where necessary, additional explanations

i) Possibility to acquire identical goods or services elsewhere at a better price

Item (i) of section 52(2) refers to goods or services from another supplier at a better price. This factor creates many practical problems that have been discussed earlier.⁶⁸⁰⁶ For instance, the phrase 'could have acquired' is problematic as the mere theoretical possibility of better terms or a better price is difficult to assess. With regard to the general irrelevance of the price

⁶⁸⁰³ UBH/*Fuchs* § 307 para 408.

⁶⁸⁰⁴ Paragraph 45 of the Explanatory Notes to the Unfair Contract Terms Bill, set out in *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005) at 161.

⁶⁸⁰⁵ Emphasis added.

⁶⁸⁰⁶ See discussion of this factor in Part I ch 3 para 4.1.4 a) ii).

argument in German standard business terms legislation⁶⁸⁰⁷ and the fact that the price is not subject to content control under German law in terms of § 307(3), considerations concerning factor (i) are not part of German standard business terms legislation. This is because in a market economy, the price for goods or services is agreed between the parties and not determined by law, which is why the German legislator did not want to submit price control to the courts.⁶⁸⁰⁸ Prices that are charged for a performance for which the supplier is obligated by law⁶⁸⁰⁹ or which he or she charges in its own interest are subject to content control though.⁶⁸¹⁰

As discussed earlier in Part I,⁶⁸¹¹ in practice, this factor should have not much relevance.

j) Special order goods

Section 52(2)(j) contains a factor concerning special order goods (services are not included in this item).⁶⁸¹²

Even though German standard business terms legislation applies an abstract-general approach, the considerations contained in the South African provision could be taken into account in consumer contracts (§ 310(3)). Indeed, it is recognised that the consumer's special interests fall under the definition of 'other circumstances attending to the entering into of the contract'. If the user is aware of a special interest or a very special purpose that the consumer associates with the contract, the user may be obliged, pursuant to the principle of good faith, to consider this when drawing up the contract. This may have the consequence that certain clauses, which are usually unobjectionable, do not fit in this individual case, and their use may thus be unfair.⁶⁸¹³

It is suggested that for other contracts than consumer contracts, the application of § 307(2) no. 2 allows for a more lenient approach for special order goods.

The German considerations do not contribute to new considerations in terms of the South African regime though.

⁶⁸⁰⁷ See Part II ch 5 para 3.2.5 e).

⁶⁸⁰⁸ BT-Drs. 7/3919 at 22, Larenz and Wolf *BGB-AT* 784.

⁶⁸⁰⁹ BGH *NJW* 2000, 651; 2001, 1419 (notification of the client that a debit order has not been honoured; banks have a duty to notify their clients of these facts in terms of § 666).

⁶⁸¹⁰ BGH *NJW* 2001, 1419; 2002, 2386 (deactivation fee for a telephone line). See Part II ch 5 para 3.1.

⁶⁸¹¹ Chapter 3 para 4.1.4 a) ii).

⁶⁸¹² See discussion of this factor in Part I ch 3 para 4.1.4 a) jj).

⁶⁸¹³ UBH/*Fuchs* § 307 para 409.

4.4.2 Other factors not listed in section 52(2) of the Act

Since the factors listed in section 52(2) are not exhaustive, South African courts may take into consideration also other factors.⁶⁸¹⁴

a) Nature of goods or services

One of the factors not listed in the Consumer Protection Act, but mentioned in recital 18 of the EU Unfair Terms Directive is the nature of the goods or services that is taken into consideration when assessing the fairness of a standard clause.⁶⁸¹⁵

Under article 3(1) of the Unfair Terms Directive, '[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' Article 4 concretises which elements have to be considered for the fairness enquiry, such as *the nature of the goods or services*, and the circumstances attending the conclusion of the contract.⁶⁸¹⁶

The nature of the goods or services is a crucial characteristic of the goods or services sold, having a direct impact on the formulation of the terms and conditions. Since the German general clause is a widely formulated catch-all clause, most authors agree that a (theoretical) divergence between the Unfair Terms Directive and § 307 can be resolved by applying the methods of interpretation.⁶⁸¹⁷ This approach would not be contrary to the abstract-universal approach of §§ 305 *et seq.* because not the nature of the parties, but the nature of the goods or services are subject to the enquiry.

Because of the importance of this factor, it should be taken into account in South Africa too.

b) Balance of the parties' interests

In a synallagmatic contractual relationship, the parties' rights and obligations should be balanced.⁶⁸¹⁸ Thus, an overall view of all contractual terms is necessary.⁶⁸¹⁹ Article 3(1) of the EU Unfair Terms Directive takes into account 'a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. § 307(1) 1st sent.

⁶⁸¹⁴ See Part I ch 3 para 4.1.4 b) (Other factors not listed in section 52(2)).

⁶⁸¹⁵ See discussion of this factor in Part I ch 3 para 4.1.4 b) aa).

⁶⁸¹⁶ See Part II ch 5 para 3.2.4 a).

⁶⁸¹⁷ Staudinger/*Coester* (2006) § 307 para 80.

⁶⁸¹⁸ See discussion of this factor in Part I ch 3 para 4.1.4 b) bb).

⁶⁸¹⁹ See s 14(4)(c) and (d) of the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

contains a similar provision, but instead of a 'significant imbalance', an 'unreasonable disadvantage' is required.⁶⁸²⁰ In German literature, content control is justified by the concept of 'warranted rightness',⁶⁸²¹ which is based on the premise that contracts reflect an 'objectively righteous order' that is disturbed in the case of a structural imbalance. This imbalance has to be mended by legal control.⁶⁸²² The balance of the parties' interests thus seems to be the foundation of every contract and should be considered in the fairness enquiry of South African courts too.

c) Inter-dependent terms

This factor means that the provisions of a contract must not be seen in isolation, but that also the circumstances and the context of the agreement must be taken into account.⁶⁸²³

Under section 48(2) *in pr.* of the Act, the fairness review does not only cover individual clauses but also transactions or agreements as a whole.⁶⁸²⁴

Contrary to the South African regime, content control under §§ 305 *et seq.* always refers to a specific contractual clause and never to the entire contractual agreement.⁶⁸²⁵ This emanates from the wording of § 307(1) ('provisions in standard business terms'). An exception to this rule exists for § 307(2) no. 2 because for the determination of the jeopardising of the purpose of the *contract*, the assessment of the *entire* agreement and not only parts of it is necessary. In this regard, one must consider that compensatory clauses can also reach the contractual purpose.⁶⁸²⁶

The disadvantageous effect of a clause that itself is still acceptable can be intensified by another clause so that the interplay between the two provisions creates an unreasonable disadvantage.⁶⁸²⁷ In general, this leads to the ineffectiveness of both clauses,⁶⁸²⁸ irrespective of

⁶⁸²⁰ WLP/Wolf § 307 para 74.

⁶⁸²¹ *Richtigkeitsgewähr*.

⁶⁸²² Schmidt-Rimpler *AcP* 147 (1941) at 149, Lieb *AcP* 178 (1978) 203.

⁶⁸²³ See discussion of this factor in Part I ch 3 para 4.1.4 b) cc). See also s 52(2)(c) and (e). See also art 4 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 and art 83(2) of the Proposal for a Regulation of the European Parliament and of the Council on the Common European Sales Law COM (2011) 635 final of 11 October 2011 and art 32(2) of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final, submitted on 8 October 2008.

⁶⁸²⁴ **Section 48(2):** '(...) a transaction or agreement, or a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if (...)'.
⁶⁸²⁵ Von Hoyningen-Huene § 9 AGBG para 171. Staudinger/*Coester* (2006) § 307 para 89.

⁶⁸²⁶ Staudinger/*Coester* (2006) § 307 para 280. See Part II ch 5 para 3.3.4 b) cc).

⁶⁸²⁷ BGH *NJW* 2006, 2116 (2117); 2007, 997 (999), UBH/*Fuchs* § 307 para 155, PWW/*Berger* § 307 para 10, von Hoyningen-Huene § 9 AGBG para 177.

⁶⁸²⁸ BGH *NJW* 2007, 997 (999), Palandt/*Grüneberg* § 307 para 13.

whether one clause was a standard clause and the other individually agreed.⁶⁸²⁹ In German law, this phenomenon is referred to as 'accumulative effect'.

On the other hand, the compensational effect refers to cases where a clause presenting a disadvantage for the consumer might be compensated by other, advantageous contractual provisions so that the interaction between these clauses does not constitute an unreasonable disadvantage. The consideration of such an advantageous clause is only permitted though if there is a material connection between the two provisions, and the advantageous clause has sufficient weight for adequate compensation.⁶⁸³⁰

The idea of the compensational effect has also been expressed in *Barkhuizen v Napier*: '[T]he idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damage for breach, should be matched by corresponding benefits to the other party.'⁶⁸³¹

More generally, also in terms of the Act, contract terms must not be seen in isolation but also the circumstances and the context of the agreement must be considered.⁶⁸³² In other words, the contract 'as a whole' must be taken into account because a provision of the agreement that confers a benefit on the consumer might be commensurate with the detriment caused by the provision alleged to be unfair.⁶⁸³³ The accumulative and compensational effects are thus also applicable in South African legislation.

⁶⁸²⁹ BGH NJW 2006, 2116 (2117).

⁶⁸³⁰ See discussion on the accumulative and compensational effects in Part II ch 5 para 3.2.5 a). BGH NJW 2003, 888 (890 *et seq*), Staudinger/*Coester* (2006) § 307 para 125, PWW/*Berger* § 307 para 10. Von Hoyningen-Huene § 9 AGBG para 173 does not require such a connection.

⁶⁸³¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [165], where Sachs J cites Collins *Law of Contract* 253.

⁶⁸³² See s 52(2)(c) and (e). See also art 4 of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 and art 83(2) of the Proposal for a Regulation of the European Parliament and of the Council on the Common European Sales Law COM (2011) 635 final of 11 October 2011 and art 32(2) of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final, submitted on 8 October 2008.

⁶⁸³³ Sharrock 2010 SA *Merc LJ* 314, Sharrock *Judicial control* 136.

d) Extent to which a term differs from statutory provisions

This factor has been formulated by the South African Law Commission.⁶⁸³⁴ Another factor is the extent to which the term differs from what would have been in the case of its absence.⁶⁸³⁵

The German BGB chose a much more comprehensive formulation by which unfairness is presumed if a term 'is not compatible with essential principles of the statutory provision from which it deviates'.⁶⁸³⁶ This refers to the residual rule in the relevant part of the BGB.⁶⁸³⁷ With the insertion of this provision, the legislator built on Ludwig Raiser's work and the preceding case law⁶⁸³⁸ concerning the guiding function of the *ius dispositivum*, serving as a concretisation of the content control standard.⁶⁸³⁹

The term 'statutory provision' from which a clause deviates is interpreted widely both by the courts and legal literature. According to this view, not only the norms contained in the BGB but also all unwritten legal principles, the principles developed by the courts as well as the rights and obligations resulting from the nature of the given agreement or the gap-filling interpretation in terms of §§ 157 and 242 fall under this term.⁶⁸⁴⁰

Others plead for a more restrictive interpretation of the term 'statutory provision' in the context of § 307.⁶⁸⁴¹ This has an impact of the content control of not codified contract types because the normative standard for those agreements are not laid down in written laws.⁶⁸⁴²

Under article 2 EGBGB,⁶⁸⁴³ a 'statute' of the BGB includes any legal rule, i.e., substantive provisions.⁶⁸⁴⁴ The function of content control, i.e., the protection against the realisation of

⁶⁸³⁴ See discussion of this factor in Part I ch 3 para 4.1.4 b) dd). **Factors (w) and (x)** read as follows: '(w) whether, to the prejudice of the party against whom the term is proffered, the party proffering the term is otherwise placed in a position substantially better than that in which the party proffering the term would have been under the regulatory law, had it not been for the term in question; (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled'.

⁶⁸³⁵ This is the formulation of s 14(4)(g) of the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005).

⁶⁸³⁶ § 307(2) no. 1.

⁶⁸³⁷ For the discussion what the phrase 'essential principles of the statutory provision' means, see, e.g., Stoffels *AGB-Recht* 197 *et seq.* with further references.

⁶⁸³⁸ Raiser *Recht der AGB* 293 *et seq.* See also the chapter 'Historical overview' in Part II ch 1.

⁶⁸³⁹ Larenz and Wolf *BGB-AT* 787, Boecken *BGB-AT* 312.

⁶⁸⁴⁰ BGH *NJW* 1993, 721 (722); 1998, 1640 (1642), WHL/Wolf § 9 AGBG para 66, UBH/Brandner (2001) § 9 AGBG para 140. See Part II ch 5 para 3.3.3.

⁶⁸⁴¹ Von Hoyningen-Huene § 9 AGBG para 245 *et seq.*, Zöllner *RdA* 1989, 159 *et seq.*

⁶⁸⁴² Stoffels *AGB-Recht* 199.

⁶⁸⁴³ **Article 2 EGBGB:** "Statute" under the Civil Code and under this Act means any legal rule.'

⁶⁸⁴⁴ Staudinger/Merten (2006) Art 2 EGBGB para 4.

freedom of contract to the benefit of only one party,⁶⁸⁴⁵ could not properly be fulfilled though if 'statutory provision' would exclusively include provisions of the *ius dispositivum*.

General legal principles are only included in the term 'statute' of article 2 EGBGB if they are reliably developed from positive law by means of analogy and can be regarded as a legal rule.⁶⁸⁴⁶ Judicial rulings are thus excluded from the meaning of 'statute' because they have no mandatory general effect for an undetermined number of persons.⁶⁸⁴⁷ As discussed in Part II,⁶⁸⁴⁸ general legal principles should be regarded as 'statutory provisions' only – like in article 2 EGBGB – if they deviate from positive law by means of a methodologically reliable procedure. This is not the case, e.g., for principles that the courts base on the principle of good faith.⁶⁸⁴⁹ On the other hand, principles that have attained such a degree of concretisation that they are no longer distinguishable from legal provisions can be regarded as 'statutory provisions' in the sense of § 307(2) no. 1.⁶⁸⁵⁰

In the South African context, the common law is considered residual rules that have been developed during a long period of time and represent a fair balancing of interests of typical suppliers and consumers, with regard to the given type of contract. The residual rules do not always represent a fair balancing of the parties' interests however as those may differ in the different industries. A deviation from residual rules in itself is therefore not automatically unfair but can establish a fair balancing of the parties' interests. One should also consider that the generalised *naturalia* of a contract, i.e., the terms included *ex lege*, do not necessarily ensure a fair balancing of the parties' interests. It might be justified to deviate from them in order to accommodate the realities of the given trade sector.⁶⁸⁵¹

The German provision is thus more restrictive in terms of the requirements for statutory provisions than the factor suggested by the South African Law Commission. In the German regime, judicial decisions are not recognised as general legal principles to be considered in the context of statutory provisions.

⁶⁸⁴⁵ PWW/*Berger* § 307 para 6.

⁶⁸⁴⁶ Staudinger/*Merten* (2006) Art 2 EGBGB para 112.

⁶⁸⁴⁷ Staudinger/*Merten* (2006) Art 2 EGBGB para 40.

⁶⁸⁴⁸ See Part II ch 5 para 3.3.3 b).

⁶⁸⁴⁹ BGH *NJW* 1983, 1671 (1672).

⁶⁸⁵⁰ These principles are referred to as '*rechtssatzförmige Prinzipien*'. Larenz and Canaris *Methodenlehre* 479.

⁶⁸⁵¹ Naudé 'Section 52' in Naudé and Eiselen (eds) *CPA Commentary* para 45.

e) Greater costs for the supplier if the term were omitted

Higher costs for the supplier are inextricably linked to higher prices for the consumer. As discussed, in German law, the 'price argument' is generally not relevant. Furthermore, the advantage in terms of the price is not measurable with regard to the price that would be fair in the absence of the term.⁶⁸⁵²

Hence, in the South African context, one should not lay too much importance on this factor because prices are always difficult to assess.⁶⁸⁵³

f) Limitation of essential rights and duties inherent in the nature of the contract

Terms limiting essential rights and duties inherent in the nature or essence of the contract and therefore jeopardise the attainment of the contractual purpose are likely to be unfair.⁶⁸⁵⁴

This principle is reflected in § 307(2) no. 2. According to this provision, a term is presumably unfair if it 'is not compatible with essential principles of the statutory provision from which it deviates'.⁶⁸⁵⁵ The type of contract in question defines the essential rights and duties.⁶⁸⁵⁶

In *Mercurius Motors v Lopez*,⁶⁸⁵⁷ it was held that an exemption clause which 'undermines the very essence' of the type of contract in question should be clearly and pertinently brought to the attention of the consumer. Even if the consumer signs such an agreement knowing of the existence of such an exemption clause, the fact that it undermines the very essence of the type of contract is an indicator that it may be contrary to public policy. This is an indication for the consumer's compromised bargaining power because the supplier took advantage of its client's position. A term might be fair though when considering other circumstances.⁶⁸⁵⁸ It is suggested that it is problematic to sanction terms that put at stake the nature or essence of the contract and the attainment of the contractual purpose since they distort the contract as a whole. Such terms should thus never be fair.

⁶⁸⁵² See Part II ch 5 para 3.2.5 e). UBH/*Fuchs* § 307 para 144 and 145.

⁶⁸⁵³ See discussion of this factor in Part I ch 3 para 4.1.4 b) ee).

⁶⁸⁵⁴ See discussion of this factor in Part I ch 3 para 4.1.4 b) ff). See also § 307(2): 'An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision 1. is not compatible with essential principles of the statutory provision from which it deviates (...)' See also *Director General of Fair Trading v First National Bank* [2002] 1 All ER 97 para [54]: 'It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction'.

⁶⁸⁵⁵ For the discussion what the phrase 'essential principles of the statutory provision' means, see, e.g., Stoffels *AGB-Recht* 197 *et seq.* with further references.

⁶⁸⁵⁶ See Part II ch 5 para 3.3.4.

⁶⁸⁵⁷ 2008 (3) SA 572 (SCA).

⁶⁸⁵⁸ Naudé/Lubbe 2005 *SALJ* 441.

4.4.3 The role of good faith and public policy

As discussed in detail in Part I,⁶⁸⁵⁹ various judgements of South African courts as well as principles based on these decisions give guidance for the revetment of the concepts of unfairness and unreasonableness, together with the role of the principle of good faith. As mentioned earlier, the common law is still applicable under section 2(10) so that common-law jurisprudence is still a valuable source in the context of the Act.

Under the common law, agreements or clauses that are contrary to public policy are unenforceable. As confirmed many times by the courts, public policy is anchored in constitutional values.⁶⁸⁶⁰ Therefore, a term that offends against a constitutional value will also be unfair under the Consumer Protection Act. The notion of public policy is important as it is inseparably linked to other concepts, such as fairness, justice, equity and reasonableness.⁶⁸⁶¹

As discussed above, in *Beadica*, the Constitutional Court confirmed that courts cannot refuse to enforce contract terms for equity considerations, such as good faith, fairness and reasonableness as these values have no self-standing status. Only where contractual terms or their enforcement would be so unfair, unreasonable or unjust that they are contrary to public policy, a court has the right to refuse to enforce them.⁶⁸⁶²

The *pacta sunt servanda* principle still plays a crucial role in the context of the control of contracts by the courts through the principle of public policy. The protection of this maxim is indispensable for the achievement of the objectives set out in the Constitution.⁶⁸⁶³ This principle is not absolute though, and where several constitutional rights and values must be considered for the determination of whether enforcement of the terms would be contrary to public policy in the given case, these must be carefully balanced against each other.⁶⁸⁶⁴

In *Beadica*, the Constitutional Court also specified that the principle of 'perceptive restraint' must not hinder the courts from shying away from their constitutional duty to infuse public policy with constitutional values. Hence, the degree of necessary restraint must be balanced against the backdrop of the constitutional rights and values.

⁶⁸⁵⁹ Part I ch 3 para 4.1.4 c).

⁶⁸⁶⁰ See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁶⁸⁶¹ *Barkhuizen v Napier* para [51].

⁶⁸⁶² *Beadica* at para [80].

⁶⁸⁶³ *Beadica* at paras [83]-[85].

⁶⁸⁶⁴ *Beadica* at para [87].

Even though there seems to be some ambivalence on the exact role of fairness in the case law decided before the Act came into force, the ideas and arguments contained in these cases can serve the courts when deciding whether a clause has to be struck down because of unfairness in terms of the Act, and in order to curtail the principle of freedom of contract where necessary.⁶⁸⁶⁵

Inequitableness under section 48(2)(b), for instance, can be assessed with the help of evaluative elements, such as good faith. It is suggested that section 52 contains elements which emanate from the principle of good faith, which in the German regime is expressly anchored in the general clause.⁶⁸⁶⁶

Hence, although the principle of good faith is not expressly mentioned in the Act, its provisions are infused with this maxim and must be interpreted accordingly when assessing the fairness of a standard clause.

4.5 Burden of proof

Under section 48, the consumer carries the risk of non-persuasion and therefore has to convince the court that a term is unfair, unlike regulation 44, where the burden of proof lies with the supplier. Some authors defend this solution by stating that the greylist of regulation 44 is already very extensive and that it might be too drastic to lay the onus on the supplier under section 48.⁶⁸⁶⁷ Others favour the model suggested by the UK Law Commissions,⁶⁸⁶⁸ which distinguishes between litigation where individual consumers are involved, and general use challenges. In the first case, the burden of proof should lay on the business, whereas in the second case, the consumer organisation, regulator or National Consumer Commission should bear the onus. These institutions are in a stronger position than 'true' consumers to argue their case and in terms of the familiarity with the legislation. According to Naudé, in B2B transactions the onus of proof should always remain on the complainant, .⁶⁸⁶⁹

In the context of the German regime, some authors assert that § 307(2) is a provision governing the burden of proof.⁶⁸⁷⁰ According to this view, the user bears the onus of proof if he or she wants to assert that there is no unreasonable disadvantage for the other party. This view is

⁶⁸⁶⁵ Hawthorne 2004 *THRHR* 295.

⁶⁸⁶⁶ See § 307(1) 1st sent.

⁶⁸⁶⁷ See Naudé 2009 *SALJ* 535-536, with further references.

⁶⁸⁶⁸ Section 16(1) of the Unfair Contract Terms Bill published in Law Commissions of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199)(2005).

⁶⁸⁶⁹ Naudé 2009 *SALJ* 535.

⁶⁸⁷⁰ L/GvW/T/Löwe § 9 AGBG para 20, WHL/Wolf § 9 AGBG para 58.

contrary to the essence of proof though, which can only concern facts, and not legal evaluations or the weighing of interests. The question of whether the other party suffers an unreasonable disadvantage is a question of law that the courts have to answer. Factual questions do therefore not concern the fairness of a clause. Factual are questions that concern the enquiry of whether the contract clauses are standard business terms, or whether or not specific clauses of the agreement have been individually negotiated, for example.⁶⁸⁷¹ In other words, content control is always legal control.⁶⁸⁷² In practice, this means that the standard clause in question has to be compared with the position in which the other party would be without this clause.⁶⁸⁷³ This is underlined by the fact that in general, 307(2) no. 1 takes precedence over no. 2, for instance.⁶⁸⁷⁴

The distinction between questions of fact and legal problems should be adhered to also in South Africa. Excessive one-sidedness of an agreement (section 48(2)(a) or the adverseness of a transaction (section 48(2)(b)), for instance, are legal questions for which no proof is possible. On the other hand, the question of whether a consumer relied on a false or misleading representation (section 48(2)(c)), or whether the fact, nature and effect of a term was not drawn to the consumer's attention (section 48(2)(d)) are factual questions which are capable of proof.

5. Conclusion

South African and German legislation use a blacklist, a greylist and a general clause, respectively. This triad is an international standard and has proven to be the most effective tool for content control.

Nonetheless, both regimes show some notable differences in respect of content control. Content control for individual actions in Germany is legal control, performed *ex officio* within a lawsuit, whereas South African consumers have to allege a contravention of the Act. Content control in South Africa is equity control, applying an individualised approach. In contrast, the German regime applies a supra-individual and generalising approach. Since equity control caters for fairness in individual cases, it is not the most effective tool for fighting unfair standard terms in mass contracts. Both regimes apply the principles of public policy and good faith concurrently with their standard business terms legislation. The development of *Fallgruppen*,

⁶⁸⁷¹ UBH/Ulmer and Habersack § 305 paras 60 *et seq.*

⁶⁸⁷² Stöffels *AGB-Recht* 182.

⁶⁸⁷³ Staudinger/Coester (2006) § 307 para 90, BGH *NJW* 1994, 1069 (1070).

⁶⁸⁷⁴ Staudinger/Schlosser (1980) § 9 AGBG para 28. Tending to the same result: von Hoyningen-Huene § 9 AGBG para 282, UBH/Fuchs § 307 para 198.

or typified categories, by South African courts, according to the German model, would tremendously assist them in the development of the common law and prevent 'piecemeal solutions'. Besides, in both countries, standard business terms legislation cannot be seen in isolation but in synergy with other provisions and the common law. The latter especially applies to South Africa.

Content control in terms of the German regime does not include performance specifications, price agreements, declaratory clauses or negotiated provisions. In contrast, the South African legislator chose to include the core terms and negotiated clauses. The courts must consider all the relevant factors in this enquiry though, and the fact that these provisions may have been negotiated should be factored in. In this regard, content control in both regimes should thus come to the same results. On the other hand, declaratory clauses should be excluded from content control in South Africa since this area contains constitutional questions.

Price control by German courts is only allowed in specific cases. Section 48(1)(a)(i) is ambiguous with regard to a price control mechanism. It is however unlikely that the legislature wished to introduce such a mechanism in the Act.

In German standard business terms legislation, an 'open' content control is performed. South African courts should also aim at an open content control in which the interpretational control takes place before the content control so that the content of the clauses that must be assessed is entirely clear before the content control takes place.

As discussed, the validity of standard terms is purely a question of law in the German regime, and questions of fact play a minor role. This is not the case for South Africa, where questions of fact and the taking of proof are crucial for content control. This is a consequence of the concrete-individual approach of the Act. The same applies to the presumption that the terms in regulation 44(3) are unfair. This too is a consequence of the individual approach, as opposed to the evaluative standard applied in Germany.

Even though regulation 44 only applies to B2C agreements, this provision might have a reflective effect on B2B contracts, especially where smaller businesses are involved. The same applies to §§ 308 and 309 as these prohibitions are a specific manifestation of the evaluative standard of § 307. Thus, the reflective effect in both regimes ensures that also B2B agreements are included in the content control in terms of the general clause.

With regard to the **blacklists**, the main difference between the two pieces of legislation in terms of the personal scope of application lies in the fact that for the application of the Act, the threshold of section 5 must be met, whereas for the German regime there is no such requirement.

The blacklist of prohibited clauses is wordy and unnecessarily complicated, unlike § 309. The South African legislator should therefore reformulate section 51 so that it conforms to international standards.

In some instances, there are only minor differences between certain items of the South African blacklist and the German regime:

With regard to exclusions or restrictions of the user's/supplier's liability (section 51(1)(c) and § 309 no. 7 lit. b), respectively), the South African and German provisions merely differ in that § 309 no. 7 lit. b) contains exceptions concerning the transport and tariff rules for regular public transport services on the road, due to German idiosyncrasies. In order to achieve effective consumer protection, the South African regime should also include restrictive modalities, i.e., formal hindrances, in terms of section 51.

Fictional declarations and fictional receipts of documents, goods or services are prohibited under section 51(1)(g). In terms of false acknowledgements, both regimes are similar in that such provisions have the effect of modifying the burden of proof. The South African provision is somewhat narrower as the document in question has to be required by the Act, which is not the case for the German regime ('any document').

Other blacklisted provisions do not have a counterpart in §§ 307 *et seq.*, but their regulatory content can be found in other provisions:

Germany has no equivalent of the South African Guardian's Fund in terms of section 51(1)(f). The protection granted by this provision is achieved in Germany particularly by provisions of family law and the law of successions.

Furthermore, §§ 305 *et seq.* do not contain a similar item to section 51(1)(h) concerning the forfeiture of money to the supplier. The BGB contains provisions elsewhere with the same regulatory content, however, e.g., for travel package agreements or defective goods.

Even though the German regime does not contain a similar item to section 51(1)(d) with regard to negative option marketing, both pieces of legislation come to the same result in respect of

consumers, in particular in terms of § 241a. In the German regime, laxer rules apply to business people who maintain a commercial relationship, however.

On the other hand, the legal result of other items of the South African blacklist is achieved by applying the German general clause or other provisions:

The Consumer Protection Act contains several provisions prohibiting specific enforcement clauses. In both regimes, a court order is generally needed in these cases. In any event, such enforcement clauses would be invalid in Germany under § 307.

The German regime does not contain a similar item to section 51(1)(i)(ii) relating to undertakings to sign documents relating to enforcement. The same results are achieved by applying the general clause of § 307 though. A similar item concerning the deposit of documents with the supplier or the provision of a PIN etc. does not exist in the BGB. The GDPR, a European Regulation, applies instead. This means that the principles of data minimisation and storage limitation (art. 5(1) lit. c) and e) GDPR) apply. Both regimes thus prohibit the deposit of an ID and the provision of personal identification codes by different means. It is recommended that the South African legislator inserts a mechanism in the Act similar to the GDPR in which also the provision (i.e., not the deposit) of data contained in IDs etc. is regulated with regard to data minimisation and storage limitation.

The **greylists** of both pieces of legislation differ in that the items of the South African list are presumed to be unfair, whereas the German provisions contain evaluative elements in the form of indeterminate legal terms. This is in line with the respective individual-personalised and abstract-general approach.

As we have seen, despite the fact that both regimes chose different formulations and qualify specific items differently, notably with regard to their grey- or blacklisting, the level of protection is similar, and a balanced solution is offered in most cases. This is achieved by different means **(1.-4.)**. Other provisions are more restrictive than their counterparts **(5.)**, or have no counterpart at all **(6.)**. In some instances, the South African item offers a lower level of protection than the corresponding German provision **(7.)** Overlaps between these categories are possible.

1. Mostly, the two regimes offer a comparable standard for certain standard clauses in their respective black- or greylists and come to the same results, even if this means applying several

items in concert to achieve a comparable level of protection (e.g., **items (a), (b), (c), (h), (i), (k), (m), (n), (q), (r), (s), (v), (w)**).

The South African legislator should however blacklist the contents of regulation **44(3)(a)** because the greylisting of such terms is a systemic weakness with regard to the Constitution and the common law.

The editorial error contained in regulation 44(4)(a), with regard to **item (k)** should be corrected as this provision was meant for item (l) of regulation 44(3).

One-sided forfeiture clauses are greylisted in regulation **44(3)(q)** and blacklisted in § 309 no. 6. The German provision is not entirely congruent with the South African item, but equal protection can be achieved by §§ 308 no. 7, 309 no. 6 or 307. The German item focuses only on the supplier, whereas the item of the South African greylist includes both parties. This could be a reason why this item is blacklisted in Germany.

Fictitious receipts are dealt with in **item (w)** and § 308 no. 6. Since 'acts similar to legal transactions', such as overdue notices, are also of particular interest to consumers, they should also be covered by the South African item. Unlike the South African regime, German legislation does generally not accept the *prima facie* proof that a registered letter has actually reached the person for which it was intended. The South African legislature should insert also other means of communication in this item, however.

2. In some instances, the respective general clause is applied where the other regime grey- or blacklists a specific item (e.g., concerning **items (j), (o), (u) and (v)**).

This is, for instance, the case for **item (v)**. The legislation of both countries differs in that fictitious facts are assessed under § 309 no. 12 in the German regime, whereas for confirmation of facts, section 48 applies to South African clauses. For fictitious receipts, other provisions are applicable in both pieces of legislation.

3. In some instances, other German provisions contained elsewhere in the BGB or other pieces of legislation are applied (e.g., concerning **items (d), (g), (l), (t), (aa)**).

The German regime does not contain a similar item to regulation **44(3)(l)**, dealing with the termination of open-ended agreements. This is because the German legislator was of the opinion that continuing obligations are characterised by the fact that they can be terminated without any particular reason by ordinary termination. § 314 provides for an exception where

open-ended agreements may be terminated by both parties for compelling reasons without giving notice though. This difference of both regimes can be explained by their underlying dogmatic foundations: the Act is a pure consumer protection statute that aims to protect consumers, whereas the BGB provisions strive at a balanced solution for both parties.

Even though the German item's scope of application is limited to certain contract types, protection for other types of agreements in terms of **item (t)** is achieved by § 305c(1) (surprising clauses) and the general clause. Unlike the South African item, § 309 no. 10 is blacklisted. Because of the caveats contained in lit. a) and b) of this provision, this item is mitigated to a great extent, however. Both regimes thus offer a comparable level of protection only in terms of the transfer of obligations.

4. Although the two regimes qualify specific items differently (e.g., the counterparts of **items (f) and (y)** are blacklisted in Germany, whereas they are merely greylisted in South Africa), this is counter-balanced by other factors, e.g., by the fact that the burden of proof lies with the supplier (**item (r)**).

5. On the other hand, some items are more restrictive than their German counterparts (e.g., **items (c), (e), (f), (i), (p), (q), (t), (x), (y), (z)**).

In terms of **item (f)**, the South African legislator should consider including facilitations of the limitation period, i.e., measures that have the same result as a shortening of the limitation period, into the greylist because the consumers' need for protection is similar in these cases.

Since a restriction to court actions would not sufficiently honour the normative objective of **item (x)**, this provision should, similar to the German item, also apply to other proceedings, such as preservation of evidence or preliminary injunctions.

§ 309 no. 6 has a wider scope of application than **item (q)** (one-sided forfeiture clauses) as it directly applies to dependent penalty clauses, and by analogy to independent penalty clauses. Since the economic implications are the same for both types of penalty clauses, South African courts should apply item (q) by analogy also to independent penalty clauses.

§ 308 no. 1 1st sent. 2nd var. contains a provision that is similar to regulation **44(3)(p)**. Both deal with long performance periods. However, the German item covers more cases than the South African regime and is formulated in a more nuanced way. In order to achieve better protection, the South African item should also apply to all sorts of periods for performance and include insufficiently specific periods for performance.

Item (t) of the South African greylist merely concerns the transfer of obligations, whereas § 309 no. 10 also covers the transfer of rights. Therefore, the free assignability of claims is not covered by item (t). The South African legislature should include the transfer of claims too because also in these cases, consumers should be protected from an unfettered change of their contractual partners.

A similar item to regulation **44(3)(x)** can be found in § 309 no. 14. As otherwise the objective of the South African provision would not be achieved, it is suggested that item (x) greylists not only arbitration but also mediation. The scope of application of the South African item is more restrictive though as it sets out that the clause must require that the consumer take disputes exclusively to arbitration. Both regimes permit voluntary arbitration, however. Since a restriction to court actions would not sufficiently honour the normative objective of item (x), this provision should, similar to the German item, also apply to other proceedings, such as preservation of evidence or preliminary injunctions.

Item (y) has a somewhat similar but blacklisted item in § 309 no. 12. The German provision is wider though. The South African legislator should therefore consider a widening of this provision towards a 'modification of the burden of proof' in order to include other aggravations. Conclusive proof certificates should always be considered unfair. Standard clauses which modify or restrict the burden of proof of suppliers who have control of the other's items should systematically be declared unfair.

The imposition of shorter limitation periods than otherwise applicable under the common law or legislation for legal steps is greylisted in **item (z)** of regulation 44(3). The scope of application of this provision is partly covered by § 309 no. 8 lit. b) ee) and ff). The cut-off period of item (z) is notably shorter than in the German regime, however. The South African item is more restrictive and should be amended so as to include all sorts of adverse modifications of the limitation period for consumers.

6. A provision such as **item (bb)** is absent in the BGB. In German contract law, the parties have the free choice as to which law should apply. Furthermore, the Rome-I Regulation provides for a balanced mechanism. In order to enhance consumer protection, and because of a lack of a mechanism similar to the one in the EU, the South African legislator rightly opted for the solution set out in item (bb). A recourse to section 2(2) would not be possible in this regard because for a mechanism similar to the Rome-I Regulation, other countries must adhere to the same mechanism, which is not the case.

7. For **item (p)** dealing with clauses allowing suppliers an unreasonably long time to perform there seems to be a need for better protection, and the South African legislature should intervene accordingly. This item should apply to all sorts of periods of performance like the German provision and include insufficiently specific periods for performance.

A need for improvement with regard to better consumer protection also exists for **items (f), (t), (w), (x), (y) and (z)**.

The South African **general clause** of section 48 of the Act is verbose and lacks clarity. It is also unsystematic and does not correspond to international standard and good legal practice. It contains 'concretisations' that do not have their place in a general clause, such as the procedural and deceptive standards. A more concise and explicit provision with some precise guidelines, such as § 307, would have been more effective.

Even though the Act is built around individual consumers, unlike §§ 305 *et seq.* which cater to a supra-individual and generalising approach, the Act should use elements of an abstract-universal approach in that the tendency (or potential unfairness) of a term and not its actual application must be assessed. The tendency enquiry of a provision concerns the question of whether the term allows the supplier to act in an unfair manner *vis-à-vis* the consumer, and not its actual application.

Contrary to the German regime where § 308 (greylist) has a radiating effect on B2B contracts, the greylist of regulation 44(3) finds no application to agreements between entrepreneurs. On the other hand, the South African blacklist (section 51) applies to B2B contracts, whereas the application of § 309 is excluded under § 310(1) 1st sent. so that the general clause applies in these cases. The reason for this difference is that the Act is a pure consumer protection statute that also protects small businesses, whereas the BGB provisions take into account that between companies laxer rules may apply because they do not necessarily deserve the same level of protection.

The moment of evaluation in individual proceedings differs in both regimes. As the Act has been in force for over a decade now, the two regimes should not differ anymore in this regard though.

Unlike South African legislation, § 305b excludes content control for individually negotiated clauses. Since South African courts have to consider all relevant factors in their fairness enquiry, they should factor in that specific clauses might have been negotiated, however. Both

regimes apply a mechanism where price control is undertaken only in specific circumstances. The South African legislature should make clear though that it did not wish to introduce a price-control mechanism in the Act as such.

Content control of clauses having the same content as legal provisions (declaratory clauses) touches constitutional questions, and should therefore be excluded from content control in South Africa too.

As the Act applies an individualised approach, the fairness control is performed by considering the factors of section 52(2). South African courts should also apply factors considered in foreign legislation which serve as the best international model. The German regime does not provide for a list of factors. Only in consumer contracts, the 'other circumstances attending the entering into of the contract must also be taken into account'. In order to enhance predictability and certainty, South African courts should be able to declare terms unfair *per se* in a particular industry, or based on the 'tendency of the clause'. Such an objective finding is also the German approach, without which institutional actions would not be possible.

The comparison of both regimes as regards the factors contained in section 52(2) of the Act has revealed that because of the general irrelevance of the price argument in the German regime, both pieces of legislation are only comparable to the extent that the price is considered by taking other factors or clauses into account.

Because of the general-abstract approach of the German regime, the nature of the parties (section 52(2)(b)) is only considered in consumer contracts (§ 310(3)). For legal certainty and practicability, only apparent characteristics should be considered in both regimes. The same applies to the circumstances of the transaction (subsection (c)). These are taken into account in the German regime only in consumer contracts. Contrary to Germany, South African legislation does not recognise a doctrine of 'change of circumstances' or 'hardship' for unforeseeable circumstances. Such a mechanism would be useful, however. The parties' conduct (item (d)) can be taken into account in the German regime for consumer agreements only. Behaviours that should be considered in South Africa too are omission (e.g., withheld information), pressure, or any other tactics to overpower consumers.

The German regime excludes negotiated terms from content control *per se*. In contrast, these are included in terms of section 52(2)(e). South African courts should distinguish between negotiated and non-negotiated terms, however. In the German regime, the factor contained in section 52(2)(f) only plays a role with regard to insurance. The aspects of risk control and the

cheapest insurer should apply in the South African regime too. The plain language requirement, a factor contained in section 52(2)(g), is also expressed in the German general clause in the form of the transparency requirement. In practice, it should not matter whether the plain language or the transparency requirements are assessed in an abstract-general manner or with having the individual consumer in mind. This applies even more when considering that the determination of a disadvantage due to intransparency is unnecessary under the German regime, and under the Act, the plain language requirement of section 22 is applied to 'an ordinary consumer of the *class of persons* for whom the [document] is intended'. According to the Act, plain language is merely a factor that the courts have to consider and does not lead automatically to voidness of the given clauses. Courts will most likely strike down such provisions, however. This is thus in keeping with German legislation where an unreasonable disadvantage ('unfairness') exists in the case of unclear or incomprehensible provisions.

In German law, it is not necessary to expressly point out unfair terms, as long as the entire legal instrument of standard terms has been duly incorporated into the contract. It is also irrelevant if the consumer has read or understood the terms. For consumer agreements (§ 310(3)), an individual approach must be applied by taking into consideration the circumstances attending the conclusion of the given contract, however. Only then, 'knowledge of unfair terms' in the sense of section 52(2)(h) is relevant.

Factor (i), pertaining to the possibility to acquire identical goods or services elsewhere at a better price, entails many practical problems. With regard to the fact that the 'price argument' is generally irrelevant in the German regime, such a factor is not considered in Germany. The consideration of whether goods are special order goods (item (j)) is relevant for consumer contracts in Germany. If the user is aware of a special interest or a very special purpose, the user must consider this. For other contracts, § 307(2) no. 2 allows for a more lenient approach.

Besides the factors contained in section 52, other factors may also be taken into consideration.

The nature of the goods or services in question can be assessed under the widely formulated German general clause and should be considered as a factor in South Africa too. The balance of the parties' interests is the foundation of every agreement and is thus also considered in § 307. Since the balance of the parties' interests is crucial for fairness, this factor should also apply in South Africa.

Although in terms of the German regime, the individual clauses of a standard terms contract are assessed, and not the agreement as a whole, this principle is mitigated due to the

accumulative and the cumulative effects. These two 'effects' also apply in South Africa. The German provision of § 307(2) no. 1 is more restrictive in terms of the requirements for statutory provisions than the factor suggested by the South African Law Commission. The limitation of essential rights and duties inherent in the nature of the contract is reflected in § 307(2) no. 2. Such terms should never be fair.

We have also seen that even though the principle of good faith is not expressly mentioned in the Act, its provisions are infused with this maxim and must be interpreted accordingly when assessing the fairness of a standard clause. The principle of good faith is expressly anchored in the German general clause. In this regard, both regimes have the same foundations.

In respect of the South African general clause, the consumer carries the risk of non-persuasion and bears the onus of proof. In German legislation, the question of whether the other party suffers an unreasonable disadvantage is a question of law and not a factual question that can be subject to evidence. The South African regime too should distinguish between legal questions and those that concern facts and are susceptible of proof.

CHAPTER 6 – ENFORCEMENT PROCEDURES

INTRODUCTION

The underlying enforcement mechanisms of the South African and German regimes entail different jurisdictions and procedures. South African legislation focuses on individual procedures, whereas the German regime offers, besides the possibility of an incidental control within individual court actions, a powerful tool in the form of institutional actions. These are substantial differences that make a comparison challenging because the respective mechanisms cannot easily be contrasted with one another. Nonetheless, this chapter tries to highlight, where possible, some of the fundamental differences. This should lead to a better understanding of both regimes and their underlying principles.

1. Jurisdiction

As discussed earlier,⁶⁸⁷⁵ South Africa presents a unique socio-economic context that has to be seen against the backdrop of the country's history. Large sections of the population are not well-educated, poor, and thus vulnerable. The redress system against unfair terms therefore must ideally be speedy and cost-efficient because conflict resolution offered by the courts is generally costly, complex and time-consuming, however.⁶⁸⁷⁶

The implementation of various fora has advantages because the most appropriate dispute resolution mechanism depends on the circumstances of the particular complaint, e.g., the value and complexity of the claim.⁶⁸⁷⁷ The different entities must work in concert, which is why their functions must be clearly defined and co-ordinated. What is more, both the already existing and the new fora must be streamlined⁶⁸⁷⁸ in order to avoid unnecessary confusions, duplications and ineffective mechanisms.⁶⁸⁷⁹

Section 69 of the Consumer Protection Act contains the entities that have jurisdiction for the enforcement of the Act. This provision contains an implied hierarchy between the Tribunal, ombuds with jurisdiction, industry ombuds, provincial consumer courts, alternative dispute resolution agents, the National Consumer Commission as well as the courts.⁶⁸⁸⁰ Since the

⁶⁸⁷⁵ In Part I, *passim*.

⁶⁸⁷⁶ Paleker 2003 *ADR Bulletin* 48, Melville 2010 *SA Merc LJ* 55.

⁶⁸⁷⁷ Centre for European Economic Law 2007 Final report: 'An analysis and evaluation of alternative means of consumer redress other than redress through judicial proceedings' (Study for the European Commission) at ec.europa.eu/consumers/archive/redress/reports.../comparative_report_en.pdf (last retrieved on 28 October 2019).

⁶⁸⁷⁸ See *Draft Green Paper on the Consumer Policy Framework* 2004 at 39, published in GenN 1957 in GG 26774 of 9 September 2004.

⁶⁸⁷⁹ See Part I ch 5 para 1.

⁶⁸⁸⁰ See Part I ch 5 para 3.

jurisdiction of these entities largely varies from the German courts' competences, a comparison between the two regimes is valuable not in terms of the various entities in place but rather with regard to the tools at their disposal to enforce the law.

1.1 The National Consumer Commission

The National Consumer Commission⁶⁸⁸¹ has many roles besides enforcement. It is considered a 'watchdog' with regard to the enforcement of the Act.⁶⁸⁸² This role is performed by promoting informal resolution between consumers and suppliers. However, the wording of section 99(a) shows that dispute and complaints resolution activities are not part of the Commission's functions.⁶⁸⁸³ The Act thus draws a distinction between enforcement on the one hand and conciliation/dispute resolution on the other.⁶⁸⁸⁴

The Commission may issue compliance notices in order to ensure that a supplier is informed of its non-compliance with the Act and given the opportunity to change its terms and conditions. Compliance notices serve as a quick and straightforward enforcement tool in cases of apparent transgressions.⁶⁸⁸⁵ In complex matters, the NCC refers the case to the Tribunal or a consumer court. Once a compliance notice has been issued, the Commission cannot investigate the matter further as it is *functus officio*.⁶⁸⁸⁶ Compliance notices should be used in exceptional circumstances or obvious cases, and if there are no compelling reasons for the issuance of a consent order or a referral to the Tribunal or a consumer court.⁶⁸⁸⁷

The Commission may also negotiate and conclude undertakings and consent orders with suppliers that the Tribunal or a court may confirm.⁶⁸⁸⁸ This avoids legal actions in cases where a complainant agrees to a damages award. Consent orders are an essential dispute resolution tool. They avoid civil actions in cases where a complainant agrees to a damages award.⁶⁸⁸⁹

In German law, warnings ('*Abmahnungen*') issued by eligible bodies have in part the same function as compliance notices issued by, or undertakings concluded with the Commission. These warnings have the function to warn the user before the consumer organisation initiates

⁶⁸⁸¹ See discussion on the NCC in Part I ch 5 para 3.2.

⁶⁸⁸² See Part I ch 5 para 3.2.

⁶⁸⁸³ Van Eeden and Barnard *Consumer Protection Law* 446.

⁶⁸⁸⁴ Van Eeden and Barnard *Consumer Protection Law* (2013) 425.

⁶⁸⁸⁵ *Murray, Cloete et al v The National Consumer Commission et al* NCT/4454/2012/101(1)(P) CPA; *Auction Alliance v The National Consumer Commission and Others* Case No 7798/2012 (WCC); *CJ Digital SMS Marketing CC v The National Consumer Commission* (NCT/3584/2011/101) [2012] ZANCT 22 (1 October 2012).

⁶⁸⁸⁶ Van Eeden and Barnard *Consumer Protection Law* 434.

⁶⁸⁸⁷ Van Eeden and Barnard *Consumer Protection Law* 438.

⁶⁸⁸⁸ Sections 74 and 99(f).

⁶⁸⁸⁹ Van Heerden 'Section 99 in Naudé and Eiselen (eds) *CPA Commentary* para 7.

court proceedings so that the user can resolve the dispute by incurring the obligation to cease and desist subject to a reasonable contractual penalty. A warning is dispensable if it is in vain or unreasonable, for example, where the infringement is so significant that the claimant cannot be expected to issue a warning before going to court.⁶⁸⁹⁰ The issuing of a warning is not mandatory⁶⁸⁹¹ and has no impact on the admissibility and merits of the court action.⁶⁸⁹² The statutes of most eligible bodies make the issuing of a prior warning mandatory though.⁶⁸⁹³ This is also because a warning can avoid negative cost consequences.⁶⁸⁹⁴ More importantly, most incriminated standard clauses where consumer associations are involved are eliminated after the given organisation has issued a warning, and not after involving the courts.⁶⁸⁹⁵ This means that warnings have a significant deterrent effect.

Hence, a warning is issued, compared to a compliance notice, not only in exceptional circumstances and in cases of apparent transgressions but almost systematically. It is a step before taking legal action, if necessary. The reason for this lies in the fact that compliance notices serve as a quick tool for more uncomplicated matters, whereas warnings are issued for both simple and complex affairs, and to avoid negative cost consequences. Common to both is their function to avoid the involvement of the judicial system and their deterrent effect.

In Germany, warnings issued by eligible bodies contain an invitation to cease the use or the recommendation of unfair standard terms as well as the invitation to the user to promise to pay a contractual penalty in case of infringement.⁶⁸⁹⁶ This is different from South African compliance notices where the supplier has to agree to pay damages in order to avoid civil-law proceedings.⁶⁸⁹⁷ The payment of a contractual penalty in the German context only takes place if the user or recommender disregards the invitation to cease the use or the recommendation of unfair terms, and is thus intended for future infringements. In contrast, damages in terms of a consent order are meant to be a remedy for past infringements. Hence, the German approach is more proactive and suitable to avoid further violations.

Another difference between compliance notices and warnings is that the eligible German body can still monitor and investigate the matter after having issued a warning. The German entity

⁶⁸⁹⁰ Palandt/*Bassenge* § 5 UKlaG para 7, WLP/*Lindacher* § 5 UKlaG para 12.

⁶⁸⁹¹ UBH/*Witt* § 5 UKlaG para 1.

⁶⁸⁹² MüKo ZPO/*Micklitz* § 5 UKlaG para 9, Maxeiner 2003 *J. Yale Int. Law* 158.

⁶⁸⁹³ Stoffels *AGB-Recht* 492.

⁶⁸⁹⁴ Stoffels *AGB-Recht* 492.

⁶⁸⁹⁵ UBH/*Witt* before § 1 UKlaG para 8.

⁶⁸⁹⁶ See Part II ch 6 para 2.3.6.

⁶⁸⁹⁷ See Part I ch 5 para 3.2 b) ee).

does hence not become *functus officio*, unlike the Commission after having issued a compliance notice.⁶⁸⁹⁸ This ensures that the eligible entity can intervene at any time, which has a deterrent effect.

Before issuing a compliance notice, the Commission must consult with the regulatory authority that issued a licence to the regulated entity in question.⁶⁸⁹⁹ This is similar to § 8(2) UKlaG. Under this provision, the court must hear the competent regulator for financial services⁶⁹⁰⁰ before the ruling if the action relates to provisions contained in general insurance standard terms. The judge has no discretion in this regard. The reason for such a hearing is that the court should benefit from the administration's insight and technical knowledge.⁶⁹⁰¹

The consultation of the South African and the hearing of the German regime are both mandatory. The main difference lies in the entity which has to perform the hearing. The Commission is, unlike a court, not a judicial body and does not directly intervene or adjudicate disputes. A reason for a consultation at such an early stage could be that the Commission is, like regulators, an administrative body, unlike eligible entities such as consumer organisations in the German context. Privately organised institutions or associations, such as consumer organisations, are not entitled to exert sovereign rights such as the performance of official hearings. The same applies to other eligible bodies, such as the chambers of trade and industry. When issuing warnings, they do not issue administrative but civil-law acts.⁶⁹⁰² Another difference between the two regimes lies in the fact that section 100(2) of the Act applies to 'the regulatory authority', whereas § 8(2) UKlaG merely refers to the 'regulator for financial services' ('*Bundesanstalt für Finanzdienstleistungsaufsicht*'). The German provision is thus narrower in its personal scope of application than its South African counterpart. Since German courts can hear experts any time for evidence in order to benefit from the necessary technical knowledge,⁶⁹⁰³ the restricted personal scope of application should not make any difference in practice, however. This applies especially to expert witnesses in terms of § 414 ZPO.⁶⁹⁰⁴

⁶⁸⁹⁸ See Part I ch 5 para 3.2 ee).

⁶⁸⁹⁹ Section 100(2).

⁶⁹⁰⁰ Bundesanstalt für Finanzdienstleistungsaufsicht (www.bafin.de).

⁶⁹⁰¹ Staudinger/*Schlosser* § 8 UKlaG para 13, WLP/*Lindacher* § 8 UKlaG para 11.

⁶⁹⁰² See 'Abmahnung- was nun?' at https://www.hannover.ihk.de/fileadmin/_migrated/content_uploads/Merkblatt_Abmahnung-was_nun_2012_01.pdf.

⁶⁹⁰³ §§ 402-414 ZPO.

⁶⁹⁰⁴ § 414 ZPO: 'Insofar as knowledgeable persons are to be examined in order to obtain evidence regarding past facts and circumstances, or situations given in the past, which required special technical competence in order to be perceived, the rules governing the taking of evidence by hearing witnesses shall be applicable.'

If a person does not agree with the compliance notice the Commission has issued, it may apply to the Tribunal to review that notice within 15 business days after receiving that notice, or such longer period as may be allowed by the Tribunal on good cause shown.⁶⁹⁰⁵ If the Tribunal confirms or modifies all or part of the notice, the applicant must comply with that notice as confirmed or modified, within the timeframe specified in it.⁶⁹⁰⁶ A compliance notice remains in force until it is set aside by the Tribunal, or a court upon a review of a Tribunal decision concerning the notice, or, if the requirements of the compliance notice have been satisfied, the Commission issues a compliance certificate.⁶⁹⁰⁷

Since warnings under the UKlaG are not administrative acts but rather a pre-trial step issued by eligible bodies, they cannot be set aside but by the issuing entity itself. Although the chambers of trade and industry and the chambers of crafts and labour are eligible bodies in terms of § 3 UKlaG and corporations under public law,⁶⁹⁰⁸ the warnings they issue are no administrative acts *per se* but civil-law acts.⁶⁹⁰⁹ Furthermore, a standard terms user cannot formally oppose a warning at court. If he or she does not agree with the content of the warning, the eligible body will file a court action. It seems that the deterrent effect of compliance notices is somewhat watered down by the fact that the supplier can apply for modification at the Tribunal. With a view to the fact that compliance notices should only be issued in clear cases, it is surprising that such a review by the Tribunal is possible. The deterrence of the German regime seems to be more comprehensive in this regard because standard terms users who do not agree with a warning expose themselves to an expensive lawsuit. What is more, since neither party wishes to go to court, this is also an incentive for eligible bodies to investigate their cases thoroughly. German legislation does not provide for the issuing of a certificate when a standard terms user has complied with the content of a warning. The reason for this might be that eligible bodies tend to monitor their affairs closely even after they dealt with them. This is highlighted by the fact that contractual penalties set out in warnings are due for future, and not past infringements. This is in stark contrast to the South African situation where there is not a history of strong and vibrant private consumer bodies.

⁶⁹⁰⁵ Section 101(1).

⁶⁹⁰⁶ Section 101(3).

⁶⁹⁰⁷ Section 100(4) and (5).

⁶⁹⁰⁸ § 3(1) Gesetz zur vorläufigen Regelung des Rechts der Industrie- und Handelskammern of 18 December 1956 (BGBl. 1956 I 920), as amended, and § 90(1) HwO.

⁶⁹⁰⁹ See https://www.hannover.ihk.de/fileadmin/_migrated/content_uploads/Merkblatt_Abmahnung-was_nun_2012_01.pdf.

The Commission has to assist consumers in formulating their complaints, if necessary.⁶⁹¹⁰ This prevents not only abusive complaints, but the Commission can also advise consumers to drop their complaint if there is no basis for a successful outcome.

The Commission's assistance in the formulation of complaints corresponds to § 139(3) ZPO,⁶⁹¹¹ under which the court may indicate to a party any inconsistencies. German courts do however not 'replace' the parties' lawyers in that they help to reformulate statements. If an application is – and remains – incomplete after the court's indication, the action is inadmissible.⁶⁹¹² Here again, in the South African regime, the assistance takes place at an earlier stage, namely by the Commission. This has the advantage that the Commission serves as a 'filter' with regard to other enforcement entities. This filtering function does not exist with respect to the court's assistance in terms of § 139(3) ZPO since a lawsuit is already *sub judice*.

In conclusion, it can be said that warnings are issued almost systematically, unlike compliance notices. Common to both is their function to avoid the involvement of the judicial system and their deterrent effect. The German approach is more proactive and suitable to avoid further violations as the payment of contractual damages refers to future violations, and not to those committed in the past. The fact that the German entity is not *functus officio* after its investigation, unlike the Commission, ensures that it can intervene any time, which has also a deterrent effect. Concerning mandatory consultation procedures, the German regime's personal scope of application is narrower than the South African one. As German courts can hear experts for evidence in order to benefit from the necessary technical knowledge, the restricted personal scope of application should not make any difference in practice though. The deterrent effect of warnings seems to be higher since unlike compliance notices, they can be set aside only by the issuing entity itself. If a standard terms user does not agree with a warning, the issuing entity will most likely go to court. The deterrent effect of compliance notices is even lesser due to the fact that the Tribunal can modify them. With regard to deterrence, warnings seem thus to be more powerful than compliance notices. On the other hand, the filtering function of the Commission's assistance in the formulation of complaints does not exist for a German court's assistance since a lawsuit is already *sub judice*.

⁶⁹¹⁰ Van Eeden *Consumer Protection Law* (2013) 397.

⁶⁹¹¹ § 139(3) ZPO: 'The court is to draw the parties' attention to its concerns regarding any items it is to take into account *ex officio*.'

⁶⁹¹² *Erman/Roloff* § 8 UKlaG para 1, *Palandt/Bassenge* § 8 UKlaG para 1.

1.2 The National Consumer Tribunal

The National Consumer Tribunal (NCT) is an *ad hoc* body that was established in terms of the National Credit Act. The German regime does not have a comparable entity. The Tribunal has adjudicative functions and is a tribunal of record.⁶⁹¹³ Since the Tribunal has jurisdiction over matters concerning the National Credit Act and the Consumer Protection Act, it is to be expected that it will deal with those matters in a similar way, e.g., in respect of compliance notices, consent agreements and administrative fines.⁶⁹¹⁴ Since the Tribunal deals both with cases concerning the Consumer Protection Act and the National Credit Act, the establishment of two separate and specialised chambers may be advisable.

Although the Tribunal is an administrative body and not a court of law, it may grant interim relief. This ensures an affordable consumer redress because consumers are not obliged to approach ordinary courts that are more expensive. The Tribunal is not a 'point of first entry' and cannot be approached directly.⁶⁹¹⁵ The legislator favours ADR and settlements by provincial consumer courts. What is more, the 'filtering function' of the Commission ensures that the Tribunal with its limited capacity is not flooded with too many matters.

The requirement that the NCT must be staffed with sufficient persons with legal training (section 28(1)(b)) is too vague, and the restriction to two consecutive terms of five years each (section 29(1)) has the disadvantage that valuable specialised skills are lost after the expiry of these terms. It is thus recommended that the legislator enables members of the Tribunal to serve longer than two terms. What is more, the legislator should define the phrase 'sufficient persons with legal training', e.g., by requiring a law diploma of a recognised university.

1.3 Consumer courts

As consumer protection is a matter of concurrent jurisdiction, the provinces can establish consumer courts.⁶⁹¹⁶ These are no common-law courts but administrative bodies. Their jurisdiction extends beyond the traditional rules of geographic jurisdiction, which may cause problems.⁶⁹¹⁷

⁶⁹¹³ See discussion on the NCT in Part I ch 5 para 3.3.

⁶⁹¹⁴ Having cost-efficiency concerns in mind, the legislator expanded the Tribunal's function to other areas of consumer protection. Hence, the Tribunal can also hear matters of general consumer protection. See Vessio *LLD thesis* 125 note 779, GenN 1957 in *GG* 26774 of 9 September 2004 at 44.

⁶⁹¹⁵ See Part I ch 5 para 3.3 b).

⁶⁹¹⁶ See discussion on consumer courts in Part I ch 5 para 3.4.

⁶⁹¹⁷ See Part I ch 5 para 3.4 a).

The fact that not all provinces provide for consumer courts means that many South Africans have no access to them.⁶⁹¹⁸ Moreover, the provinces' consumer protection legislation differs from province to province. This is unfavourable to the consumer and hampers the transfer of matters from one province to another. Consumer courts have extensive powers, but the enforcement and execution of their orders remain unaddressed.⁶⁹¹⁹ A drawback of this phenomenon is that matters which could usually be handled by provincial consumer courts end up at national level in order to achieve adequate prosecution.⁶⁹²⁰ The only sanction in provincial legislation in a case where a respondent (supplier) fails to comply with a consumer court order, is that the latter can be found guilty of an offence. A person who is found guilty of an offence can be convicted to pay the penalties set out in the legislation.⁶⁹²¹ Although the members of most consumer courts have legal experience, the fact that they do not necessarily need a law diploma, with the exception of the chairperson (e.g., in Gauteng), raises some concerns. The legal complexity of consumer protection legislation requires adjudicative bodies consisting solely or mainly of lawyers.⁶⁹²²

The issues mentioned above do not exist in Germany because only the civil courts and no other semi-professional bodies deal with disputes concerning standard business terms legislation.

Some of these problems could be addressed by creating a common legislative framework for consumer courts. This approach has been very successful in Germany with the Administrative Procedure Acts of the federal states that used the National *Verwaltungsverfahrensgesetz* as a common model. What is more, the legislator should address the urgent need for proper enforcement and execution procedure in this field. Different solutions are suggested, but they reveal the over-complicated redress mechanism of the Act. It would also be helpful if consumer courts were mainly staffed with lawyers. This should be a requirement for the appointment of the members.

1.4 Alternative Dispute Resolution

Section 69 of the Consumer Protection Act contains an implied hierarchy in terms of which consumers are encouraged to first approach an alternative dispute resolution agent before approaching the Commission.⁶⁹²³ The Commission may promote informal dispute resolution

⁶⁹¹⁸ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 18.

⁶⁹¹⁹ Du Plessis 2010 *SA Merc LJ* 517.

⁶⁹²⁰ *Draft Green Paper on the Consumer Policy Framework* 2004 at 39, published in GenN 1957 in GG 26774 of 9 September 2004.

⁶⁹²¹ See, for instance ss 30 and 31 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

⁶⁹²² See Part I ch 5 para 3.4 a).

⁶⁹²³ See discussion on ADR in Part I ch 5 para 3.5.

by first referring the matter to an alternative dispute resolution agent according to section 72(1)(b).⁶⁹²⁴ The South African legislator encourages alternative dispute resolution procedures and self-regulatory activities,⁶⁹²⁵ given the prominence of these mechanisms in the Act, *inter alia* by industry codes of conduct⁶⁹²⁶ and the accreditation of industry ombuds.⁶⁹²⁷ The Department of Trade and Industry was of the view that there is a need for ADR mechanisms in the form of industry-funded procedures. Only where voluntary mechanisms have 'not been effective or where the industry is of such a nature that greater regulation is required should statutory mechanisms be considered.'⁶⁹²⁸ With a view of traditional dispute resolution in African cultures, they could be a better choice than more adversarial redress mechanisms. What is more, consumers can still go to court if they are not satisfied with the ombud's decision.⁶⁹²⁹ Despite these advantages, an ombud might not be the appropriate forum in cases that involve complicated facts, legal uncertainty or expert witnesses. One could therefore argue that in such matters, other fora, like the courts, are probably more suited.⁶⁹³⁰ In practice though, industry ombuds have proven to be very effective as the process is informal, cheap for the consumer. Moreover, suppliers who are members of the industry tend to adhere to the decisions of the ombuds.

Directive 98/27/EC⁶⁹³¹ does not require that the national legislator implement a pre-trial conciliation procedure. The German legislature did therefore not provide for a mandatory procedure (arbitration, conciliation, mediation and so forth). This is in contrast to the current tendency to encourage such procedures.⁶⁹³² Before going to court, German consumers quite often use the path of alternative dispute resolution though. In Germany, many industries have implemented ombuds procedures, such as banks and insurance companies.⁶⁹³³ Their procedure

⁶⁹²⁴ Naudé 2010 *SALJ* 524.

⁶⁹²⁵ Van Eeden and Barnard *Consumer Protection Law* 403.

⁶⁹²⁶ Sections 82 and 93.

⁶⁹²⁷ Section 82(6).

⁶⁹²⁸ *Draft Green Paper on the Consumer Policy Framework* 2004 at 37 and 47, published in: GenN 1957 in *GG* 26774 of 9 September 2004.

⁶⁹²⁹ See Part I ch 5 para 3.5 a).

⁶⁹³⁰ Melville 2010 *SA Merc LJ* 57.

⁶⁹³¹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

⁶⁹³² E.g., § 15a(1) 1st sent. *in pr.* EGZPO: 'The laws of the federal States may stipulate that an action may only be brought after an attempt has been made to settle the dispute amicably before a conciliation office that is established or recognised by the administration of justice of the federal State.' (My own translation). Stoffels *AGB-Recht* 496.

⁶⁹³³ Ombudsmann der privaten Banken (<https://bankenombudsmann.de>), Ombudsmann der Öffentlichen Banken (www.voeb.de), Ombudsmann der genossenschaftlichen Bankengruppe (www.bvr.de), Schlichtungsstelle beim Deutschen Sparkassen- und Giroverband (www.dsgv.de/schlichtungsstelle), Schlichtungsstelle der Deutschen Bundesbank (www.bundesbank.de), Versicherungsombudsmann (www.versicherungsombudsmann.de), Ombudsmann Private Kranken- und Pflegeversicherung (www.pkv-ombudsmann.de), Ombudsstelle

is quite similar. If the clients do not agree with the decisions of the ombud, the path to the ordinary courts remains open for them. Although there are no statistics on the number of ombuds procedures concerning §§ 305 *et seq.*, pre-trial dispute resolution undoubtedly relieves the courts from many proceedings.⁶⁹³⁴ Hence, in both regimes, ADR plays a prominent role in dispute resolution. The difference lies in the fact that in Germany, ADR is not actively encouraged or promoted, unlike in South Africa. *De facto*, in both regimes, consumers nonetheless benefit from such procedures to a large extent.

An industry ombud in terms of the Act is an industry-specific ombud which either is subject to a scheme of alternative dispute resolution provided for in the relevant industry code, or subject to some degree of regulation if the scheme has been accredited under the Act.⁶⁹³⁵ South African examples are the ombuds of insurance companies and banks dealing with client complaints,⁶⁹³⁶ or the Wireless Application Service Providers' Association (WASPA) Ombudsman.⁶⁹³⁷ This kind of alternative dispute resolution usually involves codes of conduct.

§ 14(3) UKlaG provides that, upon request, the Federal Office of Justice shall recognise a conciliation office as a private consumer conciliation office if the following conditions are met: Firstly, the institution of the conciliation body is a registered association.⁶⁹³⁸ Secondly, the conciliation body is responsible for certain disputes, and thirdly, the organisation, financing and rules of procedure of the conciliation body comply with the requirements of the UKlaG and the statutory ordinance issued on the basis of this Act. The rules of procedure of a recognised conciliation body may be amended only with the consent of the Federal Office of Justice.

Both regimes thus require accreditation for industry ombuds. The German regime seems to be stricter in that the conciliation body must be composed of at least two conciliators who are qualified to hold judicial office, i.e., lawyers who have successfully passed the First and Second State Exams in Law.⁶⁹³⁹ This allows for handling more complicated matters, which relieves the

geschlossene Fonds (www.ombudsstelle-gfonds.de), Ombudsleute der Privaten Bausparkassen (www.schlichtungsstelle-bausparen.de), Büro der Ombudsstelle des BVI - Bundesverband Investment und Asset Management e.V. (www.ombudsstelle-investmentfonds.de), Bundesanstalt für Finanzdienstleistungsaufsicht (www.bafin.de), to name but a few.

⁶⁹³⁴ See Part II ch 6 para 1.2.

⁶⁹³⁵ Van Heerden 'Section 69 in Naudé and Eiselen (eds) *CPA Commentary* para 16.

⁶⁹³⁶ In order to avoid confusion, South African financial institution may not employ the word 'ombud', unless they are authorised by the Council to do so. See s 18(5)(a) of the Financial Services Ombud Schemes Act 37 of 2004.

⁶⁹³⁷ Melville 2010 *SA Merc LJ* 58.

⁶⁹³⁸ *Eingetragener Verein (e. V.)*.

⁶⁹³⁹ *Erste und Zweite juristische Staatsprüfung*. Lawyers who hold these two diplomas are referred to as 'Volljuristen' as they can practice any legal profession (advocate, judge, prosecutor, counsel, jurist etc.).

courts. It would thus be beneficial if the South African ADR mechanism had a similar requirement. As ADR seems to be closer to traditional dispute resolution, more consumers could then benefit from this system.

If the ADR agent has resolved or assisted the parties in resolving their dispute, the agent may (a) record the resolution of that dispute in the form of an order, and (b) if the parties to the dispute consent to that order, submit it to the Tribunal or the High Court to be made a consent order, in terms of its rules.⁶⁹⁴⁰ The German procedure does not know such a formalisation since the procedure applicable to ombuds in Germany is independent of judicial proceedings at court. A formalisation by the Tribunal or the High Court undoubtedly strengthens the ombud's decision.

Section 70(1) grants *locus standi* only to consumers but not to the other entities mentioned in section 4(1). This could be an editorial error of the legislator. On the other hand, it could be its intention to submit only smaller affairs to ADR agents and to reserve class actions that are more complex or those where consumer protection groups are involved for the other entities.⁶⁹⁴¹ The legislator should make this clear.

It is important to note that the South African ombud's recommendations usually are not legally binding. Because of the political pressure and the status of the office, they usually are followed, so that they are factually binding.⁶⁹⁴² In the German context, the ombud's decisions are binding on the company (e.g., a bank) if the amount in dispute between the bank and the customer does not exceed EUR 10,000. This shall not apply to the customer though. If the customer does not agree with the ombud's decision, he or she may continue to pursue the case in court.⁶⁹⁴³ Thus, both regimes offer the same level of protection in that consumers can still go to court if they do not agree with the ombud's decision.

In the South African context, a concern is the variety of different ombuds and the fact that the Act only recognises 'ombuds with jurisdiction' and 'industry ombuds'. For consumers, it will not be easy to distinguish between those ombuds and to know why some of them are accredited, whereas others are not.⁶⁹⁴⁴ It could be beneficial in the South African context to merge several ombuds of a particular sector, such as the financial industry, telecommunications or the

⁶⁹⁴⁰ Section 70(3).

⁶⁹⁴¹ See Part I ch 5 para 3.5 c).

⁶⁹⁴² See Part I ch 5 para 3.5 a).

⁶⁹⁴³ See <https://bankenombudsmann.de/ombudsmannverfahren/haeufige-fragen>.

⁶⁹⁴⁴ See Part I ch 5 para 3.5 a).

insurance industry. Overlapping jurisdictions would then be eliminated and economies of scale could be achieved. Moreover, the given ombud's profile would be raised, and consumers would exactly know whom they have to approach.⁶⁹⁴⁵

In summary, unlike the South African legislator, the German legislator does not actively encourage ADR procedures, although many consumers benefit from this system. Both regimes require accreditation for industry ombuds. The fact that German ombuds offices must be staffed with at least two lawyers allows handling more complicated matters, which relieves the courts. In South Africa, for more complex cases, other fora are probably a better choice. It is therefore suggested that South Africa should adopt a similar stance in order to establish an ADR system also for more complex cases in order to relieve the other entities. The German regime does not have formalities with regard to judicial entities. Since ADR is embedded in the South African redress mechanism, the choice of further formalities was logical, however. The South African legislature should make clear if the other entities mentioned in section 4(1) have *locus standi*, or if ADR is only intended for smaller affairs. Both regimes offer the same level of protection in that consumers can still go to court if they do not agree with the ombud's decision. The South African legislator should merge several ombuds of a particular sector. By and large, the German ombuds regime is far less complex, more transparent and also suited for more complex cases than the South African regime.

1.5 The civil courts

The term 'courts' in the Act refers to civil courts.⁶⁹⁴⁶ Small Claims Courts offer cost-efficient redress. Despite the contradiction between sections 69(d) and 52 with regard to the accessibility of civil courts, section 4(3) offers a solution in terms of which consumers may approach a Small Claims Court as a first port-of-call if this is the more efficient solution regarding consumer protection. This solution has the benefit that the Act applies and that the consumer is not obliged to trod the path of the common law but can enjoy the benefits of the Act. It is also beneficial in terms of procedural economy.⁶⁹⁴⁷

It has to be underlined that the Minister has no direct power to bring legislative changes on the provincial level because consumer protection is subject to concurrent jurisdiction.⁶⁹⁴⁸ It is

⁶⁹⁴⁵ See 'A public service ombudsman: Government response to consultation' at <https://www.gov.uk/government/consultations/public-service-ombudsman> at 'A public service ombudsman: Government response to consultation' at <https://www.gov.uk/government/consultations/public-service-ombudsman> (no longer available).

⁶⁹⁴⁶ See discussion on the civil courts in Part I ch 5 para 3.6.

⁶⁹⁴⁷ See Part I ch 5 para 3.6 a).

⁶⁹⁴⁸ See Schedule 4 Part A of the Constitution.

suggested that concurrent jurisdiction is an obstacle to effective consumer protection since transactions are made across provincial borders.

As we have seen, the South African regime consists of various entities for the enforcement of the Act. German legislation is much more streamlined in this regard. In individual actions, the civil court that has jurisdiction for the proceedings in question performs an incidental control. Regarding institutional actions, the civil chambers of the Regional Court in whose district the defendant has his or her place of business or domicile have sole competence for actions under the UKlaG, irrespective of the amount in dispute.⁶⁹⁴⁹ This provision establishes exclusive jurisdiction. Hence, choice-of-court agreements are not permitted.⁶⁹⁵⁰

In the interests of efficient proceedings or speedier litigation, the Land governments are empowered to assign, by statutory order, competence for the districts of several Regional Courts for cases under the UKlaG to a single Regional Court.⁶⁹⁵¹ It is suggested that this leads even more to a concentration of the competent entities and harmonisation of judicial rulings. This model should not be implemented in South Africa though because the assignment of competence to certain courts would hamper the access to justice for many consumers, especially those who live in remote areas.

Contrary to other civil actions, the amount in dispute in institutional actions is not calculated on the basis of the interest of a party concerning the matter in dispute. The public has the interest to have eliminated illegal standard terms though.⁶⁹⁵² Thus, consumer protection associations are protected from the risk of costs involved.⁶⁹⁵³ Under § 3 ZPO, the court assesses the value at its sole discretion. The maximum amount for disputes in the context of the UKlaG is EUR 250,000.⁶⁹⁵⁴ The relatively low amounts have a somewhat symbolic significance.⁶⁹⁵⁵ In practice, the courts have developed 'flat fees'. These are often criticised because no clear line is visible as regards their determination and the economic impact of the given clauses.⁶⁹⁵⁶ In any event, they efficiently lower the costs involved.

⁶⁹⁴⁹ § 6(1) UKlaG. Stoffels *AGB-Recht* 496.

⁶⁹⁵⁰ § 40(2) 1st sent no. 2 ZPO. Stoffels *AGB-Recht* 496.

⁶⁹⁵¹ So far, Bavaria, Hesse, Mecklenburg-West Pomerania, Northrhine-Westphalia and Saxony have made use of this empowerment. Stoffels *AGB-Recht* 496, with further references. See Part II ch 6 para 2.3.6 c) aa).

⁶⁹⁵² BGH *NJW-RR* 2007, 497.

⁶⁹⁵³ UBH/Witt § 5 UKlaG para 29.

⁶⁹⁵⁴ § 48(1) 2nd sent. GKG.

⁶⁹⁵⁵ UBH/Witt § 5 UKlaG para 29 ('mere symbolic value').

⁶⁹⁵⁶ UBH/Witt § 5 UKlaG para 30.

In other words, German legislation chose another path to make the battle against unfair terms more affordable, by applying lower amounts in dispute. Thus, the complex mechanism of the South African regime to make disputes more affordable was not the only option for the South African legislator.

In conclusion, it can be stated that concerning civil-law procedures, the German legislator made lawsuits that involve standard terms more affordable, at least for institutional actions, by lowering the amounts in dispute. The complex mechanism of the Act was thus not the only option for South Africa. Instead, it could have lowered the costs involved in matters related to the Act. The South African regime is very complex, which is partly due to the concurrent legislation in consumer matters. Nonetheless, the over-complicated redress mechanism of the Act could have been avoided by streamlining it, for instance, by giving Small Claims Courts a more predominant role. Sufficient staffing and financing of Small Claims Courts, paired with a lowering of the amounts in dispute according to the German model, would have been beneficial in this regard. Admittedly, this would have been a shift from a more administrative towards a more judicial redress mechanism, which was not the legislator's intention. On the other hand, the German model with respect to the assignment of competence to certain courts should not be implemented in South Africa as it would hamper the access to the courts for many consumers.

2. Individual proceedings *versus* abstract challenges and class actions

As discussed earlier,⁶⁹⁵⁷ the German legislature aimed to design a mechanism that is able to prevent the use of unfair terms rather than eliminating them *ex post facto*. Where individual parties are involved, the court decides whether a standard business clause is effective in a so-called 'incidental control', i.e., within the individual proceedings. Hence, the legal force of the judgement only applies *inter partes*, and where other individuals wish to attack the same clause, they have to bring a new court action.⁶⁹⁵⁸ In order to prevent the use of unfair terms and achieve 'positive enforcement', individual proceedings were not considered sufficiently effective in Germany, which is why the procedure of the institutional action has been introduced.⁶⁹⁵⁹ § 11 UKlaG enhances the effect of the court's decision in the context of institutional actions tremendously because it grants an extension of the legal force of the judgment beyond an *inter partes* effect. This is important because it prevents suppliers from avoiding legal proceedings

⁶⁹⁵⁷ See Part II ch 6 para 1.1.

⁶⁹⁵⁸ *Wendland* in: Staudinger/Eckpfeiler E para 20.

⁶⁹⁵⁹ Maxeiner 2003 *Yale J. Int. Law* 157.

with 'difficult clients' by giving in to their complaints.⁶⁹⁶⁰ Individual consumers that are concerned with the given clauses can assert a substantive objection.⁶⁹⁶¹ This 'extension of the legal force of the judgment' does however only apply to rulings reached within institutional actions that have reached the state of legal force, and not to those that can still be subject to an appeal. Although provisional injunctions may have the form of a judgment, the extension of the legal force does not apply to them because they have not the same binding effect as final judgments.⁶⁹⁶²

The Consumer Protection Act focuses instead on individual proceedings and leaves it to individual consumers to fight unfair terms.⁶⁹⁶³ Although section 77 of the Act sets out various support mechanisms for consumer protection groups which may represent consumers in court 'either specifically or generally', the Act does not provide for any proceedings similar to institutional actions.⁶⁹⁶⁴ Hence, the battle against unfair terms is a lonely one for the consumer who is faced with a more powerful and most of the time financially stronger supplier. This particular-personalised (i.e., individualised) approach applied in South African individual actions, coupled with equity control, is diametrically opposed to the German abstract-universal approach. A supra-individual and generalising approach is more suited for standard business terms because they have been drafted for mass contracts.⁶⁹⁶⁵ In a particular-personalised approach, the individual client has to go to court. The following decision only has an *inter partes* effect, and other consumers cannot benefit from the judgment. Experience has shown that individuals rather shy away from court proceedings as they often think that standard business terms have quasi-legislative authority. They also cannot evaluate the risks and are afraid of the costs involved with individual proceedings.⁶⁹⁶⁶

Even though the South African regime is geared towards individual actions between suppliers and consumers, section 52(3)(b)(iii) provides that the court may also 'make any further order [it] considers just and reasonable in the circumstances, including, but not limited to, an order (...) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.' Naudé correctly points out that this allows for preventative control in the view of future contracts between the given supplier and

⁶⁹⁶⁰ Medicus *BGB-AT* 163.

⁶⁹⁶¹ Erman/*Roloff* § 11 UKlaG para 7, Stöffels *AGB-Recht* 503.

⁶⁹⁶² UBH/*Witt* § 11 UKlaG para 4, Erman/*Roloff* § 11 UKlaG para 4. See Part II ch 6 para 2.3.6 g).

⁶⁹⁶³ See Part I ch 5, *passim*.

⁶⁹⁶⁴ See discussion in Part I ch 5.

⁶⁹⁶⁵ Staudinger/*Rieble* § 315 para 305. See Part II ch 5 para 1.1.1 b) cc).

⁶⁹⁶⁶ MüKo ZPO/*Micklitz* (2001) before § 13 AGBG para 2.

other consumers (who were not a party to the procedure). She suggests that section 52 should be redrafted in order to include ex-ante challenges.⁶⁹⁶⁷ Since the involvement of an individual contract is not necessary, Naudé refers to 'abstract', '*ex ante*' or 'general use' challenges in this regard.⁶⁹⁶⁸ Even though the wording of section 52(3) is wide enough, Naudé's view is correct in that the legislator should expressly insert a mechanism for abstract challenges in the Act. Other consumers could benefit from a ruling reached within an abstract challenge by inserting a provision similar to § 11 UKlaG.

Section 4(1)(c) to (e) deals with class actions. These are typically used in order to recover similar claims of numerous plaintiffs against few defendants.⁶⁹⁶⁹ Although the members of the given class are not parties in the formal sense, the judgment is binding on all class members. Class actions serve the procedural economy as they protect the courts from having to rule on numerous claims referring to the same cause of action, and facilitate access to the courts, especially by people living in remote areas.⁶⁹⁷⁰

It raises some concern though that there are no procedural provisions for class actions, neither in the Constitution nor in the Consumer Protection Act, despite the introduction of class actions in both pieces of legislation. Thus, legislation is necessary with regard to harmonisation, substantiation and legal certainty. This could be done by the introduction of a Public Interest and Class Actions Act, as suggested by the Law Commission.⁶⁹⁷¹ The requirements established by the courts are too vague in order to ensure a harmonised approach to class actions.⁶⁹⁷²

It is suggested that class actions cannot compensate for the lack of a general use challenge mechanism in the Consumer Protection Act. Decisions reached in class actions merely concern the parties (in the broader sense) involved but not consumers who did not join the lawsuit.

The 'model declaratory proceedings' (*Musterfeststellungsklage*) is a civil law action introduced into German law in 2018.⁶⁹⁷³ The *Musterfeststellungsklage* is no class action in the sense of South African or US-American law, however. German law generally requires the infringement

⁶⁹⁶⁷ Naudé 2010 SALJ 531.

⁶⁹⁶⁸ Naudé 2010 SALJ 518. The Unterlassungsklagengesetz (UKlaG) refers to '*Verbandsklage*' which is referred to as 'institutional action' in this thesis.

⁶⁹⁶⁹ Van Eeden and Barnard *Consumer Protection Law* 532, with further references.

⁶⁹⁷⁰ *Nkala and Others v Harmony Gold Mining Company Ltd and Others (Treatment Action Campaign NPC and Another as Amici Curiae)* [2016] 3 All SA 233 (GJ) at para [98].

⁶⁹⁷¹ SALRC *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88) (1998) at 111 *et seq.*

⁶⁹⁷² See Part I ch 5 para 2.

⁶⁹⁷³ Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage of 12 July 2018.

of one's own subjective rights in order to initiate legal proceedings and to be admissible (principle of individual legal protection).⁶⁹⁷⁴ The interest of a group or class of affected persons in the sense of section 4(1)(b) is thus irrelevant for this type of German court proceedings.⁶⁹⁷⁵ If the court should decide in favour of the associations representing the plaintiffs, each consumer entered in the specifically set up 'register of claims'⁶⁹⁷⁶ must then enforce its claim for damages individually in court. For consumers not entered in the register of claims, a 'model declaratory decision' has no effect. In a judgement in the context of a *Musterfeststellungsklage*, the court thus only decides whether there are facts that entitle the consumer to payment of damages by the defendant. The *Musterfeststellungsklage* has more resemblance with an institutional action according to the UKlaG than with a class action.⁶⁹⁷⁷ The *locus standi* provisions of § 4 UKlaG, for instance, apply to the *Musterfeststellungsklage*.⁶⁹⁷⁸

It is also suggested that the lack of abstract challenges in the South African regime cannot be balanced by a co-operation between the Commission and trade associations with the objective to establish voluntary codes of practice.⁶⁹⁷⁹ Such voluntary codes of practice hardly have the same impact as the threat of an institutional action because they are merely voluntary. Besides, there is a risk that suppliers' organisations or industries tend to negotiate terms with the Commission that favour more the suppliers than their clients.

The wording of section 4(1) suggests that a consumer's rights must have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring. This means that the legislator only provides for an *ex post facto* redress and not for a preventative or proactive control mechanism. A proactive approach would however be essential in a country like South

⁶⁹⁷⁴ *Verletzung eigener subjektiver Rechte = Prinzip des Individualrechtsschutzes.*

⁶⁹⁷⁵ For a *Musterfeststellungsklage*, in order to file a complaint with a competent Oberlandesgericht, a group of at least 10 aggrieved consumers is required. The court can then allow or dismiss the action. When the action is admitted, affected consumers then enter their names in a 'register of claims' (*Klageregister*) which is set up by the Federal Office of Justice in accordance with § 609(1) ZPO and § 1 of the *Musterfeststellungsklagenregister-Verordnung* (MFKRegV), i.e., the Regulation on Registers of Claims for Model Declaratory Proceedings. This requires at least 50 aggrieved parties within two months. Such an entry has the effect of inhibiting the statute of limitations for the individual consumer (§ 204(1) no. 1a BGB). There is no risk of litigation costs for the consumer. If the court should however decide in favour of the plaintiff associations, each consumer entered in the register of claims must then enforce its claims for damages individually in court. For consumers not entered in the register of claims, a 'model declaratory decision' has no effect. In a judgement in the context of a *Musterfeststellungsklage*, the court therefore only decides whether there are facts that entitle the consumer to payment of damages by the defendant. In the case of the Volkswagen emissions scandal ('Dieselgate'), this is based, among other things, on the fact that the consumer's vehicles in question are to be distinguished individually according to model, type approval, age, etc.

⁶⁹⁷⁶ *Klageregister.*

⁶⁹⁷⁷ See §§ 606-614 ZPO. Unfortunately, there is no official translation of these relatively new provisions.

⁶⁹⁷⁸ See 'Musterfeststellungsklage' at <https://www.musterfeststellungsklagen.de>.

⁶⁹⁷⁹ Section 93.

Africa with a large number of vulnerable consumers who cannot afford litigation, or who simply do not know that their rights are being or have been infringed. Preventive control is independent of an individual contract or consumer and exercised by consumer organisations endowed with preventative powers.⁶⁹⁸⁰ Such proactive control by consumer organisations and administrative watchdog entities would, therefore, be very effective, as shown by international experience.⁶⁹⁸¹

The institutional action is a core element of German standard business terms legislation. The type of institutional action this thesis is concerned with is set out in § 1 UKlaG, a statute containing the procedural aspects in relation to §§ 305 *et seq.* BGB. Institutional actions have a broader effect than individual actions and incite standard terms users to use clauses that are in keeping with the law. Its objective is to make content control more efficient and to allow for a broader effect. The UKlaG protects not individual consumers, but the public in general.⁶⁹⁸² For the enquiry of the given standard clauses, a strict abstract-general approach is applied. The given standard terms are not declared invalid, but the user is required to refrain from further using them, and recommenders of standard provisions must withdraw any recommendation made. Moreover, institutional actions have the effect of inciting standard terms users to use irreproachable clauses, and they often step in when customers refrain from taking legal action because of the wording of specific clauses. That a concomitant application of a particular-personalised approach (for consumer contracts) and an abstract-universal approach for institutional actions is possible has been shown in the context of § 310(3) dealing specifically with consumer contracts.

In German law, institutional actions aim to prevent the use of invalid clauses. It is therefore not necessary that a given clause has been incorporated into the agreement, and it is sufficient that the intention of incorporating the standard provisions into contracts in the future is apparent.⁶⁹⁸³ This broad interpretation corresponds to article 7(2) of the Unfair Terms Directive according to which the abstract control must be designed for 'contractual terms *drawn up* for general

⁶⁹⁸⁰ Naudé 2010 *SALJ* 517.

⁶⁹⁸¹ **Article 7 of the Council Directive 93/13/EEC of 5 April 1993** on unfair terms in consumer contracts requires adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by 'provisions whereby persons or organisations, having a legitimate interest under national law in protection consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

⁶⁹⁸² Consistent case law. See, e.g., BGH *NJW* 1994, 2693.

⁶⁹⁸³ Palandt/*Bassenge* § 1 UKlaG para 7, UBH/*Witt* § 1 UKlaG para 24.

use'.⁶⁹⁸⁴ Therefore, a commercial offer or the invitation to make an offer concluding standard business terms,⁶⁹⁸⁵ or an invoice on which standard terms are printed, without the latter being incorporated,⁶⁹⁸⁶ can be challenged by eligible entities.

This shows that the eradication of unfair standard business terms within an abstract challenge at an early stage, i.e., before their actual use for the public, is a more effective instrument than the elimination of standard provisions of an individual agreement. The implementation of a mechanism that does not consider a specific consumer-supplier relationship but rather applies a proactive approach would enhance consumer protection in South Africa. The warnings that German consumer protection associations usually send to standard terms users contain, *inter alia*, a deadline to comply with the association's complaint and a threat to take legal action. The threat of taking legal action can be an effective tool.⁶⁹⁸⁷ The fact that specific entities have the power to 'negotiate' with suppliers or the issuing of a 'warning' is often sufficient to change their unfair terms and comply with the warning so that litigation becomes superfluous.

Although this tool has not realised its full potential,⁶⁹⁸⁸ the creation of the institutional action has not been in vain because many standard business terms are more in line with the legislation than before.⁶⁹⁸⁹ The adaption of the *locus standi* for consumer organisations for cross-border transactions and the creation of a registration procedure for eligible organisations⁶⁹⁹⁰ as well as the punctual extension of active legitimation for transnational transactions by the insertion of § 4a UKlaG⁶⁹⁹¹ enforce this procedural tool.⁶⁹⁹²

It is a well-established principle that courts may decide on issues that have been overlooked by the parties, where this is required in the interest of justice.⁶⁹⁹³ Naudé legitimately argues that it would be advisable to include an explicit provision in the Act according to which courts are empowered to raise the issue of unfairness on their own initiative.⁶⁹⁹⁴ This is the case in

⁶⁹⁸⁴ WLP/Pfeiffer Art 7 RiLi para 7. Emphasis added.

⁶⁹⁸⁵ MüKo ZPO/Micklitz § 1 UKlaG para 20.

⁶⁹⁸⁶ LG Munich BB 1979, 1789.

⁶⁹⁸⁷ Naudé 2010 SALJ 518. See UK DTI Consumer and Competition Policy Directorate Commission Review of Council Directive 93/13(EEC on Unfair Terms in Consumer Contracts (Consultation Paper) (2000).

⁶⁹⁸⁸ From 2000 to 2005, for instance, there were only 62 appeals on points of law (*Revisionen*) where consumer associations were involved. In the same period, there were 354 court actions in total, which is not a very high number either. This trend continued in subsequent years. The very active Verbraucherzentrale Bundesverband, for example, issued in 2009 105 warnings and 15 court actions. See UBH/Witt before § 1 UKlaG para 8.

⁶⁹⁸⁹ UBH/Witt before § 1 UKlaG para 8.

⁶⁹⁹⁰ § 3 UKlaG.

⁶⁹⁹¹ Currently, there is no official English translation of this provision.

⁶⁹⁹² See Part II ch 6 para 2.2.

⁶⁹⁹³ See *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd* 2008 (6) SA 468 (W).

⁶⁹⁹⁴ Naudé 2009 SALJ 536.

Germany, where the courts assess the fairness of standard business terms 'incidentally,' within a so-called 'incidental control'.⁶⁹⁹⁵

In summary, one can conclude that the 'positive enforcement' by institutional actions for which an abstract-general approach is applied is a much more efficient tool to fight unfair terms than the South African individual approach, mainly consisting of individual proceedings. Class actions or a co-operation between the Commission and trade association with regard to voluntary codes of practice cannot compensate for the lack of a general use challenges mechanism. The legislator should introduce procedural provisions for class actions (this must not be necessarily in the Act) though. The South African legislator should expressly provide for abstract challenges in the Act in order to offer a proactive procedural mechanism, and introduce a provision that overcomes the *inter partes* effect, similar to § 11 UKlaG. This would improve consumer protection. South African courts should also have the possibility to raise the issue of unfairness on their own initiative, i.e. incidentally.

3. Entities involved

In the South African context, the parties typically involved in consumer protection matters are the supplier and the consumer. As discussed, the Act is geared towards individual actions and does not provide for abstract challenges (institutional actions).

The Act sets out extensive *locus standi* provisions in section 4(1) and therefore enhances access to redress. This is particularly true for low-income persons as class actions facilitate their access to redress in terms of affordability.⁶⁹⁹⁶ As discussed earlier in this chapter, class actions cannot compensate for a non-existing general use challenges mechanism in the Act though. In terms of section 4(1)(c), a person acting as a member of, or in the interest of, a group or class of affected persons also has *locus standi*. From sections 78, 71(2)(b)(iii) and 10(1) which all speak of 'accredited consumer groups' one can conclude that such a consumer group must be accredited in order to have standing, despite the wording of section 4(1)(c). Under section 4(1)(e), an association acting in the interest of its members also has standing.

As suggested in Part I,⁶⁹⁹⁷ Naudé's view to require accreditation is only correct in respect of *consumer protection* groups.⁶⁹⁹⁸ Other associations, not primarily concerned with consumer

⁶⁹⁹⁵ See discussion in Part II ch 6 para 1.1.

⁶⁹⁹⁶ Van Heerden 'Section 69' in Naudé and Eiselen (eds) *CPA Commentary* para 4.

⁶⁹⁹⁷ Chapter 5 para 2.

⁶⁹⁹⁸ Naudé 2010 *SALJ* 515.

protection matters, are not contemplated in section 1. The legislator should however amend section 4(1) in order to bring clarification of whether also non-accredited consumer protection groups have *locus standi*.⁶⁹⁹⁹

Section 71(1) broadens the *locus standi* to any person who is not a consumer concerned with a supplier's terms and conditions. This provision has a deterring effect on suppliers and facilitates the eradication of unfair terms.⁷⁰⁰⁰

The German regime requires a distinction between individual and institutional proceedings. In individual actions, the validity of a user's standard terms is assessed within an incidental control. The legal force of the judgement merely has an *inter partes* effect. The parties in individual actions are typically the given standard terms user and its client. In contrast, in institutional actions, a standard terms user is the opponent of a qualified entity in terms of § 3 UKlaG, e.g., a consumer protection organisation or a chamber of commerce and industry.⁷⁰⁰¹

Hence, the actors involved within individual proceedings are the supplier/user, on the one hand, and the consumer/other party, on the other. In the South African regime, the supplier's counterpart in class actions is an (accredited) consumer protection group. The same applies to German institutional actions. The fact that South African legislation does not provide for abstract challenges in the Act is somewhat, though not sufficiently balanced by section 71(1) which gives *locus standi* to any person who is not a consumer concerned with the supplier's standard terms.

The eligible bodies for institutional actions are contemplated in § 3(1) UKlaG. In this regard, consumer associations that are inscribed in the list of the European Commission are equal to German associations with regard to their standing. In order to be inscribed in these lists, the given association must have legal personality, e.g., being a registered association under § 21 BGB, and promote consumers' interests by education and advice on a non-commercial and non-temporary basis. Their functions must at least include the promotion of consumers' interests by education and advice on a non-commercial and non-temporary basis. This does not need to be their central role, however. Associations promoting commercial and independent professional

⁶⁹⁹⁹ Van Heerden 'Section 78' in Naudé and Eiselen (eds) *CPA Commentary* para 3.

⁷⁰⁰⁰ See Part I ch 6 para 3.2 e).

⁷⁰⁰¹ See Part II ch 6 para 2.3.5.

interests, or those that have obtained their legal personality by State awarding, e.g., the chambers of commerce and industry, are eligible too.⁷⁰⁰²

Unlike consumer protection groups as defined by the Consumer Protection Act in section 1, read in conjunction with section 77, the Act seems not to include associations that are not primarily concerned with consumer protection. Hence, 'accreditation' in terms of the Act and 'certification' under the UKlaG are not congruent concerning the associations concerned. In order to improve consumer protection, it is recommended that the South African legislator should also include associations which are not primarily concerned with consumer protection.

The Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests⁷⁰⁰³ aims to enable the 'free movement of actions for an injunction'⁷⁰⁰⁴ within the EU and to improve consumer protection in cross-border transactions. The German legislator chose the option given by the Directive by which not independent public bodies but private consumer organisations are competent for consumer protection.⁷⁰⁰⁵ This has historical, systemic and practical reasons.⁷⁰⁰⁶ Preventive control by administrative bodies has not reached the expected efficiency where it had been established.⁷⁰⁰⁷ Stoffels argues not without good reason that the tendency within EU law to shift the execution of consumer protective measures more towards administrative organisations⁷⁰⁰⁸ has to be seen with scepticism.⁷⁰⁰⁹ As discussed, preventive control by the administration is not compatible with the German 'private law society' and has not reached the same efficiency where it has been implemented.⁷⁰¹⁰

In contrast, with the involvement of the National Consumer Commission, which can be seen as the centrepiece of the consumer protection mechanism, South Africa opted for a mixed solution with administrative⁷⁰¹¹ and civil-law actors, such as consumer protection associations.

⁷⁰⁰² See Part II ch 6 para 2.3.5, with further references.

⁷⁰⁰³ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. This Directive replaced Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

⁷⁰⁰⁴ This phrase was coined in the Green Paper of the Commission of the European Communities on access of consumers to justice and the settlement of consumer disputes in the single market of 16 November 1993 (KOM (93) 576 at 77 *et seq.*

⁷⁰⁰⁵ Article 3 of the Directive.

⁷⁰⁰⁶ See Part II ch 6 para 2.2.

⁷⁰⁰⁷ See MüKo ZPO/Micklitz (2001) before § 13 AGBG para 13, with further references.

⁷⁰⁰⁸ E.g., by the Consumer Protection Cooperation Regulation (EC) No 2006/2004 of 27 October 2004.

⁷⁰⁰⁹ Stoffels *AGB-Recht* 480.

⁷⁰¹⁰ See Part II ch 6 para 2.2.

⁷⁰¹¹ For instance, the Tribunal is a 'specialist administrative tribunal' the functions and activities of which constitute 'administrative action' in terms of section 1 of the Promotion of Administrative Justice Act (Van Eeden *Consumer Protection Law* (2013) 444); the Commission is to be located within the administrative branch of government (see s 87(1) and (6) dealing with the appointment of its members by the Minister).

The choice of a central administrative body entails indeed more bureaucracy than the German solution. However, the co-existence between the NCC and consumer organisations is not a contradiction and could lead to more effective consumer protection if these organisations would be supported financially. In this regard, it is reminded that also in Germany, these organisations are chronically under-financed.⁷⁰¹²

In conclusion, it can be said that in order to improve consumer protection, the South African legislator should include associations that are not primarily concerned with consumer protection. In any event, it should make clear whether non-accredited consumer protection groups have standing. The fact that any person who is not a consumer has *locus standi* in terms of section 71(1) does not sufficiently balance the non-existing abstract challenges mechanism in the Act. Consumer organisations should financially and otherwise be supported in order to enhance consumer protection.

4. Limitation period

Under section 116(1) of the Act, a complaint in terms of the Act may not be referred or made to the Tribunal or a consumer court more than three years after (a) the act or omission that is the cause of the complaint; or (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.⁷⁰¹³ This is in line with the general prescription period contained in the Prescription Act for debts generally.

For lack of special limitation periods in the UKlaG due to the revision of the limitation periods in the BGB,⁷⁰¹⁴ §§ 194 *et seq.* BGB apply. Hence, for claims for injunction and withdrawal of recommendation, the standard 3-year limitation period of § 195 applies⁷⁰¹⁵. § 199(1) provides that unless another commencement of limitation of is determined, the standard limitation period commences at the end of the year in which: 1. the claim arose and 2. the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or

⁷⁰¹² Many German authors thus advocate for better financial resources of consumer protection organisations in order to improve their work in the long term. See Stoffels *AGB-Recht* 481, *Wendland* in: Staudinger/Eckpfeiler E para 20, MüKo ZPO/Micklitz (2001) before § 13 AGBG para 12 notes 27 and 42. Wendland argues that the biggest obstacle for an effective work of consumer associations is their weak financial resources, and Micklitz qualifies consumer protection associations as 'overstrained' due to their weak financial allocation. See also discussion in Part II ch 6 paras 2.2 and 2.3.6 i).

⁷⁰¹³ See Part I ch 5 para 3.3 b).

⁷⁰¹⁴ BT-Drs. 14/6040 at 275.

⁷⁰¹⁵ § 195 BGB: 'The standard limitation period is three years.'

would have obtained such knowledge if he had not shown gross negligence. Since § 195 provides for the standard limitation period, it also applies to individual actions.⁷⁰¹⁶

Both regimes thus apply the same limitation period of 3 years. Only the calculation of the beginning of this period varies. The calculation of the German limitation period seems to be more consumer-friendly in that it also contains a subjective element, i.e., knowledge of the claim.

5. Publication

Consumer court orders must be published in the Provincial Gazette.⁷⁰¹⁷ The publication serves as a record as the hearings and arrangements are recorded entirely, but also for future reference.⁷⁰¹⁸ These publication requirements are more far-reaching than those of § 7 of the German UKlaG that requires that only the operative part of judgement may be published. The benefit of this provision is somewhat limited though since the reach of such a publication is restricted in terms of the number of readers.⁷⁰¹⁹ Publication in newspapers or other media is only efficient if not only the operative part, like in German law but the entire decision is published. This is because read in isolation, the publication of the operative part of a court ruling is not always very conclusive. Furthermore, the costs for the publication are to be borne by the claimant. Consumer protection groups with rather limited resources might thus tend to do without a publication.⁷⁰²⁰

Naudé suggests that suppliers should be obliged to publish the NCC decisions concerning unfair terms on their website or in other media. A useful, less circuitous and less expensive procedure could consist in the establishment of a register of undertakings by the Commission.⁷⁰²¹ The latter would have to keep a record of all undertakings in respect of unfair terms and publish them, for instance, on its website and/or other media. Naudé also suggests that the Commission should have the duty to inform any person on request about the contents

⁷⁰¹⁶ See Part II ch 6 para 2.3.4.

⁷⁰¹⁷ Du Plessis 2008 *SA Merc LJ* 77. See, e.g., s 21(3) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

⁷⁰¹⁸ Du Plessis 2008 *SA Merc LJ* 77.

⁷⁰¹⁹ Staudinger/*Schlosser* § 7 UKlaG para 2, WLP/*Lindacher* § 7 UKlaG para 4, Stoffels *AGB-Recht* 503.

⁷⁰²⁰ See Part II ch 6 para 2.3.6 f).

⁷⁰²¹ In the UK, the Unfair Terms in Consumer Contracts Regulations 1999 do not provide for undertakings to be made court orders, but the OFT had simply to keep a record of all undertakings in respect of unfair terms which were published on its website. See para 10(3) read with para 15 UTCCR.

of a particular undertaking and amendments made to them.⁷⁰²² This might not be very practical since the Commission might soon experience a work overload if it had to take on such a task.

The register of decisions provided for in the former AGBG has not been inserted into the UKlaG because of data protection concerns and the loss of its significance due to other forms of publication.⁷⁰²³ What is more, this register was never very efficient because it was only useful *ex post facto*. What is more, a register of decisions has a limited effect because it might be difficult to find specific clause-related answers that apply to particular circumstances. A register of undertakings by the Commission might thus have the same fate. An information pool using a 'matrix approach' as applied in German legal commentaries could thus be more effective⁷⁰²⁴ in both countries. Such a pool could consist of a website where anyone can easily find rulings concerning consumer matters by headwords and a filter function, e.g., the name of a supplier, the concerned area (e.g., 'limitation period' or 'cancellation') and/or the adjudicating body and the date of the decision.

In summary, the publication of consumer-related decisions in some form is necessary in respect of information and transparency. A register of decisions has a limited effect however because it might be challenging to find specific clause-related answers that apply to particular circumstances. An information pool using a 'matrix approach' would be more effective in both countries.

6. Conclusion

Because of the many idiosyncrasies in both regimes, a comparison of their enforcement mechanisms is difficult and only makes sense to a certain extent. One reason is that the Consumer Protection Act bases its redress mechanism on individual actions, whereas German legislation also offers the possibility of institutional actions. Furthermore, the Act provides for various fora that are linked in a complex manner, which is not the case for the BGB and the UKlaG. A comparison between the two regimes is nonetheless prolific with regard to the tools at the disposal of the various entities in order to enforce the law.

⁷⁰²² Naudé 2010 *SALJ* 529.

⁷⁰²³ BT-Drs. 14/6040 at 276.

⁷⁰²⁴ Stoffels *AGB-Recht* 481. See also Maxeiner 2003 *Yale J. Int. Law* 156.

Compliance notices issued by the National Consumer Commission under section 100 have been compared in this chapter to warnings in terms of the UKlaG. Unlike compliance notices, warnings are issued not only in exceptional circumstances and cases of apparent transgressions but almost systematically. The reason for this lies in the fact that compliance notices serve as a quick tool for simpler matters, whereas warnings are issued for both simple and complex affairs, and to avoid negative cost consequences. Common to both is their function to avoid the involvement of the judicial system and their deterrent effect. The payment of damages in terms of a compliance notice has the function to avoid a civil-law action and refers to past infringements, whereas the payment of a contractual penalty in the German regime refers to future infringements. Hence, the German approach is more proactive and suitable to avoid further violations. The fact that the German entity is not *functus officio* after its investigation, unlike the Commission, ensures that it can intervene any time, which has a deterrent effect.

Both regimes provide for a mandatory consultation procedure in specific cases by the Commission or the court, respectively. The German regime's personal scope of application is narrower than the South African one though because only the competent regulator for financial services can be heard. As German courts can hear experts any time for evidence, and especially expert witnesses in terms of § 414 ZPO, in order to benefit from the necessary technical knowledge, the restricted personal scope of application should not make any difference in practice, however. Unlike compliance notices, warnings cannot be set aside by a judicial body but only by the issuing entity itself. If a standard terms user does not agree with a warning, the issuing entity will most likely go to court. Hence, the deterrent effect of warnings is very high. On the other hand, the fact that the Tribunal can modify compliance notices lessens the deterrent effect somewhat in the South African regime. This is even more the case for standard terms users that do not agree with a warning. They expose themselves to an expensive lawsuit, which they ultimately wish to avoid. For the reasons mentioned above, the deterrent effect of warnings is higher than for compliance notices. On the other hand, the Commission's assistance in the formulation of complaints serves as a filter regarding other enforcement entities. This is not the case for the court's assistance in terms of § 139(3) ZPO because the given lawsuit is already *sub judice*.

The German regime does not have a comparable body to the National Consumer Tribunal. It is recommended that the legislator enables members of the Tribunal to serve longer than two terms and that the phrase 'sufficient persons with legal training' in section 28(1) of the National Credit Act is defined. Since the Tribunal deals both with matters concerning the Consumer

Protection Act and the National Credit Act, the establishment of two separate and specialised chambers is advisable.

Some of the problems encountered with consumer courts could be addressed by creating a common legislative framework for consumer courts, as it was the case in Germany with the *Verwaltungsverfahrensgesetz*. The legislator should address the urgent need for proper enforcement and execution procedure in this field. It would also be helpful if consumer courts were mainly staffed with lawyers. Besides, the problems related to consumer courts, such as different consumer legislation in the various provinces, the unaddressed enforcement and execution of consumer court orders and the semi-professional nature of these entities, do not exist in the German regime where only the civil courts deal with disputes concerning consumer legislation.

ADR might often be the better choice in the South African context than more adversarial redress mechanisms. Unlike the South African legislator, the German legislature does not actively encourage ADR procedures. Nonetheless, consumers often benefit from the ombuds procedures that have been implemented by many industries, especially by banks and insurances. Hence, in both regimes, ADR plays a predominant role in dispute resolution. Both regimes require accreditation for industry ombuds. The fact that German ombuds offices must be staffed with at least two lawyers allows handling more complicated matters, which relieves the courts. In South Africa, in more complex cases, other fora are probably a better choice.

With a view to traditional dispute resolution, South Africa should adopt a similar stance in that also more complex matters can be handled by ADR agents so that more consumers could benefit from ADR. The German regime does not have formalities with regard to judicial entities (i.e., submission to the Tribunal or the High Court for a consent order) since the German ombud procedure is independent of judicial proceedings. As ADR is embedded in the South African redress mechanism, the choice of further formalities was logical, however. A formalisation by the Tribunal or the High Court undoubtedly strengthens the ombud's decision. The South African legislator should make clear if the other entities mentioned in section 4(1) have standing, or if ADR is only intended for smaller affairs.

The decisions of South African ombuds are usually not legally, but factually binding. In contrast, the decisions of German ombuds are legally binding on the company up to a certain amount. They are never binding to the consumer, though, who still can go to court. Therefore, the two regimes offer the same level of protection in this regard. The South African legislator

should merge several ombuds of a particular sector in order to eliminate overlapping jurisdictions, achieve economies of scale, raise the ombuds' profile and make the whole system more transparent. By and large, the German ombuds regime is far less complex, more transparent and also suited for more complex cases than the South African system.

Concerning civil law procedures, the German legislator chose another path to make the fight against unfair terms more affordable: it merely lowered the amounts in dispute so that consumer protection organisations are protected from the risk of costs involved. Therefore, the complex mechanism of the Act was not the only option for South Africa. Instead, it could have lowered the costs involved in matters related to the Act. In general, the South African regime is very complex, which is partly due to the concurrent legislation in consumer matters. Nonetheless, the over-complicated redress mechanism could have been avoided by streamlining it, for instance, by giving Small Claims Courts a more prominent role. Sufficient staffing and financing of these judicial bodies, paired with a lowering of the amounts in dispute according to the German model would have been beneficial in this regard. Admittedly, this would have been a shift from a more administrative towards a more judicial redress mechanism, which was clearly not the legislator's intention. On the other hand, the German model concerning the assignment of competence to certain courts would hamper the access to justice of South African consumers and should not be implemented.

Unlike the South African legislator, the German legislator's objective was to eliminate unfair terms from the beginning by 'positive enforcement'. This is done by institutional actions for which a supra-individual and generalising approach is applied. This tool is by far more efficient and effective in the battle against unfair terms than the South African particular-personalised approach within individual proceedings who merely have an *ex post facto* as well as an *inter partes* effect, and where other consumers do not benefit from the given decision. Other consumers could benefit from a ruling reached within an *ex-ante* challenge by inserting a provision similar to § 11 UKlaG. Even though the Act provides for the possibility of class actions (which do not exist in Germany; the *Musterfeststellungsklage* has more resemblance with an institutional action) and a co-operation between the Commission and trade association with regard to voluntary codes of practice, these cannot compensate the lack of an abstract challenges mechanism.

Nevertheless, the legislator should introduce procedural provisions for class actions (e.g., in a Public Interest and Class Actions Act) in order to ensure a harmonised application of this tool.

Hence, the South African legislature should expressly provide for general use challenges in the Act in order to provide for a proactive procedural mechanism. The implementation of a mechanism which does not consider a specific consumer-supplier relationship but applies a proactive approach instead would enhance consumer protection in South Africa. That a concomitant application of a particular-personalised approach (for consumer contracts) and an abstract-general approach for institutional actions is possible has been shown in the context of § 310(3) dealing with consumer contracts. South African courts should also have the possibility to raise the issue of unfairness on their own initiative, i.e. incidentally.

'Accreditation' under the Act and 'certification' in terms of the UKlaG are not similar with respect to consumer protection organisations. The South African legislator should include associations that are not primarily concerned with consumer protection in order to enhance consumer protection. It should make clear whether non-accredited consumer protection groups have standing. The fact that any person who is not a consumer has *locus standi* under section 71(1) balances the fact that the Act does not provide for an abstract challenges mechanism to a certain, though not sufficient extent. What is more, the South African regime opted for a more administrative solution in terms of consumer redress, which is mitigated by the involvement of private actors, such as consumer protection organisations. These organisations should financially and otherwise be supported in order to enhance consumer protection.

Both regimes apply the same limitation period, but their calculation is different. The calculation of the German limitation period seems to be more consumer-friendly in that it also contains a subjective element and starts only after the person obtains knowledge of the circumstances giving rise to the claim. The publication of consumer-related decisions in some form is necessary regarding information and transparency. A register of decisions has a limited effect however because it might be difficult to find specific clause-related answers that apply to the circumstances of a given case. Thus, an information pool using a 'matrix approach' would be more effective in both countries.

PART IV – CONCLUSION AND RECOMMENDATIONS

I. CONCLUSION

1. Introduction

The present and final Part IV provides in its Conclusion (**I.**) an overview highlighting the main issues that had been dealt with in Parts I to III. The following Recommendations (**II.**) contain specific assessments and suggestions as to where and how the South African legislator should take action in order to ensure better consumer protection, on the one side, and as to how the courts should deal with specific issues, on the other. Finally, in the Overall Conclusion (**III.**) an overall assessment of the findings of this thesis will be presented.

2. Historical development

In both countries, the courts had very different roles to play from the beginning. This is foremost due to the fact that South Africa has a much more developed common-law tradition than Germany does. In contrast, the role of German courts in developing the law is much more restricted because the basis of their decisions is the codified law. Nevertheless, the rich body of decisions of German jurisprudence developed over the years was the basis of the provisions of the former AGBG (now §§ 305 to 310 BGB). In this sense, the German courts too played a crucial role regarding the standard business terms regime.

In spite of various judicial developments in both countries, the need to legislate the field of consumer protection in a broader sense, on the one side, and the area of standard business terms, on the other, was palpable: In South Africa there was an apparent need for protection of vulnerable consumers, and in Germany, only the most apparent abuses were brought before the courts whose rulings merely had an *inter partes* effect. These reasons led to the codification of the German AGBG of 1976 and the South African Consumer Protection Act of 2008.

Before the codification of the aforementioned statutes, a more systematic and dogmatic view in terms of the *pacta sunt servanda* principle prevailed in Germany, whereas the South African development in this regard was guided by historical and practical considerations. This dogmatic approach in Germany is also reflected in the principles of good faith and public policy, where a more normative context prevails for these codified maxims. In contrast, in South Africa, these principles were developed by the courts, which apply a contextual *bona fides* standard.

3. Scope of application

With regard to the **territorial scope of application**, the South African provisions ascertain that the Consumer Protection Act applies in a wide range of cases in **international transactions**. In contrast, the German provisions are part of a complex mechanism of European and international law. Both pieces of legislation achieve a high level of consumer protection. This also applies to **e-commerce** transactions.

Concerning the **material scope of application**, the Act grants a higher level of protection to consumers than the common law or other legislation. The provisions of the Act have a different rationale than the provisions of the BGB in that the BGB provisions do not only apply to consumer contracts, but to contracts in general. The scope of application is only extended to consumers by § 310(3).

The protection of sections 48 *et seq.* is not granted to **once-off transactions**. The same applies to §§ 305 *et seq.* For consumer contracts in terms of § 310(3) no. 2, a non-recurrent use on one occasion is sufficient for the application of §§ 305 *et seq.* though. Therefore, the BGB widens the material scope of application as regards consumer contracts.⁷⁰²⁵

The German provisions do not contain any requirement of **consideration**, unlike the Act, where the exchange of consideration is a condition for a transaction under section 1, except for section 5(6)(a).

In terms of **utilities**, the BGB provisions are more restrictive than the provisions of the Act because the German legislation only allows the application of the general clause. The scope of application of the Consumer Protection Act in respect of **goods** is however broader than in German law since it unrestrictedly includes immovable property and utilities. On the other hand, the German understanding of '**service**' is more inclusive as it does not positively enumerate the performances included in the definition, unlike the Consumer Protection Act. Under the Act, also **intermediaries** are included in the definition of 'services'.⁷⁰²⁶ Although in German law, a *cessio legis* is possible, a direct recourse against a person who did not directly participate in a transaction is generally excluded in contract law.⁷⁰²⁷

With regard to the **personal scope of application**, the more formalistic approach of the Act in respect of the **threshold** provision of section 5 seems more appropriate for South Africa than

⁷⁰²⁵ Concerning once-off transactions, see also the recommendations in this chapter.

⁷⁰²⁶ See Part I ch 2 para 2.2 a) bb) and Part III ch 2 para 2.1.

⁷⁰²⁷ See Part III ch 2 para 2.1.

the more flexible German regime. This is an emanation of the fact that the Act is foremost consumer protection law and has a different purpose than §§ 305 *et seq.*

The South African legislator did not include **employment contracts** into the scope of application of the Act because other pieces of legislation already offer extensive protection for employees. Both regimes exclude **collective agreements** from content control because employees are already sufficiently protected in this regard.

The areas of the **law of succession and family law** are excluded in terms of the BGB provisions. The South African regime excludes *de facto* also contracts concluded in the areas of the law of succession and family law, with certain exceptions applying to family law. Both regimes thus come to the same result. An exclusion of **company law**, like in the German regime, would not have been necessary in the context of the Act since the parties cannot be defined as suppliers and consumers under section 1. **Franchise agreements** are an exception under the Act. In contrast to the Act, content control for franchise agreements is possible in Germany as long as they do not concern the company's organisational structure.

The German term of '**other party**' and its synonyms are more restrictive in that the South African regime expands the notion of '**consumer**' to persons who are not directly involved in the transaction as well as to any natural person in terms of section 65. This expansion aims to balance deficiencies of the common law of delicts and the fact that no other legislation dealing with product liability exists in South Africa.⁷⁰²⁸ In Germany, these areas are already covered by §§ 823 *et seq.* and the ProdHaftG. On the other hand, a '**consumer**' in the Act merely relates to agreements related to goods or services. In contrast, for the German regime, such a restriction does not exist. As in practice, most contracts deal with goods or services, the majority of transactions should be covered in the South African regime, however. The South African definition of '**supplier**' is more restrictive than the German term '**user**' in that it only includes activities performed in the ordinary course of business and related to goods or services.

4. Incorporation control

The incorporation requirements for terms and conditions set out in section 49 of the Consumer Protection Act merely concern **notices to consumers or provisions in respect of certain risks or liability**. Insofar they have not been amended by this provision, the incorporation requirements of the South African common law still apply. They are laxer than those of the Act

⁷⁰²⁸ See Part III ch 2 para 3.1.

because reasonable reliance on the part of the supplier that the consumer had accepted the terms is sufficient. For electronically concluded transactions under the ECTA, additional incorporation requirements must be met. The ECTA is thus stricter as regards the incorporation requirements than the Consumer Protection Act.

In contrast, the German legislator chose a more **formalistic approach** by requiring that specific incorporation requirements apply to *all* kinds of standard business terms, except where a functional reduction of § 305(2) is necessary, or other provisions contain laxer incorporation rules.⁷⁰²⁹ In some instances, the parties can conclude a framework agreement in order to facilitate the incorporation of the terms, which is not possible under the South African regime.

The **level of protection of section 49** is higher than the one offered by the BGB provisions since the consumer must not only be informed of the existence of the given provision but also of the 'nature and potential effect' of it. § 305 merely requires that the user refer to its standard terms. This difference is justified because for section 49, a higher standard is necessary with regard to potentially harmful effects. What is more, German standard terms users do not have a similar obligation for standard terms applying to potentially dangerous activities or objects.

Even though the South African provision gives more leeway and flexibility to suppliers in that the surrounding circumstances are considered regarding the **conspicuous manner and form** in which the consumer's attention must be attracted, this might cause interpretational problems.⁷⁰³⁰

Similar to both regimes is the fact that the reference to the user's standard terms under § 305(2) and the notice or provision in terms of section 49 must meet the **transparency and plain language requirements**.

In the German regime, the other party does not necessarily need to receive a copy of the standard terms. Both regimes are alike in that a granting of an (adequate) opportunity to take notice or to understand the terms and conditions is sufficient; the actual comprehension of the terms is not required.

Except for transactions with significant implications where the agreement has to be drafted in the client's **language**, the German regime offers less protection for customers who do not understand German and who are confronted with documents written in this language. The Act

⁷⁰²⁹ See Part II ch 3 para 1.1 a) and Part III ch 3 para 1.

⁷⁰³⁰ See Part III ch 3 para 2.1. Concerning the weaknesses of section 49, see also the recommendations in this chapter.

provides at least protection under section 40(2) by which the non-existing requirement that documents have to be written in the consumer's language is somewhat counter-balanced.

The requirement of **signing or initialling** of certain provisions in South African consumer protection legislation is inexistent in the German regime. This requirement is a double-edged sword that entails more disadvantages than advantages. The more formalistic German regime offers a more balanced solution in this regard.⁷⁰³¹

Both provisions differ in terms of the moment in which the supplier's client must have an '**opportunity to take notice**' of the contents of the standard terms (BGB) or an 'adequate opportunity (...) to receive and comprehend the provision or notice' (CPA).

In South African and in German law alike the principle of **freedom of form** prevails. Specific form requirements have to be fulfilled in the German regime in exhaustively regulated cases, or if the parties agree on a specific form. The written form under section 50(2) is comparable to the text form in § 126b, but the latter is mostly allowed for quasi-contractual acts. In South Africa, such a restriction does not exist, which might create some evidential problems.

For the free **electronic access to a copy** of the (South African) consumer agreement, it seems to be sufficient that the supplier provides the given document on its website; subsequent changes of the agreement made by the supplier are thus possible. The German regime excludes this possibility by requiring a durable medium. The South African regime is also weaker in that only access to the electronic copy is to be granted; a printable copy is not required. Unlike § 126b, there is no requirement that the consumer must be able to retain or store the copy. However, as long as the conditions of § 126b are met in the form of a data message containing the given document, which can be retained or stored, the German provision is similar to section 19(1) ECTA which considerably extends the meaning of 'copy' by including data messages.⁷⁰³²

The **financial breakdown** required by section 50 would not make sense in the German regime, where text form applies mostly to quasi-contractual acts, which typically do not contain financial information. On the other hand, such a breakdown assists South African consumers in their understanding of their financial obligations. The introduction of such a requirement was thus a wise choice of the South African legislature.

⁷⁰³¹ See Part I ch 2 para 3.2 b) cc) and Part III ch 3 para 2.3. Concerning this requirement, see also the recommendations in this chapter.

⁷⁰³² See Part I ch 2 para 4.2 b) and Part III ch 3 para 2.5. With regard to subsequent modifications of documents, see also the recommendations in this chapter concerning a durable medium.

Both the South African and the German regimes restrict the validity of **non-variation (written-form) clauses**. While in South Africa, this restriction serves to ensure the principle of freedom of contract and to avoid harsh and unfair results, the German legislator aims to ascertain that individually agreed written-form clauses cannot overturn stipulations made orally.

Unlike § 305c, the Consumer Protection Act does not provide for a provision dealing with **surprising terms**. This principle is recognised by the common law, however. Since surprising terms need not necessarily constitute an unreasonable disadvantage, Naudé's and Lubbe's argument in respect of the 'essential obligations' to be determined in the context of surprising terms – which in the German regime is an element of the general clause – cannot be applied to German incorporation control, but within the content control. The Act achieves similar protection in respect of surprising terms where the supplier does not comply with the plain language requirement.⁷⁰³³

Concerning the **legal consequences** of infringements of incorporation requirements, both regimes differ in that German courts are not allowed to take the parties' position and alter the agreement in the case of invalid clauses. Both pieces of legislation aim to maintain the agreement, however. In the case of non-compliance with written-form requirements, such as text form, the German regime entails a stricter legal consequence than South African literature, which considers this form requirement not constitutive.

Section 52 seems to allow for **partial retention** of a clause, which is not permitted according to the BGH.⁷⁰³⁴

5. Interpretational control

For the **interpretation of the provisions** of the Consumer Protection Act, a **purposive approach** is applied. This paternalistic though flexible approach is alien to German construction. In order to assess the purpose of a norm, purposive construction must also apply other techniques though, such as systematic, historical and teleological interpretation. The constructional techniques can thus not be separated from each other and are overlapping to a certain degree.

The South African and the German regimes apply different legislative techniques as regards the **definitions** contained in the Consumer Protection Act and the BGB. Unfortunately, the

⁷⁰³³ See Part I ch 2 para 3.2. c) and Part III ch 3 para 3.

⁷⁰³⁴ See Part II ch 3 para 4 and Part III ch 4 para 4.

South African legislature has not stringently performed its technique and scattered many definitions elsewhere in the Act instead of grouping them all in section 1.⁷⁰³⁵

The Act contains in section 2(3) a provision concerning **signatures**. Such a specific provision does not exist in the BGB. On the other hand, §§ 125 to 129 provide for a form requirements regime. It seems that provisions falling under the Consumer Protection Act may be signed or initialled in various ways, including by the use of electronic signatures. In contrast, the BGB provisions provide that if a specific formality is prescribed by statute or agreement, the parties have to adhere to the specifically prescribed form. The Act is hence more flexible in this regard.

Section 2(6) of the Act contains a provision for the **calculation of business days**. In contrast, the German BGB provisions have a vaster scope of application as they concern the calculation of periods of time in general, similar to the South African Interpretation Act. What is more, for the calculation of the beginning and the end of a time-period, §§ 187 and 188 are more complex than their South African counterparts. The different calculation methods in both regimes are however clear enough to achieve legal certainty.

For the **interpretation of agreements** and the enquiry of the parties' intention, both regimes start with the construction of the words of a provision. Grammatical interpretation is inseparably linked with the context in which the given words have been used, however. Thus, **systematic and grammatical interpretation** applies in tandem in both regimes. The abolition of the distinction between background and surrounding circumstances in South African legislation and the permission of all evidence in order to determine the meaning of a word or phrase approaches both regimes and enhances the determination of the parties' intention.

Both pieces of legislation apply **secondary rules of interpretation** (general principles of interpretation) where the primary rules of interpretation do not lead to a satisfactory result. Furthermore, the courts of both countries have developed **interpretational maxims**. Although certain of these rules might not apply in one or the other legislation, they assist the courts to a great extent.

In South African legislation, **tertiary rules of interpretation** apply as a last resort. The objective of these rules is not the finding of the parties' intention, but a fair outcome. German courts fill unintentional gaps by performing complementary interpretation instead. Although in

⁷⁰³⁵ See Part I ch 4 para 2.1 and Part III ch 4 para 1 b). Concerning the definitions in the Act, see also the recommendations in this chapter.

both regimes, the parties' *actual* intention is not considered, the German approach takes into account their *presumed* intention. German judges thus must undertake an 'interpretational effort' in order to find out the parties' presumed intention. In contrast, South African courts can rely on a ready-made scheme of tertiary rules.⁷⁰³⁶ The latter play a minor role however since the Supreme Court of Appeal has adopted a new contextual approach to interpretation in which all evidence in order to determine the meaning of a word or phrase is permitted.

The Act and the BGB apply different **interpretational standards** for terms and conditions in relation to other agreements. The German approach takes the perspective of an average customer without legal knowledge. It is thus more objective than the South African regime where a more paternalistic attitude is applied to the consumer's benefit. The reason for this discrepancy lies in the different objectives of both pieces of legislation.

It is suggested that section 4(4)(b) introduces a **different standard of consumer protection in relation to other provisions of the Act**, by taking into consideration a more objective standard similar to the German regime. Hence, this provision of the Act widens the perspective with regard to what a reasonable person can or cannot expect. This approach cannot be qualified as abstract-universal in the sense of §§ 305 *et seq.* though.

Both the South African and the German regimes apply **interpretation in favour of the other party/consumer**. German courts apply § 305c(2) rather to cases where the objective ambiguity of a standard provision does not also affect the transparency requirement in terms of § 305c(1). Hence, the construction in favour of the other party is more restricted in Germany, as opposed to South Africa. In practice, this different scope of application should not be relevant however since in most cases, a clause will be struck down either because of the transparency requirement or under the ambiguity rule.⁷⁰³⁷

The South African regime provides for an original approach according to which **foreign law** can be taken into consideration when interpreting or applying the Act. This provision must be seen against the backdrop of the consideration that foreign and international law may influence not only the interpretation of the Act but also its application. 'Foreign law' in the sense of section 2(2) of the Act has no direct or indirect connection with South African law, contrary to EU law that must be considered in German law. What is more, it is not clear how considerations developed in the context of an abstract-generalised approach – which is an international

⁷⁰³⁶ See Part I ch 4 para 4 c), Part II ch 4 para 3.3 b) and Part III ch 4 para 2 c).

⁷⁰³⁷ See Part II ch 4 para 6.1, Part III ch 4 para 3 d).

standard – can be applied within a framework whose system is diametrically opposed. In any event, section 2(2) should be applied with precaution. With regard to language barriers, the consideration of foreign laws will most likely be limited to legal orders of which English or Dutch (which has similarities with Afrikaans) are official languages (including the EU).⁷⁰³⁸

6. Content control

This **triad of a blacklist, a greylist and a general clause** used in both regimes is an international standard and has proven to be the most effective tool for content control.

Both regimes show nonetheless some notable differences with regard to content control. Content control for individual actions in Germany is **legal control**, performed *ex officio* within a lawsuit, whereas South African consumers have to allege a contravention of the Act. Content control in South Africa is **equity control**, applying an **individualised (particular-personalised) approach**. In contrast, content control in Germany applies a **supra-individual and generalising (abstract-general) approach**. Since equity control caters for fairness in individual cases, it is not the most effective tool for fighting unfair standard terms in mass contracts, unlike the **abstract-general approach** applied in the German regime⁷⁰³⁹

Both regimes apply the principles of **public policy** and **good faith** concurrently with their standard business terms legislation.⁷⁰⁴⁰ Besides, in both countries, standard business terms legislations cannot be seen in isolation but in synergy with other provisions and the common law. The latter especially applies to South Africa.⁷⁰⁴¹

The German standard terms regime does not include performance specifications, price agreements, declaratory clauses or negotiated provisions into content control. In contrast, the South African legislator chose to include the so-called '**core terms**' and **negotiated clauses**. The courts must consider all the relevant factors in this enquiry though, and the fact that these terms may have been negotiated should be factored in. In this regard, content control in both regimes should thus come to the same results.⁷⁰⁴²

⁷⁰³⁸ See Part I ch 4 para 2.2 and Part III ch 4 para 3 e).

⁷⁰³⁹ See Part II ch 1 para 1.2 and Part III ch 2 para 2.1.

⁷⁰⁴⁰ With regard to good faith and public policy, see also the recommendations in this chapter.

⁷⁰⁴¹ See Part II ch 5 para 1.1.1 a) and Part III ch 5 para 1.

⁷⁰⁴² See Part I ch 3 para 1.3, Part II ch 5 paras 1.2.4 and 1.2.5 and Part III ch 5 para 1. With regard to negotiated and declaratory clauses, see also the recommendations in this chapter.

Price control by German courts is only allowed in specific cases. Section 48(1)(a)(i) is ambiguous as to a price control mechanism. It is however unlikely that the legislator wished to introduce such a mechanism in the Act.⁷⁰⁴³

Unlike the South African regime, in German standard business terms legislation, an '**open**' **content control** is performed in which the interpretational control takes place before the content control, and suspicious clauses are not declared invalid in this stage, but where possible within the content control. This means that the reasons of the inadequacy of standard terms must be unfolded within the content control, and not 'concealed' within the interpretational control, which otherwise would serve as a 'correction' of standard provisions.⁷⁰⁴⁴ This ensures a more balanced argumentation and weighing of the pros and cons.⁷⁰⁴⁵

As discussed, the validity of standard terms is purely a **question of law** in the German regime, and questions of fact play a minor role. This is not the case for South Africa, where **questions of fact** and the **taking of proof** are crucial for content control. This is a consequence of the concrete-individual approach applied by the Act. The same applies to the presumption that the terms in regulation 44(3) are unfair.⁷⁰⁴⁶

Even though regulation 44 only applies to B2C agreements, this provision might have a **reflective effect on B2B contracts**, especially where smaller businesses are involved. The same applies to §§ 308 and 309 as these prohibitions are a specific manifestation of the evaluative standard of § 307. Thus, the reflective effect in both regimes ensures that also B2B agreements are included in the content control in terms of the general clause.⁷⁰⁴⁷

With regard to the **blacklists**, the main difference between the two pieces of legislation with respect to the personal scope of application lies in the fact that for the application of the Act, the threshold of section 5 must be met. In contrast, for the German regime there is no such requirement.⁷⁰⁴⁸

The blacklist of prohibited clauses of section 51 is wordy and unnecessarily complicated, unlike § 309.⁷⁰⁴⁹

⁷⁰⁴³ See Part I ch 3 para 4.1.1 a) and Part III ch 5 para 1.

⁷⁰⁴⁴ BGH *NJW* 1999, 1633 (1634). See Part II ch 4 para 3.2 and Part III ch 5 para 1.

⁷⁰⁴⁵ See Part III ch 5 para 1. With regard to an open content control, see also the recommendations in this chapter.

⁷⁰⁴⁶ See Part III ch 5 para 1.

⁷⁰⁴⁷ See Part II ch 5 para 3.5.2 and Part III ch 5 para 1.

⁷⁰⁴⁸ See Part III ch 5 para 1.

⁷⁰⁴⁹ With regard to the re-wording of the blacklist, see also the recommendations in this chapter.

In some instances, there are only minor differences between certain items of the South African blacklist and the German regime:

For instance, concerning exclusions or restrictions of the user's/supplier's liability (section 51(1)(c) and § 309 no. 7 lit. b), respectively), both regimes merely differ in that § 309 no. 7 lit. b) contains exceptions concerning the transport and tariff rules for regular public transport services on the road, due to German idiosyncrasies.⁷⁰⁵⁰

Other blacklisted provisions do not have a counterpart in §§ 307 *et seq.*, but their regulatory content can be found in other provisions:

Germany has no equivalent of the South African Guardian's Fund in terms of section 51(1)(f), for example. Similar protection is achieved by provisions of family law and the law of successions, however.⁷⁰⁵¹

On the other hand, the legal result of other items of the South African blacklist is achieved by applying the German general clause or other provisions:

The German regime does not contain a similar item to section 51(1)(i)(ii) in respect of undertakings to sign documents relating to enforcement. The same results are achieved by applying the general clause of § 307, however. A similar item concerning the deposit of documents with the supplier or the provision of a PIN etc. does not exist in the BGB. The GDPR, a European Regulation, applies instead. This means that the principles of data minimisation and storage limitation (art. 5(1) lit. c) and e) GDPR) apply. Both regimes thus prohibit the deposit of an ID and the provision of personal identification codes by different means.⁷⁰⁵²

The **greylists** of both pieces of legislation differ in that the items of the South African list are presumed to be unfair, whereas the German provisions contain evaluative elements in the form of indeterminate legal terms. This is in line with the respective individual-personalised and abstract-general approach.

Even though both regimes chose different formulations and qualify specific items differently, notably with regard to their grey- or blacklisting, the level of protection is similar, and a

⁷⁰⁵⁰ See Part I ch 3 para 2.2, Part II ch 5 para 2.2.7.1 d) and Part III ch 5 para 2.1. In this regard, see also the recommendations in this chapter.

⁷⁰⁵¹ See Part III ch 5 para 2.2.

⁷⁰⁵² See Part III ch 5 para 2.5 b) and c). With regard to a mechanism similar to the GDPR, see also the recommendations in this chapter.

balanced solution is offered in most cases. This is achieved by different means, whereby overlaps between the different categories are possible:

Mostly, the two regimes offer a **comparable standard** for certain standard clauses in their respective black- or greylists and come to the **same results**, even if this means applying several items in concert to achieve a comparable level of protection (e.g., **items (a),**⁷⁰⁵³ **(b), (c), (h), (i), (k), (m), (n), (q),**⁷⁰⁵⁴ **(r), (s), (v), (w)**⁷⁰⁵⁵). In some instances, the respective **general clause is applied where the other regime grey- or blacklists a specific item** (e.g., concerning **items (j), (o), (u)**⁷⁰⁵⁶ **and (v)**). In some cases, **other German provisions contained elsewhere in the BGB or other pieces of legislation are applied** (e.g., concerning **items (d), (g), (l), (t), (aa)**). Although the two regimes **qualify specific items differently** (e.g., the counterparts of **items (f) and (y)** are blacklisted in Germany whereas they are merely greylisted in South Africa), this is counter-balanced by other factors, e.g., by the fact that the burden of proof lies with the supplier (**item (r)**).

On the other hand, some items are **more restrictive than their German counterparts** (e.g., **items (c), (e), (f),**⁷⁰⁵⁷ **(i),**⁷⁰⁵⁸ **(p),**⁷⁰⁵⁹ **(q),**⁷⁰⁶⁰ **(t),**⁷⁰⁶¹ **(x),**⁷⁰⁶² **(y),**⁷⁰⁶³ **(z)**⁷⁰⁶⁴).

For some of these items, there is a **need for improvement** with regard to better consumer protection. This concerns **items (f), (p), (t), (w), (x), (y) and (z).**⁷⁰⁶⁵

Other provisions, such as **item (bb)** are **absent in the BGB**.

The South African **general clause** of section 48 of the Act is verbose and lacks clarity. It is also unsystematic and does not correspond to international standard and good legal practice.⁷⁰⁶⁶

Contrary to the German regime where § 308 (greylist) has a **radiating effect on B2B contracts**, the greylist of regulation 44(3) finds no application to agreements between entrepreneurs. On

⁷⁰⁵³ With regard to item (a), see also the recommendations in this chapter.

⁷⁰⁵⁴ With regard to item (q), see also the recommendations in this chapter.

⁷⁰⁵⁵ With regard to item (w), see also the recommendations in this chapter.

⁷⁰⁵⁶ With regard to item (u), see also the recommendations in this chapter.

⁷⁰⁵⁷ With regard to item (f), see also the recommendations in this chapter.

⁷⁰⁵⁸ With regard to item (i), see also the recommendations in this chapter.

⁷⁰⁵⁹ With regard to item (p), see also the recommendations in this chapter.

⁷⁰⁶⁰ With regard to item (q), see also the recommendations in this chapter.

⁷⁰⁶¹ With regard to item (t), see also the recommendations in this chapter.

⁷⁰⁶² With regard to item (x), see also the recommendations in this chapter.

⁷⁰⁶³ With regard to item (y), see also the recommendations in this chapter.

⁷⁰⁶⁴ With regard to item (z), see also the recommendations in this chapter.

⁷⁰⁶⁵ Concerning these items, see the recommendations in this chapter.

⁷⁰⁶⁶ With regard to the wording of the general clause, see also the recommendations in this chapter.

the other hand, the South African blacklist (section 51) applies to B2B contracts, whereas the application of § 309 is excluded in terms of § 310(1) 1st sent. so that the general clause applies in these cases. The reason for this difference is that the Act is a pure consumer protection statute that also protects small businesses, whereas the BGB provisions take into account that companies do not necessarily deserve the same level of protection.

As the Consumer Protection Act applies an **individualised approach**, the fairness assessment is undertaken by considering the factors of section 52(2).⁷⁰⁶⁷ South African courts should also apply those **factors considered in foreign legislation** which serve as the best international model. The German regime does not provide for a list of factors. Only in consumer contracts, the 'other circumstances attending the entering into of the contract must also be taken into account'. In order to enhance predictability and certainty, South African courts should also be able to declare terms unfair *per se* in a particular industry, or based on the '**tendency of the clause**'. Such an objective finding is also the German approach, without which institutional actions would not be possible.

The comparison of both regimes with regard to the factors contained in section 52(2) of the Act has revealed that because of the general irrelevance of the so-called 'price argument' in the German regime, both pieces of legislation are only comparable to the extent that the **price** is considered by taking other factors or clauses into account.⁷⁰⁶⁸

Besides the factors contained in section 52, **other factors** may also be taken into consideration. Examples are the nature of the goods or services in question or the balance of the parties' interests.

Although in the German regime, the individual clauses of a standard terms contract are assessed, and not the agreement as a whole, this principle is mitigated due to the **accumulative and the cumulative effects**. These two 'effects' also apply to South Africa.⁷⁰⁶⁹

7. Redress mechanism

Because of the many **idiosyncrasies in both regimes**, a comparison of their enforcement mechanisms is difficult and only makes sense to a certain extent because besides individual actions, the German regime is also designed for institutional actions. On the other hand, the

⁷⁰⁶⁷ Concerning the factors of section 52(2), see also the recommendations in this chapter.

⁷⁰⁶⁸ In terms of price control, see also the recommendations in this chapter.

⁷⁰⁶⁹ See Part III ch 5 para 4.4.2 c).

Act provides for various fora that are linked in a complex manner, which is not the case in Germany.

Unlike **compliance notices** pursuant to section 100, **warnings** under the UKlaG are issued almost systematically. Compliance notices serve as a quick tool for simpler matters, whereas warnings are also issued for complex affairs. Common to both is their function to avoid the involvement of the judicial system and their deterrent effect. The German approach is more proactive and suitable to avoid further violations since the payment of a contractual penalty refers to future infringements. The fact that the German entity is not *functus officio* after its investigation has a deterrent effect too.⁷⁰⁷⁰

If a standard terms user does not agree with a warning, the issuing entity will most likely go to court. On the other hand, the fact that the Tribunal⁷⁰⁷¹ can modify compliance notices lessens the deterrent effect somewhat in the South African regime. Standard terms users that do not agree with a warning expose themselves to an expensive lawsuit. For the reasons stated above, the deterrent effect of warnings is higher than for compliance notices.

Besides, the problems related to **consumer courts**, such as different consumer legislation in the various provinces, the unaddressed enforcement and execution of consumer court orders and the semi-professional nature of these entities do not exist in the German regime where only the civil courts deal with disputes concerning consumer legislation.⁷⁰⁷²

ADR might often be the better choice in the South African context than more adversarial redress mechanisms. Unlike the South African legislator, the German legislator does not actively encourage ADR procedures. Despite this fact, consumers often benefit from the ombuds procedures that have been implemented by many industries. Hence, in both regimes, ADR plays a predominant role in dispute resolution. Both regimes require accreditation for industry ombuds. The fact that German ombuds offices must be staffed with at least two lawyers allows handling more complicated matters, which relieves the courts. In South Africa, other fora are probably a better choice in more complex cases.⁷⁰⁷³

⁷⁰⁷⁰ See Part III ch 6 para 2.1.

⁷⁰⁷¹ Concerning the Tribunal, see also the recommendations in this chapter.

⁷⁰⁷² With regard to the problems concerning consumer courts, see also the recommendations in this chapter.

⁷⁰⁷³ Regarding ADR, see also the recommendations in this chapter.

The two regimes offer the same level of protection as regards ombuds procedures. The German ombuds regime is nevertheless far less complex, more transparent and also suited for more complex cases than the South African regime.⁷⁰⁷⁴

Concerning civil law procedures, the German legislator made the fight against unfair terms more affordable by lowering the amounts in dispute, which protects consumer protection organisations from the risk of costs involved. Therefore, the complex mechanism of the Act was not the only option for South Africa. The over-complicated redress mechanism of the Act could have been avoided by streamlining it, e.g., by giving Small Claims Courts a more prominent role. Sufficient staffing and financing of these judicial bodies, paired with a lowering of the amounts in dispute according to the German model would have been beneficial in this regard. Admittedly, this would have been a shift from a more administrative towards a more judicial redress mechanism, which was not the legislator's intention.⁷⁰⁷⁵

The German legislature aimed to eliminate unfair terms from the beginning by institutional actions for which an abstract-general approach is applied. This tool is by far more efficient and effective than the South African individual approach within individual proceedings who merely have an *ex post facto* and an *inter partes* effect. The possibility of class actions and a co-operation between the Commission and trade associations regarding voluntary codes of practice cannot compensate for the lack of an abstract challenges mechanism.⁷⁰⁷⁶

'Accreditation' under the Act and 'certification' in terms of the UKlaG are not similar as regards consumer protection organisations. The fact that any person who is not a consumer has *locus standi* according to 71(1) balances the fact that the Act does not provide for an abstract challenges mechanism to a certain, though not sufficient extent. What is more, the South African regime opted for a more administrative solution in terms of consumer redress, which is mitigated by the involvement of private actors, such as consumer protection organisations.

Both regimes apply the same limitation period, but their calculation is different. The calculation of the German limitation period seems to be more consumer-friendly as it also contains a subjective element. The publication of consumer-related decisions in some form is necessary regarding information and transparency.⁷⁰⁷⁷

⁷⁰⁷⁴ See Part III ch 6 para 2.4.

⁷⁰⁷⁵ See Part III ch 6 para 2.5.

⁷⁰⁷⁶ See Part III ch 6 para 3. With regard to the introduction of an abstract challenges mechanism in the Act, see also the recommendations in this chapter.

⁷⁰⁷⁷ Regarding the publication of consumer-related decisions, see also the recommendations in this chapter.

II. RECOMMENDATIONS

1. Scope of application

As South African courts have to consider all relevant factors in their fairness enquiry, they should factor in the fact that certain terms have been negotiated, and treat **negotiated and non-negotiated terms** differently. Consumers that can negotiate specific terms are in a stronger bargaining position than those who have to accept a set of terms. The need for protection is not the same.⁷⁰⁷⁸

In order to afford better consumer protection, the fairness enquiry should include **once-off transactions**, similar to the German regime, which provides for consumer contracts that specific provisions apply to pre-formulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, did not influence their contents. German law thus renounces the condition of a use 'for a multitude of contracts' (§ 305(1)) in consumer agreements. This applies to terms 'which ha[ve] not been individually negotiated' and 'drafted in advance'. Individual agreements are not included in the scope of application of § 310(3) no. 2. If the other party itself suggested a clause which is subsequently inserted into the contract, it deserves no protection, however.⁷⁰⁷⁹

The South African legislator should hence broaden the meaning of 'transaction' in section 48. The following additional subsection for section 48 is suggested:

'This section also applies to transactions between a supplier and a consumer where the supplier's terms and conditions are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their contents.'

What is more, the South African legislator should balance the deficiencies of the personalised-individual approach of the Act by **introducing an abstract challenges mechanism** similar to the German institutional action. By doing so, the courts would apply an approach that is detached from individual consumers, and unfair terms could be eradicated for all the given supplier's customers.⁷⁰⁸⁰ Other consumers could benefit from a decision reached within an abstract challenge by inserting a provision similar to § 11 UKlaG, providing for an extension of a decision's legal force to other consumers.⁷⁰⁸¹

⁷⁰⁷⁸ See Part III ch 2 para 2.1.

⁷⁰⁷⁹ In this regard, see discussion in Part II ch 2 para 1.1.1 b) cc).

⁷⁰⁸⁰ See Part III ch 2 para 2.1.

⁷⁰⁸¹ See Part III ch 6 para 3.

For B2B agreements, the **knockout approach** in the context of the so-called '**battle of forms**' has undeniable advantages over other doctrines and should be applied both in Germany and in South Africa.⁷⁰⁸² The knockout approach assures that the transaction is not destroyed because of conflicting standard terms, and that colliding terms are replaced by statutory provisions.

Opposed to many other legislative regimes, the Act does not contain a definition of 'terms and conditions'. From a legislative point of view, the legislator should insert the following (or similar) **definition of 'terms and conditions'** into section 1:

"Terms and conditions" means any general and special arrangements, provisions, requirements, rules, specifications and standards contained in an agreement between a consumer and a supplier, irrespective of their denomination, content and presentation.'

Such a definition would cover all possible kinds of standard terms, ascertain a uniform application of the Act and unfairness control and remove all ambiguities of whether certain terms and conditions are part of an agreement.⁷⁰⁸³

Although the question of whether the **definition of 'State'** in section 1 includes organs of state or merely comprises departments of state at the national, provincial and local level has little practical relevance since parastatals are most likely excluded from the application of the Act due to their annual turnovers or asset values, the legislator should clarify this question and insert a definition of 'State' in the Act.⁷⁰⁸⁴

Item 2 of the Schedule in GN 294⁷⁰⁸⁵ defines the annual turnover as the gross revenue of the juristic person from income in, into or from the Republic, whereas certain transactions are expressly included and specific amounts excluded from this calculation. The following addition should be made under (c) as not all juristic persons, especially small businesses, conclude credit agreements but work on a cash-in-cash-out basis. Most of them file tax returns though.

If audited financial statements are not required by law and therefore not available, for the determination of the annual turnover or the asset value, the most current tax return or balance sheet is used as a basis for the calculation of the assets or turnover. If the juristic or natural person has concluded a credit agreement during the relevant period for its business, the turnover or the asset value mentioned in this credit agreement is used as a basis for this calculation.⁷⁰⁸⁶

The Consumer Protection Act has not repealed **section 90 of the National Credit Act** dealing with unfair contract terms. Generally, sections 89 and 90 of the National Credit Act offer less

⁷⁰⁸² See Part II ch 3 para 1.5.

⁷⁰⁸³ See Part I ch 2 para 2.2 ff) and Part II ch 2 para 1.1.

⁷⁰⁸⁴ See Part I ch 2 para 2.2 b) aa).

⁷⁰⁸⁵ GN 294 in GG No. 34181 of 1 April 2011.

⁷⁰⁸⁶ See Part I ch 2 para 2.2 b) bb).

protection than sections 48 and 51 of the Consumer Protection Act. Better consumer protection in terms of the NCA could therefore be achieved by amending section 90 and aligning it with the CPA provisions. Section 121, read with Schedule 1 of the Consumer Protection Act, and section 172, read with Schedule 1 of the National Credit Act would have to be amended for this purpose. The amendment of section 90 NCA is preferable over a repealing of section 90 of the NCA and making it subject to an amended Consumer Protection Act because a cross-referencing between the two pieces of legislation is avoided.⁷⁰⁸⁷

2. Incorporation control

Section 49 shows some weaknesses.⁷⁰⁸⁸ The legislator should thus make the three following **modifications concerning section 49(2) and (4)**:

Firstly, it should give more guidance to suppliers as regards the '**conspicuous manner and form**' in which the consumer's attention must be attracted, and prescribe some guidelines for this requirement. As this has to be done with regard to the surrounding circumstances, a minimum standard would be sufficient. This would avoid interpretational problems.

The following sentence, based on the model of § 305(2) no. 1, should be inserted at the end of section 49(4):

'In order to satisfy the requirements set out in paragraph (a) of this subsection, the user must at least post a clearly visible notice at the place where the transaction is entered into.'

Secondly, the legislator should abandon the requirement of **signing or initialling** provisions regarding activities or facilities that are subject to any risk by virtue of section 49(2). Initialling or counter-signing of exemption clauses can be a double-edged sword as the supplier could ultimately argue that they are always fair. The courts should instead be able to enquire the fairness of such terms regardless of whether the consumer has signed or initialled the given provisions. In tandem with the minimum standard for the requirement of 'conspicuous manner and form' suggested above, consumers can be expected to be sufficiently aware of the risks involved when engaging in such a risky activity.

Only then, the phrase '**or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision**' in section 49(2) can develop its full sense. Consumers engaging in risky activities for which specific and clearly visible warning signs have been installed presumably agree with the given notice or provision.

⁷⁰⁸⁷ See Part III ch 2 para 2.2 e).

⁷⁰⁸⁸ See Part I ch 2 para 3.2 b).

Evidential problems should not be expected at this stage because such consumers act in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

Thirdly, in order to strengthen the consumer's position, the following sentence, which follows the example of § 305c BGB, should be inserted in section 49(2) *in fine*:

'A provision or notice which in the circumstances, in particular with regard to the outward appearance of the contract, is so unusual that the consumer need not expect to encounter it, is not valid.'

This would apply irrespective of whether the provision or notice is drafted in plain language as it would be so surprising that one cannot expect a normally alert consumer to encounter it.⁷⁰⁸⁹

With these three measures, consumers would be sufficiently alerted about the risks involved so that signing or initialling would be superfluous and a more objective standard would apply.

The current wording of **section 50(2)** is prone to manipulations by the supplier. **Subsequent modifications** of documents that are available on the supplier's website with regard to **written consumer agreements** (section 50) should hence be made impossible by requiring that the given declaration must be made on a durable medium in the sense of § 126b, such as paper, or electronic mediums (e.g., USB sticks, CD-ROM, DVD, hard or external disks).⁷⁰⁹⁰

3. Interpretational control

As regards the **interpretational control**, the legislator should revise some **definitions** and insert all definitions into section 1 in order to take a more stringent approach.⁷⁰⁹¹

The definition of 'used goods' in section 1 appears nowhere else in the Act and should be deleted.

South African courts should also aim at an **open content control** in which the interpretational control takes place before the content control so that the content of the clauses that must be assessed is entirely clear before the content control takes place.⁷⁰⁹² Unnecessary discussions on whether or not a clause is unfair before knowing its meaning as well as the risk that the reasons of the inadequacy of the clause are 'concealed' within the interpretational control, which then would serve as a 'correction' of the provision, are then avoided beforehand.⁷⁰⁹³ The

⁷⁰⁸⁹ See Part I ch 2 para 3.2 b).

⁷⁰⁹⁰ See Part I ch 2 para 4.2 b) and Part III ch 3 para 2.5.

⁷⁰⁹¹ See Part I ch 4 para 2.1 and Part III ch 4 para 1 b).

⁷⁰⁹² See Part III ch 5 para 1.

⁷⁰⁹³ BGH *NJW* 1999, 1633 (1634). See Part II ch 4 para 3.2 and Part III ch 5 para 1.

interpretational and content controls must be strictly separated and cannot be performed within one another.⁷⁰⁹⁴

Purposive interpretation in terms of section 2(1) should not only consider the consumer's position because the interests of the parties are not always competing. If a court favours the consumer's interests in a particular case, this may ultimately lead to higher prices or even make the product or business unprofitable. The courts should therefore also consider the broader economic impact of their decisions by taking into account the interests of *both* parties.⁷⁰⁹⁵ The National Credit Act⁷⁰⁹⁶ deals with this problem in a more nuanced way than the Consumer Protection Act.⁷⁰⁹⁷ Thus, the legislator should insert the following additional phrase into section 2(1):

'(...) and by taking into consideration the broader economic impact that any interpretation of the Act might have.'

4. Content control

The South African and the German regimes apply the principles of **public policy** and **good faith** concurrently with their standard business terms legislation. The development of typified categories, or *Fallgruppen*, by South African courts would tremendously assist them in the development of the common law and prevent 'piecemeal solutions'.

Declaratory clauses, i.e., those that merely reflect legal provisions, should be excluded from content control in South Africa too since this area contains constitutional questions.⁷⁰⁹⁸

In order to conform to international standards, the South African legislator should reformulate the wordy and unnecessarily complicated **blacklist** of section 51.

§ 309 no. 7 lit. b), the counterpart to section 51(1)(c), not only expressly states the exclusion or limitation of liability, but also applies to **restrictive modalities** for the assertion of a given claim by the other party, such as a very short preclusion period. These create an obstacle for the user's liability. In order to ensure adequate consumer protection, such restrictive modalities should thus also apply in terms of section 51(1)(c).⁷⁰⁹⁹

As regards **section 51(1)(j)**, it is recommended that the South African legislator inserts a mechanism in the Act similar to the GDPR in which also the provision (i.e., not only the

⁷⁰⁹⁴ See Part I ch 4 para 4.2, Part II ch 4 para 3.2 and Part III ch 4 para 3 b).

⁷⁰⁹⁵ De Stadler 'Section 2' in Naudé and Eiselen (eds) *CPA Commentary* para 12.

⁷⁰⁹⁶ 34 of 2005.

⁷⁰⁹⁷ Section 3 NCA.

⁷⁰⁹⁸ See Part III ch 5 para 1.

⁷⁰⁹⁹ See Part I ch 3 para 2.2, Part II ch 5 para 2.2.7.1 d) and Part III ch 5 para 2.1.

deposit) of data contained in IDs etc. is regulated with respect to data minimisation and storage limitation. This would avoid the unnecessary provision of data and enhance consumer protection.⁷¹⁰⁰

Concerning the items contained in regulation 44(3), the South African legislator should blacklist the contents of regulation **44(3)(a)** because the greylisting of such terms is a systemic weakness with regard to the Constitution and the common law.⁷¹⁰¹

Furthermore, the **editorial error** contained in regulation 44(4)(a), referring to item (k), should be corrected because this provision was meant for item (l) of regulation 44(3).⁷¹⁰²

With regard to **item (f)**, the legislator should consider including any **facilitation of the limitation period**, i.e., measures that have the same result as a shortening of the limitation period, into the greylist as the consumers' need for protection is similar in these cases.⁷¹⁰³

Item (i) should be amended according to the wording of § 6(2) no. 3 of the Austrian KSchG, so that variation clauses are fair

'unless the consumer may be reasonably expected to accept the alteration or variation, particularly because it is negligible and factually justified'.

This is because the possibility for the consumer to cancel an agreement with substantially altered terms does not make it fair. The consumer should not be in the situation where he or she has to choose between accepting the given product or service which he or she had not agreed to initially, or refusing it and suffering the inconvenience of not getting what he immediately needed, just because it is more convenient for the other party not to supply what was initially agreed.⁷¹⁰⁴ The Austrian formulation ensures better consumer protection than § 308 no. 4 where a variation is of no effect 'unless the agreement of the modification (...) can reasonably be expected of the [consumer] when the interests of the [supplier] are taken into account'.⁷¹⁰⁵

Regulation **44(3)(p)** deals with long performance periods. § 308 no. 1 1st sent. 2nd var. covers more cases though and is formulated in a more nuanced way. In order to achieve better

⁷¹⁰⁰ See Part III ch 5 para 2.5.

⁷¹⁰¹ See Part I ch 3 para 3.4.1 a) and Part III ch 5 para 3.2 a).

⁷¹⁰² See Part I ch 3 para 3.4.2 d) and Part III ch 5 para 3.2 k).

⁷¹⁰³ See Part III ch 5 para 3.2 f).

⁷¹⁰⁴ OFT *Unfair Contract Terms Guidance* (2008) para 11.7 at 55.

⁷¹⁰⁵ See Part I ch 3 para 3.4.1 b).

protection, the South African item should also apply to all sorts of **periods for performance** and include insufficiently specific periods for performance.⁷¹⁰⁶

§ 309 no. 6 has a broader scope of application than **item (q)** (one-sided forfeiture clauses) as it directly applies to dependent penalty clauses, and by analogy to **independent penalty clauses**. Since the economic consequences are the same for both types of penalty clauses, South African courts should apply item (q) by analogy also to independent penalty clauses.

In the context of item (q), better consumer protection under **section 17(5)** would be achieved by redrafting this provision and inserting a more extensive and better-defined range of reasons, such as:

*'... because of the death of the person for whom, or for whose benefit the booking, reservation or order was made, or for any other medical, psychological or psychiatric reason or treatment which was not known by the consumer at the time of his or her booking, reservation or order as well as any case of force majeure which makes it objectively impossible for the consumer to honour his or her agreement'.*⁷¹⁰⁷

Item (t) of the South African greylist merely concerns the transfer of obligations, whereas § 309 no. 10 also covers the **transfer of rights**. Therefore, the free assignability of claims is not covered by item (t). The South African legislature should include the transfer of claims too because also in these cases, consumers should be protected from an unfettered change of their contractual partners.⁷¹⁰⁸

The limitation of the transferability of commercial guarantees is greylisted in **item (u)**. These guarantees add substantial value to the purchased good. However, item (u) should not only apply to the re-sale, but also to other types of transactions, irrespective of whether the initial purchaser had used the good in question. There is no reason why a re-sale should be greylisted but not a donation. Otherwise, the consumer or donee is deprived of part of what was paid for, and the supplier has an economic benefit. The wording of this item should thus be amended accordingly.⁷¹⁰⁹

The South African legislature should insert other **means of communication** into **item (w)**, such as e-mail, and not limit this provision to prepaid registered mail. According to Naudé, the following words should thus be added at the end of paragraph (w):

'(...) or by another means of communication chosen by the consumer for such statements'.

⁷¹⁰⁶ See Part III ch 5 para 3.2 p).

⁷¹⁰⁷ Suggested modification of s 17(5) emphasised. See Part I ch 3 para 3.4.3 a).

⁷¹⁰⁸ See Part III ch 5 para 3.2 t).

⁷¹⁰⁹ See Part I ch 3 para 3.4.4 b).

With a view to the SAPO's unreliable service, the inclusion of other means of communication would be an advantage in order to avoid unnecessary frustration and disputes.⁷¹¹⁰

As otherwise the objective of regulation **44(3)(x)** would not be achieved, it is suggested that this item greylists not only **arbitration** but also **mediation**, similar to § 309 no. 14. Since a restriction to court actions would not sufficiently honour the normative objective of item (x), this provision should also apply to other proceedings, such as preservation of evidence or preliminary injunctions.⁷¹¹¹

The South African legislator should consider a **widening of item (y)** towards a 'modification of the burden of proof' in order to **include other aggravations**, similar to § 309 no. 12. **Conclusive proof certificates** should always be considered unfair. Standard clauses which **modify or restrict the burden of proof of suppliers** who have control of the other's items should systematically be declared unfair.⁷¹¹²

Item (z) is more restrictive than § 309 no. 8 lit. b) ee) and ff) and should be amended so as to **include all sorts of adverse modifications** of the limitation period for consumers.⁷¹¹³

Due to the many shortcomings of the South African **general clause**, the legislator should **redraft** section 48 in a way that corresponds to international standard and good legal practice.

Most general clauses in other jurisdiction make clear that a clause is 'unfair' if there is some imbalance between the parties' rights and obligations, that is if the clause 'unreasonably disadvantage[s] the other party',⁷¹¹⁴ 'constitute[s] a severe disadvantage for one of the parties',⁷¹¹⁵ 'is unreasonably burdensome for the counterparty',⁷¹¹⁶ or 'causes a significant imbalance in the parties' rights and obligations arising under the contract'.⁷¹¹⁷

A more concise South African general clause could thus be worded by following the example of the German and the European provisions:

'A term of a consumer agreement which has not been individually negotiated is unfair if it unreasonably disadvantages the consumer. An unreasonable disadvantage notably exists where

⁷¹¹⁰ See Part I ch 3 para 3.4.5 a) and Part III ch 5 para 3.2 w).

⁷¹¹¹ See Part I ch 3 para 3.4.6 a), Part II ch 5 para 2.2.14 and Part III ch 5 para 3.2 x).

⁷¹¹² See Part I ch 3 para 1.4.6 b), Part II ch 5 para 2.2.12 and Part III ch 5 para 3.2 y).

⁷¹¹³ See Part III ch 5 para 3.2 z).

⁷¹¹⁴ § 307(1) 1st sent. BGB (Germany).

⁷¹¹⁵ § 879(3) ABGB (Austria).

⁷¹¹⁶ Article 6:233 BW (Netherlands).

⁷¹¹⁷ Article 3(1) of the EC Directive on Unfair Terms in Consumer Contracts 93/13/ECC of 5 April 1993 and Art 3(1) of the Australian Consumer Law.

a term causes a significant imbalance in the parties' rights and obligations arising under the agreement, to the detriment of the consumer.'

This formulation is succinct, contains a concretisation and would also distinguish between negotiated and non-negotiated standard terms. This is in keeping with the suggested insertion of an additional subsection of section 48 (see under II.1 above).

Even though the Act is built around individual consumers, the Act should **use elements of an abstract-universal approach** in that the tendency (potential unfairness) of a term, and not its actual application, must be assessed.⁷¹¹⁸

Both regimes apply a mechanism where **price control** is undertaken only in specific circumstances. The South African legislature should make clear though that it did not wish to introduce a price-control mechanism in the Act as such.⁷¹¹⁹

Since content control of clauses having the same content as legal provisions (**declaratory clauses**) touches constitutional questions, they should be excluded from content control in South Africa too.⁷¹²⁰

As regards the **factors** to be taken into account by the court under **section 52(2)**, the **nature of the parties** is only considered in consumer contracts (§ 310(3)) because of the general-abstract approach of §§ 305 *et seq.* For legal certainty and practicability, only apparent characteristics should be considered in both regimes. The same applies to the **circumstances of the transaction**. The legislator should introduce a **doctrine of 'change of circumstances'** or 'hardship' for unforeseeable circumstances, similar to the German regime. This would enhance consumer protection in terms of section 52(2)(c).⁷¹²¹

For the sake of a better understanding and a direction to the courts, the legislator should make clear that the courts must consider also other circumstances than those mentioned in section 52(1), and that the **list in section 52(2) is not exhaustive**. It should therefore reformulate the first sentence in subsection (2) as follows:

'(2) In any matter contemplated in subsection (1), the court must consider, *inter alia*, the following factors, if applicable –⁷¹²²
(a)...⁷¹²³

⁷¹¹⁸ See Part III ch 5 para 4.1.

⁷¹¹⁹ See Part III ch 5 para 4.3 a).

⁷¹²⁰ See Part III ch 5 para 4.3 b).

⁷¹²¹ See Part III ch 5 para 4.4.1 c).

⁷¹²² My own suggestion emphasised.

⁷¹²³ See Part I ch 3 para 4.1 a).

The term ‘**circumstances**’ in **section 52(2)(i)** is ambiguous in the given context. Logically, it can only refer to the terms under which the consumer could have acquired identical or equivalent goods or services from a different supplier. The legislator should make this clear by replacing 'circumstances' by 'terms and conditions'.⁷¹²⁴

The German regime excludes **negotiated terms** from content control *per se*. In contrast, these are included in **section 52(2)(e)**. South African courts should distinguish between negotiated and non-negotiated terms, however. Non-negotiated terms are rarely considered the proper expression of the self-determination of the parties, which is why fairness intervention is justified in these cases.⁷¹²⁵ Where a supplier effectively claims freedom of contract for it alone, whereas the consumer has no influence on the wording of non-negotiated terms, and where the ‘balancing’ of the parties' rights and obligations is purely formalistic and meaningless, real freedom of contract does not exist.⁷¹²⁶ On the other hand, consumers that can negotiate specific terms are in a stronger bargaining position than those who have to accept a set of terms. The need for protection is thus not the same.⁷¹²⁷

In terms of the South African general clause, the consumer carries the risk of non-persuasion and bears the onus of proof. In German legislation, the question of whether the other party suffers an unreasonable disadvantage is a **question of law** and not a **factual question** that can be subject to evidence. The South African regime too should distinguish between legal questions and those that concern facts and are susceptible of proof.⁷¹²⁸

5. Redress mechanism

The **reference in section 71(1) to section 69(1)(c)(ii) or (2)(b)** is wrong since these provisions do not exist in the Act. The legislator should correct the wording of **section 71(1)** accordingly.⁷¹²⁹

It is recommended that the legislator enables **members of the Tribunal** to serve longer than two terms and that the phrase 'sufficient persons with legal training' in **section 28(1)** of the National Credit Act is defined. Since the Tribunal deals both with matters concerning the

⁷¹²⁴ See Part I ch 3 para 4.1.4 a) ii).

⁷¹²⁵ See BVerfG NJW 1990, 1469, Zimmermann *New German Law of Obligations* 206.

⁷¹²⁶ Naudé 2006 *Stell LR* 366, Maxeiner 2003 *Yale J. Int. Law* 143 and 147, Lewis 2003 *SALJ* 348.

⁷¹²⁷ See Part III ch 2 para 2.1.

⁷¹²⁸ See Part III ch 5 para 4.5.

⁷¹²⁹ See Part I ch 5 para 3.2 e). Regarding section 69, see also the recommendations in this chapter.

Consumer Protection Act and the National Credit Act, the establishment of two **separate and specialised chambers** is advisable.

Some of the problems encountered with consumer courts could be addressed by creating a **common legislative framework for consumer courts**, as it was the case in Germany with the *Verwaltungsverfahrensgesetz*. The legislator should address the urgent need for a **proper enforcement and execution procedure** in this field. It would also be helpful if consumer courts were mainly staffed with lawyers.⁷¹³⁰

With a view to traditional dispute resolution, South Africa should adopt a similar stance to the German regime in that German **ombuds offices** must be staffed with at least two lawyers. Then, also more complex matters can be handled by ADR agents and more consumers could benefit from it. The South African legislator should make clear if the other entities mentioned in section 4(1) have standing, or if ADR is only intended for smaller affairs.

The South African legislator should **merge several ombuds** of a particular sector in order to eliminate overlapping jurisdictions, achieve economies of scale, raise the ombuds' profile and make the whole system more transparent.

Even though the Act provides for the possibility of class actions and a co-operation between the Commission and trade association with regard to voluntary codes of practice, these cannot compensate the lack of an abstract challenges mechanism.

In this regard, the legislator should redraft section 52(2) also having **general-use challenges** in mind in order to allow for an abstract-universal approach and provide for a proactive procedural mechanism. Other consumers could benefit from a decision reached within an abstract challenge by inserting a provision similar to § 11 UKlaG.⁷¹³¹

The legislator should also introduce **procedural provisions for class actions** (e.g., in a Public Interest and Class Actions Act) in order to ensure a harmonised application. South African courts should also have the possibility to raise the issue of unfairness on their own initiative.⁷¹³²

Moreover, the legislator should include **associations** that are not primarily concerned with consumer protection in order to enhance consumer protection. It should make clear whether non-accredited consumer protection groups have **standing**. The South African regime opted

⁷¹³⁰ See Part III ch 6 para 2.3.

⁷¹³¹ See Part III ch 6 para 3.

⁷¹³² See Part III ch 6 para 3.

for a more administrative solution for consumer redress, which is mitigated by the involvement of private actors, such as **consumer protection organisations**. These organisations should financially and otherwise be supported in order to enhance consumer protection.⁷¹³³

With respect to the **publication of consumer-related decisions**, a register of decisions has a limited effect. Thus, an information pool using a 'matrix approach' would be more effective in both countries.⁷¹³⁴

Section 69 infringes the consumer's constitutional right of access to court, which is an unintended consequence of the legislature's desire to ensure quick, effective and efficient redress of disputes for consumers. Hence, there is a contradiction between section 69(d) and section 52. Referring consumers to other bodies before they can institute action with a small claims court is inefficient with regard to procedural economy. This is an anomaly that should be corrected by extending the same powers to the Tribunal.

III. OVERALL CONCLUSION

We have seen that the content control performed according to the Act offers a comparable level of protection to the German regime. With respect to the South African blacklist, the legislator should amend some provisions though in order to be in line with other regimes and enhance consumer protection. In terms of the greylist of regulation 44(3), there is a need for improvement, especially with regard to provisions that are more restrictive than their German counterparts. The legislature should also redraft the general clause in order to conform to international standards.

Despite this comparable level of protection for individual consumers, the lack of an abstract challenges mechanism, similar to institutional actions in Germany, and the fact that the South African courts apply a particular-personalised approach, coupled with equity considerations, are an obstacle for effective consumer protection and the eradication of unfair terms. As shown, the South African approach is not suited for mass contracts. Class actions, voluntary codes of practice, or the extension of the *locus standi* under section 71(1) cannot compensate for the lack of such a mechanism. The introduction of a supra-individual and generalising approach

⁷¹³³ See Part III ch 6 para 4.

⁷¹³⁴ See Part III ch 6 para 6.

and an abstract challenges mechanism, in tandem with the possibility for an extension of a decision's legal force to other consumers, similar to § 11 UKlaG, would therefore enhance consumer protection tremendously.

Given that the Act applies a particular-personalised approach, the possibility to consider foreign and international law under section 2(2) seems somewhat out of place. It is hard to imagine, even if applied with precaution, how considerations developed in the context of an abstract-generalised approach – which is an international standard – can be applied within a framework whose system is diametrically opposed.

It has also been demonstrated that in order to avoid unnecessary complications and to ensure a more balanced argumentation, the interpretational control should take place before the content control. Thus, an 'open' content control is favourable to an approach where the interpretational control takes place after the content control, or where both controls are merged.

The South African enforcement mechanism is unnecessarily complicated and intransparent. A streamlining of the redress system, e.g., by giving Small Claims Courts a more predominant role, or by lowering the amounts in dispute in order to ensure more affordable access to the court system, would be beneficial in this regard. Moreover, the German approach is more proactive than the South African regime. This is not only due to the fact that the UKlaG offers the possibility of institutional actions, but also because specific mechanisms and tools in the German regime, such as warnings, have a deterrent effect.

What is more, some procedural amendments should be undertaken in this regard, such as the splitting of the Tribunal into two separate specialised chambers, or the introduction of a common legislative framework for consumer courts. The need for a proper enforcement and execution procedure should be addressed urgently. Furthermore, the merger of several ombuds and their staffing with trained lawyers would enable ombuds also to handle more complicated matters and relieve the courts.

Associations that are not primarily concerned with consumer protection should be included in order to improve consumer protection. Moreover, the financial and otherwise support of consumer protection organisations is a key prerequisite for the battle against unfair terms.

Besides editorial errors, the Act contains some uncertainties that should be clarified. In this respect, the legislator should make clear that it did not wish to introduce a price-control

mechanism in the Act, introduce some specific definitions ('terms and conditions', 'State') and insert all definitions contained in the Act in section 1.

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LIST OF ABBREVIATIONS

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian General Civil Code)
AcP	Archiv für die civilistische Praxis (Journal)
ADR	Alternative Dispute Resolution
ADSp	Allgemeine Deutsche Spediteursbedingungen (General German Carrier Conditions)
AG	Amtsgericht (Local Court) / Aktiengesellschaft (public limited company)
AGBG	AGB-Gesetz (Standard Business Terms Act)
AktG	Aktiengesetz (Stock Corporation Act)
alt.....	alternative
AnwBl.....	Anwaltsblatt (Journal)
AO	Abgabenordnung (Fiscal Code)
AP	Arbeitsrechtliche Praxis (reference work of the Bundesarbeitsgericht)
ArbGG	Arbeitsgerichtsgesetz (Labour Courts Act)
art.....	article
BAG	Bundesarbeitsgericht (Federal Labour Court)
BAnz.....	Bundesanzeiger (German Official Journal)
BauR.....	Baurecht (Journal)
BauSparkG.....	Bausparkkassengesetz (Building and Loan Associations Act)
BB	Der Betriebsberater (Journal)
BeckRS	Beck Rechtsprechung Online-Datenbank
BetrVG	Betriebsverfassungsgesetz (Works Constitution Act)
BeurkG	Beurkundungsgesetz (Notarisation Act)
BGB.....	Bürgerliches Gesetzbuch (Civil Code)
BGBI.....	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
BGHZ	Sammlung der Entscheidungen des BGH in Zivilsachen (Collection of the decisions of the Federal Court of Justice in civil law matters)
BKR.....	Zeitschrift für Bank- und Kapitalmarktrecht (Journal)
BMG.....	Bundesmeldegesetz (Federal Registration Act)
BNotO.....	Bundesnotarordnung (Federal Code for Notaries)
BRAGO	Bundesrechtsanwaltsgebührenordnung (former Lawyers' Compensations Act)
BRAO	Bundesrechtsanwaltsordnung (Federal Lawyers' Act)
BR-Drs.....	Bundesratsdrucksache (Official Record of the Bundesrat)
BT-Drs.....	Bundestagsdrucksache (Official Record of the Bundestag)
Buff. Hum. Rts. L. Rev.....	Buffalo Human Rights Law Review
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BW	Burgerlijk Wetboek (Dutch Civil Code)
CCLJ	Competition and Consumer Law Journal (Australia)
ch.....	chapter
CILSA.....	Comparative and International Law Journal of South Africa
CISG.....	UN Convention on Contracts for the International Sale of Goods, 1980
Common Mkt. L. Rev.....	Common Market Law Review
CPA	Consumer Protection Act 68 of 2008

DAR	Deutsches Autorecht (Journal)
DB	Der Betrieb (Journal)
DNotZ	Deutsche Notar-Zeitschrift (Journal)
DR	Deutsches Recht (Journal)
DRiZ	Deutsche Richterzeitung (Journal)
DStR	Deutsches Steuerrecht (Journal)
DTI	Department of Trade and Industry
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (Journal)
ECJ	European Court of Justice
ECTA	Electronic Communications and Transactions Act 25 of 2002
ed(s)	editor(s) / edition
EFZG	Entgeltfortzahlungsgesetz (Act on Continued Employment Remuneration)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the Civil Code)
EGZPO	Einführungsgesetz zur Zivilprozessordnung (Introductory Act to the Code of Civil Procedure)
EnWG	Energiewirtschaftsgesetz (Energy Industry Act)
et al.	<i>et alii</i> (and others)
et seq.	<i>et sequentes / et sequentia</i> (and the following)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Journal)
e. V.	eingetragener Verein (registered association)
EWS	Europäisches Wirtschafts- und Steuerrecht (Law Journal)
FAIS	Financial Advisory and Intermediary Services Act 37 of 2002
FernAbsG	Fernabsatzgesetz (Distance Selling Contracts Act)
FernUSG	Gesetz zum Schutz der Teilnehmer am Fernunterricht (Distance Learning Protection Act)
FS	Festschrift (commemorative publication)
GBO	Grundbuchordnung (Land Registry Code)
GG	Government Gazette, Grundgesetz (German constitution)
GenG	Genossenschaftsgesetz (Cooperatives Act)
GenN	General Notice
GKG	Gerichtskostengesetz (Court Fees Act)
GN	Government Notice
GVG	Gerichtsverfassungsgesetz (Judicature Act)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition)
GwG	Geldwäschegesetz (Money Laundering Act)
Harv LR	Harvard Law Review
HGB	Handelsgesetzbuch (Commercial Code)
HL Deb	Debate of the House of Lords (UK)
HRefG	Handelsrechtsreformgesetz (Commercial Law Reform Act)
HwO	Handwerksordnung (Trade and Crafts Code)
InvG	Investmentgesetz (Investment Act)
IFRS	International Financial Reporting Standards
in pr.	<i>in principio</i> (at the beginning)
Int. J. Private Law	International Journal of Private Law
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Journal)

JA	Juristische Ausbildung (Journal)
J. Appl. Psychol.	Journal of Applied Psychology (USA)
JICLT	Journal of International Commercial Law and Technology
JuS	Juristische Schulung (Journal)
JW	Juristische Wochenschrift (Journal)
JZ	JuristenZeitung (Journal)
KAGB	Kapitalanlagegesetzbuch (Investment Companies Code)
KG	Kammergericht (Higher Regional Court of Berlin)
KSchG	Konsumentenschutzgesetz (Consumer Protection Code) (Austria), Kündigungsschutzgesetz (Protection Against Dismissal Act) (Germany)
KWG	Kreditwesengesetz (Banking Act)
LAG	Landesarbeitsgericht (State Labour Court)
MDR	Monatsschrift für Deutsches Recht (Journal)
MEC	Member of the Executive Council
MFKRegV	Musterfeststellungsklagenregister-Verordnung (Regulation on Registers of Claims for Model Declaratory Proceedings)
NachwG	Nachweisgesetz (Evidence Act for Employment Relationships)
NCA	National Credit Act 34 of 2005
NCC	National Consumer Commission
NCT	National Consumer Tribunal
NJW	Neue Juristische Wochenschrift (Journal)
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport (Journal)
No./no.	Number
NPA	National Prosecuting Authority
NZA	Neue Zeitschrift für Arbeitsrecht (Journal)
NZA-RR	Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport (Journal)
NZBau	Neue Zeitschrift für Baurecht und Vergaberecht (Journal)
NZG	Neue Zeitschrift für Gesellschaftsrecht (Journal)
NZM	Neue Zeitschrift für Miet- und Wohnungsrecht (Journal)
ObLG	Oberstes Landesgericht (Bavarian Supreme Court)
OFT	Office of Fair Trading (UK)
OJ	Official Journal (EU)
O.J.L.S.	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Court)
PAngV	Preisangabenverordnung (Price Indication Regulation)
para(s)	paragraph(s)
PatAnwO	Patentanwaltsordnung (Patent Lawyers' Act)
PBefG	Personenbeförderungsgesetz (Passenger Transportation Act)
PDLV	Postdienstleistungsverordnung (Post Service Regulation)
PersAuswG	Personalausweisgesetz (Identity Card Act)
PELJ / PER	Potchefstroom Electronic Law Journal / Potchefstroomse elektroniese regsblad)
p(p).	page(s)
ProdHaftG	Produkthaftungsgesetz (Product Liability Act)
RdA	Recht der Arbeit (Journal)
rec.	recital

reg.	regulation
RG	Reichsgericht (Supreme Court of the German Reich)
RGZ	Sammlung der Entscheidungen des Reichsgerichts in Zivilsachen (Collection of the decisions of the Reichsgericht in civil law matters)
RheinSchiffahrtsOG	Rheinschiffahrtsobbergericht (Supreme Court for the Navigation on the River Rhine)
RHPfIG	Reichshaftpflichtgesetz (Liability Act of the German Reich)
RIW	Recht der Internationalen Wirtschaft (Journal)
RPfIG	Rechtspflegergesetz (Act on the Competencies of Officers of Justice)
RVG	Rechtsanwaltsvergütungsgesetz (Lawyers' Compensation Act)
SAICA	South African Institute of Chartered Accountants
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SA Merc LJ	South African Mercantile Law Journal
SAPS	South African Police Service
s(s)	section(s)
SCA	Supreme Court of Appeal
sent.	sentence
SigG	Signaturgesetz (Signature Act)
StBerG	Steuerberatungsgesetz (Tax Consultancy Act)
Stell LR	Stellenbosch Law Review
s.v.	<i>sub verbo</i> (under the heading of)
TEC	Treaty establishing the European Community
Tex. J. Cons. & Comm. Law	Journal of Consumer and Commercial Law (Texas, USA)
TFEU	Treaty on the Functioning of the European Union
THRHR	Tydskrif vir hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid-Afrikaanse reg /Journal of South African Law)
TVG	Tarifvertragsgesetz (Collective Bargaining Act)
TzBfG	Teilzeitbefristungsgesetz (Part-Time and Fixed-Term Employment Act)
UCPD	EU Unfair Commercial Practices Directive
ÜG	Überweisungsgesetz (Cashless Payment Transactions Act)
UKlaG	Unterlassungsklagengesetz (Injunctions Act)
UNECIC	United Nations Convention on the Use of Electronic Communications in International Contracts, 2005
UNICITRAL	United Nations Commission on International Trade Law
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999 (UK)
UWG	Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition)
v / vs	<i>versus</i>
VAG	Versicherungsaufsichtsgesetz (Insurance Supervision Act)
var.	variation
VDG	Vertrauensdienstegesetz (Trust Services Act)
VersR	Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht (Journal)

VGG	Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften (VGG) (Act on the Administration of Copyright and Neighbouring Rights by Collecting Societies)
VJ	Vindobona Journal of International Commercial Law & Arbitration
VOB/B	Vergabe- und Vertragsordnung für Bauleistungen (Teil B) (Construction Tendering and Contract Regulations, Part B)
VSBG	Verbraucherstreitbeilegungsgesetz (Act on Alternative Dispute Resolution in Consumer Matters)
VuR	Verbraucher und Recht (Journal)
VVG	Versicherungsvertragsgesetz (Insurance Contract Act)
WEG.....	Wohnungseigentumsgesetz (Act on the Ownership of Apartments and the Permanent Residential Right)
WiB	Wirtschaftsrechtliche Beratung (Journal)
WiPrO.....	Gesetz über die Berufsausübung der Wirtschaftsprüfer (Wirtschaftsprüferordnung) (Certified Accountants' Act)
WM.....	Zeitschrift für Wirtschafts- und Bankrecht (Journal)
WRV.....	Weimarer Reichsverfassung (Constitution of Weimar)
WuM.....	Wohnungswirtschaft und Mietrecht (Journal)
Yale J. Int. Law	Yale Journal of International Law (USA)
ZAG	Zahlungsdiensteaufsichtsgesetz (Payment Services Supervision Act)
ZEuP.....	Zeitschrift für Europäisches Privatrecht (Journal)
ZfA	Zeitschrift für Arbeitsrecht (Journal)
ZHR.....	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (Journal)
ZIP.....	Zeitschrift für Wirtschaftsrecht (formerly 'Insolvenzrecht – Zeitschrift für die gesamte Insolvenzpraxis') (Journal)
ZKG.....	Zahlungskontengesetz (Payment Accounts Act)
ZPO	Zivilprozessordnung (Code of Civil Procedure)
ZRP.....	Zeitschrift für Rechtspolitik (Journal)
§(§)	paragraph(s) (sections in German codes)

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Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers 2001 (3) SA 110 (NC)
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Swinburne v Newbee Investments (Pty) Ltd 2010 (5) SA 296 (KZN)

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The National Consumer Commission v Western Car Sales t/a Western Car Sales NCT/81554/2017/173(2)(b)
Total South Africa (Pty) Ltd v Bekker 1992 (1) SA 617 (A)
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2. German decisions

The different German types of court decisions have been translated as follows:

Urteil – judgement / *Versäumnisurteil* – default judgement / *Teilurteil* – partial judgement / *Beschluss* – court order / *Stattgebender Kammerbeschluss* – granting Chamber's order / *Nichtannahmebeschluss* – non-acceptance order / *Rechtsentscheid* – decision / *Rechtsentscheid in Mietsachen* – decision in rental matters

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BVerfG *NJW* 1993, 36 – court order of 19/10/1993, 1BvR 567, 1044/89, 'Bürgschaftsbeschluss'
BVerfG *NJW* 2001, 957 – judgement of 06/02/2001, 1 BvR 12/92, 'Unterhaltsverzichtungsvertrag'
BVerfG *NJW* 2001, 2248 – granting Chamber's order of 29/03/2001, 1BvR 1766/92
BVerfG *NJW* 2005, 1036 – court order of 25/10/2004, 1 BvR 1437/02, 'Zahnarzthonorar'
BVerfG *NZA* 2007, 85 – non-acceptance order of 23/11/2006, 1 BvR 1909/06

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RGZ 81, 117 – judgement of 13/12/1912, VII 228/12
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BGHZ 17, 1 – judgement of 08/03/1955, I ZR 109/53
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BGHZ 40, 65 – judgement of 11/07/1963, VII ZR 120/62

BGHZ 41, 151 – judgement of 17/02/1964, II ZR 98/62
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BGH NJW 1954, 1153 – court order of 31/05/1954, GSZ 2/54
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BGH NJW 1976, 2345 – judgement of 07/07/1976, IV ZR 229/74
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